
Do Recommendations to the
Universal Periodic Review work?
Examining Recommendations
in UPR's first two cycles for Nepal,
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Do Recommendations to the Universal Periodic Review work? Examining Recommendations in UPR's first two cycles for Nepal, Sri Lanka and Indonesia.¹

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Abstract

This paper looks at the Asia-Pacific region's experience of the UPR process through case studies of three countries: Nepal, Sri Lanka, and Indonesia. It examines the effectiveness of the UPR process in communicating existing human rights concerns to the States by focussing on the recommendations given to States, and

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asks if this information is translated into tangible change in States' responses to first cycle recommendations. Two thematic areas are selected: non-discrimination and freedom of speech. The selection of these are to capture both fundamental human rights though non-discrimination, and also to see if the mechanisms allow for individual interpretations in the freedom of expression, which is widely debated in all countries. The study shows that recommendations, which should emerge from a participatory process involving non-governmental organisations (NGOs), too often reflect only State interests, and thus the UPR Working Groups and participating states in many cases do not adopt civil society recommendations when framing their own recommendations. Finally, this study assesses the extent to which the UPR process has translated into real changes in policy and practices in the region.

Keywords: Universal Periodic Review (UPR), United Nations, Sri Lanka, Indonesia, Nepal

Introduction

Criticising the lack of a state's response to their Universal Periodic Review (UPR) is increasingly used in international advocacy on human rights. For example, a recent International Federation for Human Rights (FIDH) press release notes "Burma's extremely disappointing response to its second Universal Periodic Review (UPR) at the UN confirmed the outgoing government's unwillingness to address the country's key human rights challenges" (FIDH, 2016). FIDH has given similar comments on Singapore and Thailand, and organizations like Human Rights Watch (HRW) and Amnesty

International (AI) have regularly issued press releases on this subject. For global human rights organizations, the UPR is a tool to highlight violations and pressure governments to comply with their human rights obligations. However, does this mean that states will respond to the UPR process? Given that the UPR process is starting its third cycle (2017-2021), there is still much to learn from this process, in particular regarding whether States are influenced to change behavior because of effective and constructive criticisms.

This article examines the Asia-Pacific region's experience of the UPR process through case studies of three countries: Nepal, Sri Lanka, and Indonesia. It also assesses the effectiveness of the UPR process in communicating existing human rights concerns to the States by focussing on the recommendations given to States, and asks if this information is translated into tangible change by examining the response to first cycle recommendations in the second cycle. Two thematic areas were selected: non-discrimination and freedom of speech. They were selected because these two issues are fundamental human rights relevant to all categories of rights, and concerns about them are found in all countries. Both freedom of expression and non-discrimination are widely debated in all countries. The human rights concerns around non-discrimination and expression vary greatly throughout the region; the examination of the responses during the UPR process can determine if this diversity is being addressed by States during the review.

Second, the article examines if recommendations are emerging from a participatory process by determining if non-governmental organisations' (NGOs) concerns are expressed in the recommendations. The study attempts to assess the extent to which the UPR Working

Groups and participating States adopted civil society recommendations when framing their own recommendations.

Third, the article aims to assess the extent to which the UPR process has translated into real changes in policy and practices in the region. This will be done by assessing the follow-up to the recommendations, in particular to policies and practices pertaining to non-discrimination and freedom of speech and expression in the selected countries. As this study finds, there is little, if any, systematic follow up, and the question is, then, why not? Why are human rights defenders not using the recommendations as a form of advocacy?

The research for this article is based on a desk review of publicly available reports pertaining to the UPR processes in the selected countries, with expert interviews from key stakeholders in the UPR process. Research was conducted from 2014 to late 2015. Data and statistics are sourced from the comprehensive database found on www.upr-info.org. Any failures or shortcomings of the UPR process such as the failure of the Working Groups to consider specific civil society observations or recommendations, or the reluctance of states to accept certain Working Group recommendations were also analysed. Moreover, specific illustrations were cited to assess how well the states have implemented the recommendations of the UPR Working Groups, and the role civil society has played in advocating for such implementation.

There are some obvious limitations to this study, which should be pointed out. Firstly, recommendations are only one aspect of the UPR process alongside the national, UN, or stakeholder reports. A failure in recommendations does not mean the UPR process has failed. Second, proving causality between a recommendations and

State action is open to much debate. States' actions on human rights may be completely independent of recommendations. Finally, the three case studies were selected based on convenience. While this study does give findings relevant to all three cases, the response of every State to its recommendations may be unique, and therefore it may be problematic to generalize findings. However, given the process is universal, as are the rights under review, and the global civil society and UN system operates similarly across the region, there is a structure that allows for a broader, region wide understanding of the efficacy of UPR recommendations.

Case studies from the Asia Pacific Region

1.1 Nepal

The Working Group on the Universal Periodic Review (UPR) held its review of Nepal from 24 January to 4 February 2011. The review resulted in 193 recommendations (and a further 2 voluntary pledges). Nepal accepted 146 of the recommendations, while maintaining that 24 recommendations were in the process of implementation. Nepal rejected the remaining 23 recommendations.³

³ The Working Group report does not provide accurate numbers of recommendations or numbers of accepted/rejected recommendations by civil society that were taken on by states (Working Group on Nepal Universal Periodic Review, 2011). The top five thematic areas of concern were:

1. Children's rights (29 recommendations or 15% of total)
2. Women's rights (29 recommendations or 15% of total)
3. Justice (26 recommendations or 14% of total)
4. Ratifying international Treaties (26 recommendations or 14% of total)
5. Torture (18 recommendations or 10% of total)

Recommendations Nepal considered as already implemented or in the process of implementation include: making a human rights friendly constitution, peace

This examination looks at two important areas, no discrimination, and freedom of expression, to determine if these recommendations from the UPR were implemented.

1.1.1 Non-discrimination

Nepal, home to diverse ethnic, lingual, cultural, and caste groups, has a challenge of addressing discrimination issues in social and economic development. The dalits of Nepal live below the poverty line and are landless and much poorer than the dominant caste population. Their life expectancy is lower than the national average, and so is their literacy rate. The population in the rural areas of Nepal still believes in the untouchability of so-called low caste communities, which results in various forms of discrimination - from lack of access to water to not being allowed to enter temples.

The rights of women, dalits, indigenous peoples, Madhesi (inhabitants of the terai), farmers, workers, economically, socially or culturally backward classes, children, the aged, and persons with disabilities, have been recognised and addressed in the interim constitution. Nevertheless, the patriarchal values, rural beliefs, and ingrained discrimination against dalits and Madhesis continue to result

process, political stability and strengthening democracy, transitional justice, enforced disappearances, institutional reforms of security agencies, extra judicial execution, ending impunity, gender equality, LGBTI rights, non-discrimination, rights of indigenous people, rights to education, rights of persons with disability, human rights defenders, refugees, national human rights action plan, and human rights education. Recommendations Nepal considered as 'will be reviewed' or 'rejected' include: ratification of optional protocol to the convention against torture and enforced disappearance convention, rights of refugees, law promulgation and amendment to book government and security service officials for HR violations, and extra judicial killing in the terai.

in discrimination of these groups. It is in this context that this section focuses on the UPR recommendations on non-discrimination.

The Nepalese NGO coalition's joint submission strongly emphasised the issues of discrimination on the basis of caste, gender, ethnicity, and religion in Nepal. The joint submission also drew attention to discrimination against persons with disabilities and persons infected with HIV/AIDS. In this context, the Nepalese NGO coalitions made many recommendations, including addressing economic inequality, and ensuring balanced and inclusive development, reforming laws and enforcement for women and persons with disabilities, implementing ILO Convention 169 on Indigenous and Tribal Peoples, criminalising discrimination based on caste, improving prisons and detention facilities, and enhancing human rights education (INSEC, 2011).

Despite the constitutional guarantee against discrimination and legislative efforts, discrimination against vulnerable groups is still a widespread reality in Nepal. According to the Mid-term Implementation Assessment published in November 2013, women, former bonded labourers, persons from indigenous groups, dalits, other ethnic, religious, and sexual minorities, the landless, persons with disabilities, and HIV/AIDS infected persons continue to suffer multiple forms of discrimination in practice. They suffer in various sectors and do not enjoy full rights to land, healthcare, education, work, and participation in decision-making processes. Although Nepal has adopted a law that prohibits caste-based discrimination and the so-called practice of untouchability, effective implementation is still lacking. Dalits still suffer from severe human rights violations. Moreover, women are still largely exposed to domestic and sexual violence. Women are treated differently and discriminated against

in almost all families in Nepal. Discrimination against women in Nepal is rooted in deep cultural and religious contexts. They have limited access to resources, including land and forests, and labour and income opportunities. In most cases, women do not possess their own land. Many harmful traditional practices are still prevalent and law enforcement continues to struggle to eliminate these practices. In addition, rural women who are also part of the poor and indigenous communities, often fall victim to multiple forms of discrimination (UPR-Info, 2013, p.118).

The UPR process did produce some positive results. The Nepalese civil society coalition raised the issues of discrimination and the Working Group recommendations captured important dimensions of civil society concerns. In response, the Government of Nepal stated that these recommendations were either being implemented or in-progress. However, unfortunately, this process is yet to translate into sustainable reform on the ground. As detailed above, various forms of unequal treatment and discrimination against women, persons with disabilities, dalits, and ethnic minorities continue to persist in Nepal.

1.1.2 Freedom of speech and expression

After a decade long conflict in Nepal, the Comprehensive Peace Accord of 2006 formed the basis of establishing a competitive democratic system along with the rule of law, constitutional checks and balances, and an independent judiciary. The political transition in Nepal, which included overthrowing the monarchy and establishing a federal republican state, does require public participation, which is only possible when the public at large can exercise their freedom of expression and right to information. Moreover, citizens cannot take part in public decision-making such as voting if they do not have

free access to information and ideas and are unable to express their views freely. It is in this context that this section focuses on the UPR recommendations on freedom of speech and expression.

Nepalese NGOs highlighted the issue of freedom of speech and expression. Despite the enactment of a Right to Information Act, there have been many instances where rights mentioned in the act have been denied or where information is not provided in a timely manner. Hence the consensus amongst the civil society coalition has been that the Right to Information Act 2007 has not been effectively implemented. The lack of freely available information has resulted in public bodies becoming more corrupt over the past three years. It was thus recommended that in the new constitution, laws and regulations should adequately protect the right to freedom of speech and expression in line with international standards. The coalition also recommended that Nepal take immediate action to ensure the full freedom of speech and expression, association, and peaceful assembly (INSEC, 2011).

Despite these pressing concerns, there were no specific recommendations by any participating member States on the freedom of speech and expression. Some recommendations, however, dealt with the freedom of the press and the protection of journalists in Nepal such as ensuring the security of human rights defenders, including journalists, and investigating violations against journalists.

Moreover, the recommendations by Chile and Spain on extending standing invitations to all special procedures, as well as the recommendation made by Japan to make further efforts to implement the recommendations of various treaty bodies, indirectly link with freedom of speech and expression and the right to information.

We note that the UN Special Rapporteurs for Freedom of Religion and Freedom of Expression wrote to the Government of Nepal in autumn 2011 requesting invitations to visit the country, but received no responses.

The foregoing reveals that, despite the fact that the Nepalese civil society coalition raised the issue of freedom of speech and expression, member States did not properly address the issue. This gap resulted in the failure of the UPR process in terms of specifically including the freedom of speech and expression within the Working Group's recommendations. As there was no direct recommendation on the issue, it was unaddressed by the Nepal government in their UPR plan of action.

1.1.3 Follow up to the recommendations

Following the conclusion of the UPR session, the National Human Rights Commission of Nepal (NHRCN) and the Civil Society Coalition organised some follow-up and advocacy programmes. These programmes were more akin to an interactive dialogue than a designed and planned follow-up. Following these programmes, the Nepal government appeared to be interested in implementing the recommendations it had accepted. The Nepal government, the NHRCN, and other NGOs have thereafter produced several mid-term implementation assessments of the UPR recommendations.⁴ According to a mid-term assessment carried out by UPR-Info, the status of implementation has been poor. 117 recommendations have not

⁴ These publications include: National Human Rights Commission of Nepal (2012); National Human Rights Commission of Nepal (2013); NepalGovernment (2013); UPR-Info (2012).

been implemented and 59 recommendations have only been partially implemented (UPR-Info, 2013; p.3).

The analysis of the response to recommendations reveals the following trends. Firstly, given the significant involvement and participation of member States of the UN in the UPR reporting and reviewing process, there appears to be a clear willingness on the part of the Nepal government to cooperate with the UPR framework. This framework remains a unique method of reviewing states' human rights record; and its strength lies in its cooperative nature. However, beyond this strength, the UPR process has emerged as a process riddled with weaknesses, particularly in the way NGO concerns are picked up on an ad hoc basis by the member States.

Secondly, Nepal lacks clear procedures and lines of responsibility in terms of implementing recommendations emerging from the UPR process. No central coordinating body or authority currently exists to take on overall responsibility for implementation. The NHRCN appears to play a partial role in terms of monitoring progress, but the NHRCN's actual ability to enforce commitments and compel government ministries to implement recommendations remains unclear.

Thirdly, the opportunity for rights-specific NGOs (for example, child rights, women's rights, and labour rights NGOs) to make their own submissions and have them adequately captured in the OHCHR's summary report remains a serious challenge. Alongside the lack of capacity for sector specific NGOs to advocate in Geneva, there is competition for space in the report. Moreover, awareness about the UPR system among government authorities and NGO and civil society workers is still low, which possibly exacerbates this challenge.

Finally, the UPR mechanism, adopted by the UN to avoid political selectivity is still problematic, as it produces other forms of selectivity. The issues picked by the member States, as seen in the case of freedom of speech and expression in Nepal, often omit civil society concerns. States retain the power or privilege to reject the recommendation. This framework seems to hinder the meaningful fulfilment of a country's human rights obligations.

1.2 Sri Lanka

1.2.1 Background

The population of the Democratic Socialist Republic of Sri Lanka is comprised of a number of ethnic and religious groups; Sinhalese make up approximately 75 percent of the population, while Tamils and Muslims make up approximately 15 percent and 9 percent of the population respectively. The Constitution of Sri Lanka recognises Sinhala and Tamil as the two national languages and stipulates that English shall be the 'link' language.⁵

The constitution guarantees the right to equality and the freedom from discrimination on the grounds of race, religion, language, caste, sex, political opinion, place of birth, or 'any such grounds' which is still open to judicial interpretation.⁶ It also guarantees the freedom of speech and expression including publication.⁷ These fundamental rights are judicially enforceable, as any person is

⁵ See Article 18 of the Constitution of Sri Lanka. Also see Sri

⁶ See Article 12 of the Constitution of Sri Lanka.

⁷ See Article 14(1)(a) of the Constitution of Sri Lanka.

entitled to apply to the Supreme Court when such a right is infringed by executive or administrative action.⁸ Apart from the Supreme Court's jurisdiction, the Human Rights Commission of Sri Lanka, the Public Petitions Committee of Parliament, and the Parliamentary Commissioner for Administration have jurisdiction to hear petitions from citizens who claim they have been discriminated against by a public official (Sri Lanka, 2008, paras.15-19).

Sri Lanka underwent its first UPR session in June 2008 and its second in September 2012.⁹ A total of 303 recommendations were received in both cycles. In the 2008 cycle, 95 recommendations were made, of which 61 were accepted and 26 were rejected. The second cycle in 2012 resulted in a significant increase in the number of recommendations with 204 recommendations, of which only 113 (or about 55% of recommendations) were accepted. The remaining 91 recommendations were rejected.

The following sections of this study examine the manner in which the specific issues of non-discrimination and freedom of speech and expression were captured during the two UPR cycles. Moreover, specific illustrations of discrimination and the violation of the

⁸ Article 17 of the Constitution of Sri Lanka.

⁹ The general thematic focus during the first cycle in 2008 appeared to be on the rights of the child (15 recommendations), humanitarian issues (13 recommendations), the National Human Rights Commission (10 recommendations), torture and other cruel, inhuman, and degrading treatment (9 recommendations), and enforced disappearances (7 recommendations). The top five recommendations for both cycles are:

1. Justice (51 recommendations or 17% of total)
2. Ratifying international Treaties (42 recommendations or 14% of total)
3. National Plan of Action (28 recommendations or 9% of total)
4. Child rights (26 recommendations or 8% of total)

freedom of speech and expression are discussed in order to analyse the tangible outcomes of the UPR process.

2.2.1 Non-discrimination

Civil society organisations highlighted several critical issues pertaining to equality and non-discrimination, amongst which a key issue was the military seizure and occupation of lands owned by minorities. It is noted that discrimination on the basis of gender, sexual orientation, and disabilities were also discussed during the UPR session. However, the specific example of racial discrimination in the form of land seizures remains a crucial illustration of some of the challenges inherent within the UPR process.

According to Minority Rights Group International, 'large chunks of minority owned land' were converted into High Security Zones (HSZs) by the government (Minority Rights Group International, 2008, p.2). In Sampur, Trincomalee, the military took over a 35 square mile area of land, covering 15 villages, barring 15,000, mostly Tamil, civilians from their homes (Minority Rights Group International, 2008, p.2). The Internal Displacement Monitoring Centre also noted that over 100,000 people had been displaced due to 18 HSZs in Jaffna (Internal Displacement Monitoring Centre, 2007, p.17).

The issue of displacement due to military occupation was scarcely discussed during the UPR session. Only one recommendation dealt with the question of discrimination, albeit in a generic manner, which was given by Mexico (and accepted by Sri Lanka).

Continue to strengthen its activities to ensure there is no discrimination against ethnic minorities in the enjoyment of the full

range of human rights, in line with the comments of the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child, and the Committee on the Elimination of Discrimination Against Women (Mexico, 2008., Recommendation at the Sri Lankan UPR Session).

The National Report submitted by Sri Lanka made no mention of the HSZs or the challenges that emerged as a result of declaring private lands belonging to minority communities as part of these restricted zones. During the subsequent interactive dialogue at which participating member States engaged the Sri Lankan state, only Austria raised the issue of HSZs, highlighting the fact that the return of IDPs to their places of origin was impeded by the designation of HSZs (Working Group on Sri Lanka Universal Periodic Review, 2008: para.41). Recommendation 34 of the Working Group appears to incorporate some of Austria's concerns, as it called on Sri Lanka to facilitate reintegration of IDPs in areas of return in keeping with international standards (Working Group on Sri Lanka Universal Periodic Review, 2008, para.82). However, the specific mention of land dispossession due to military occupation and the discriminatory dimension of the problem were absent in the recommendation. Moreover, Sri Lanka's voluntary commitments only spoke of 'a comprehensive and uniform compensation policy for the displaced and dispossessed' (Sri Lanka, 2008, para.86).

During the second UPR cycle in 2012, not a single recommendation directly dealt with the issue of racial discrimination. The issue of HSZs and their overreaching effect on the minority population in the north and east, particularly in Sampur, were once

again raised by civil society organisations (OHCHR, 2012b). The National Report claimed that the 'former' HSZs had ceased to exist and that only limited security restrictions remained in Palaly in the Jaffna District (Sri Lanka, 2012, para 35). The report also claimed that the 'former' HSZ in Sampur had been reduced in extent by 65% and declared a Development Zone under the Board of Investment (Sri Lanka, 2012). It was intimated that the IDPs from this area would be granted alternative land or compensation (Sri Lanka, 2012).

The interactive dialogue and Working Group recommendations failed to capture to any degree the issue of HSZs and military occupation of private land. The only recommendation that contended with the issue, albeit in a tangential manner, was the recommendation calling on Sri Lanka to ensure legal ownership and the return or restitution of houses and lands to IDPs, according to international standards (Working Group Report, 2012, para. 127.95).

2.2.2 Freedom of speech and expression

The violation of the freedom of speech and expression in Sri Lanka was highlighted by numerous NGOs. Amnesty International, for instance, drew attention to the fact that 'journalists have faced shootings and other physical assaults, abductions, intimidation and harassment, reportedly carried out by both government personnel and members of armed groups' (Amnesty International, 2008, p.5). Civil society organisations accordingly called for the immediate cessation of such violations (Amnesty International, 2008, p.6).

The national report submitted by Sri Lanka made no reference to the challenges faced with respect to violence against the media.

Instead, perfunctory references were made to a ‘free media’ that guaranteed ‘participation and democratic scrutiny’ (Sri Lanka 2008: para 35). Hence there was no acknowledgement that the government needed to address ongoing violations of the freedom of speech and expression. However, the interactive dialogue captured some of the concerns expressed in relation to media freedom in Sri Lanka. Ireland, for instance, raised the issue and recommended that Sri Lanka ‘take measures to safeguard freedom of expression and protect human rights defenders, and effectively investigate allegations of attacks on journalists, media personnel and human rights defenders and prosecute those responsible’ (Sri Lanka 2008, para.82.39). Importantly, the Sri Lankan state accepted this recommendation.

During the second UPR cycle in 2012, civil society organisations once again drew attention to the violation of the freedom of speech and expression. The Joint Civil Society statement submitted to the UPR highlighted the fact that ‘[t]he failure of the government to intervene has given rise to concerns about a clamp down on dissent and creating a fear psychosis amongst media actors, despite the government’s pronouncements and commitments with respect to media freedom and democracy’ (OHCHR, 2012b). Numerous other free speech organisations emphasised on the exacerbation of the situation since 2008 and pointed to a steady decline in media freedom even in the post-war context (Networking for Rights in Sri Lanka, et al. 2012). The issue was once again raised during the interactive dialogue. The United Kingdom raised concerns about attacks on and intimidation of journalists in particular (Working Group on Sri Lanka Universal Periodic Review, 2012, para.28). Two important recommendations emerged from the discussion. First, Sri Lanka was requested to adopt

a national policy on the protection of human rights defenders and journalists in order to prevent harassment and intimidation and to ensure effective investigation of such acts and prosecution of perpetrators (Working Group Report, 2012, para.128.86). Second, it was requested to take immediate steps to prevent attacks on the human rights defenders and media and take action to investigate such acts (Working Group Report, 2012, para.128.90). Surprisingly, both these recommendation were not accepted by Sri Lanka.

2.2.3 Follow up to the recommendations

The procedure through which recommendations emerging from the UPR process were to be implemented involved the formulation and rollout of a National Action Plan for the Promotion and Protection of Human Rights (NHRAP) in 2011. The plan in fact emerged from a voluntary pledge by Sri Lanka during the 2008 cycle to formulate the 5-year plan. The initial focal point in terms of formulating and implementing the plan was the Ministry of Disaster Management and Human Rights. According to the Sri Lanka's National Report submitted in 2012, 'Government focal points and civil society representation were invited to participate in the formulation of the NHRAP from inception' (Sri Lanka. 2012, para 10). The process adopted in developing the NHRAP involved the identification of eight priority areas: two general areas on civil and political rights and economic, social, and cultural rights and six specialized areas looking at prevention of torture, rights of internally displaced persons (IDP's), protection of labour rights, rights of children, rights of women, and rights of migrant workers (Sri Lanka Government, 2011, p.5). Using these areas of focus as an organisation tool, eight issue papers were developed and thereafter

discussed at eight consultations attended by relevant government agencies and civil society organisations. Following this process, eight Drafting Committees, each comprising an equal representation of government and civil society experts, were established to draft the NHRAP (Sri Lanka Government, 2011). Thereafter, the Ministry of Disaster Management and Human Rights compiled a combined draft under the guidance of the National Action Plan Steering Committee, which was comprised of the chairpersons of the Drafting Committees and other relevant experts. Under the NHRAP, specific line ministries were placed in charge of implementing specific human rights commitments (Sri Lanka Government, 2011). However, at the actual implementation stage, a central coordinating body for implementing action points was not appointed. The Ministry of Disaster Management and Human Rights was in fact abolished and no new focal point for the NHRAP has been identified since.

An analysis of the UPR process pertaining to Sri Lanka during two cycles reveals two dispiriting trends.

First, key human rights issues brought to light by civil society have not been captured adequately within the UPR process. This lacuna is clearly the case when examining the issue of minority discrimination. The exclusion of minority communities from their lands and livelihoods due to military occupation was brought to the attention of the Working Group and the member States in both 2008 and 2012. However, the UPR process failed to produce tangible recommendations in respect of this particular issue. The present crisis of military occupation of private lands in Sri Lanka reveals that the UPR process has been ineffectual in dealing with certain pressing human rights concerns. In Sampur, communities continue to be

prevented from accessing their lands, mainly due to the fact that part of the previous HSZ was subsequently declared a Special Zone for Heavy Industries in May 2012.¹⁰ Moreover, the military continues to seize and occupy private land in the Northern Province. In April 2013, the Army seized 6,371 acres of private land in Valikamam North, Jaffna, for the purpose of establishing a military base (Sri Lanka Government, 2013). The acquisition is currently ongoing, and is being challenged by 2,176 affected Tamil landowners in the Court of Appeals (Daily FT, 2013).

Second, the UPR process has not produced a more cooperative state. This trend is clear in Sri Lanka's response to attacks on the media. In 2008, civil society concerns were clearly echoed during the interactive dialogue by several participating member States. Sri Lanka thereafter accepted the recommendation on protecting journalists and investigating past attacks on the media. By 2012, the situation pertaining to media freedom had not been addressed. Several journalists had been attacked, abducted or killed during the four years that lapsed between the two UPR cycles.¹¹ A number of recommendations were made during the interactive dialogue on addressing the situation and bringing perpetrators to justice. Sri Lanka, however, refused to accept

¹⁰ The Zone was declared under Section 22A of the Board of Investment of Sri Lanka Law No. 04 of 1978. Also see M.A. Sumanthiran (2013).

¹¹ See for example, the 2 January 2009 arson attack on the broadcasting station of television station, MTV/MBC; the 8 January 2009 assassination of Lasantha Wickrematunge, the editor of the strongly anti-government newspaper, The Sunday Leader; the 27 February 2009 abduction of Nadesapillai Vithyatharan, the editor of the Sudar Oli, a leading Tamil-language newspaper; the 24 January 2010 disappearance of political cartoonist Prageeth Eknaligoda; the 31 January 2011 arson attack on the office of the Lanka-eNews news website; and the 29 July 2011 assault of Gnanasundaram Kuhanathan, the news editor of Jaffna's leading newspaper Uthayan.

these recommendations a clear departure from its position in 2008. Hence amidst an increase in violations of the freedom of speech and expression in Sri Lanka, the government has grown less receptive to recommendations emerging from the UPR process.

The foregoing analysis reveals that the overall impact of the UPR process has been somewhat limited in translating recommendations into tangible reform. On the one hand, the UPR process has not captured certain key human rights problems in the country concerned, despite the problems being repeatedly raised by civil society actors. This gap reveals certain critical weaknesses in the process in terms of its capacity to take cognizance of serious violations and abuses of human rights. On the other hand, the UPR process has been largely ineffectual in curbing certain violations. Instead of a reduction in attacks on the media, the period between 2008 and 2012 witnessed a marked increase in attacks. To exacerbate matters, the Sri Lankan state refused to accept any recommendations on the matter in 2012. Hence the Sri Lankan experience calls into question the overall scope and effectiveness of the UPR process. While it is arguable that such a process is needed in order to engage states on continuing violations of human rights, the effectiveness of the UPR process in bringing about tangible change remains somewhat doubtful.

1.3 Indonesia

1.3.1 Background

This section discusses the UPR process pertaining to Indonesia during two cycles (2008 and 2012) and attempts to examine how the lack of efforts to introduce human rights into mainstream discourse

leads to various problems in implementation. The report submitted by the Government of Indonesia (GOI) during the first cycle mentioned the issues of religious freedom, women's rights and the implementation of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), and child rights. The alternative reports submitted by Indonesian civil society, however, brought up other major issues.

The first cycle in 2008 only produced 13 concrete recommendations.¹² Nine of the recommendations were accepted by Indonesia, while the remaining 4 were said to be under review. By contrast, the second cycle produced over 180 recommendations, of which 150 were accepted and 30 were rejected. The number of accepted recommendations (83% of the recommendations) is significantly higher than that of Sri Lanka. Issues of non-discrimination and freedom of speech and expression emerged both in 2008 and 2012. These issues range from the fate of political-prisoners related to the issue of West-Papua, gender equality, access to public information, and the rights of minority groups and indigenous people.

1.3.2 Non-discrimination

On the issue of non-discrimination, the Komnasham-Indonesian Commission for Human Rights recommended that the regional

¹² A total of 193 recommendations were received in both cycles. The top five recommendations for both cycles are:

1. Ratifying international treaties (41 recommendations or 21% of total)
2. Child rights (31 recommendations or 16% of total)
3. Freedom of religion and belief (26 recommendations or 13% of total)
4. Justice (51 recommendations or 17% of total)
5. Torture (20 recommendations or 10% of total)

government withdraw regulations based on Islamic law, such as the anti-pornography regulation; obligation on students to wear a veil; and the prohibition of women to travel alone in the evening.¹³

The issues of minority group rights, particularly religious and LGBT groups, emerged in the alternative reports submitted by civil society during the second UPR cycle in particular. Some NGOs, such as AI and HRW, made specific remarks on the issue of recognition and protection of human rights of religious minority groups, including Ahmadiyah and Christians (OHCHR, 2008, p.8).¹⁴ Moreover, the Centre of Human Rights and Democracy specifically recommend a review of Clause 28J (2) of the Indonesian Constitution due to its discriminatory nature (Center for Human Rights and Democracy, 2012: 3). Furthermore, it recommended the elimination of the blasphemy law, regulated through the Law No.1/PNPS/1965. Other NGOs also made similar recommendations in their alternative reports.¹⁵ The other key issue related to the principle of non-discrimination that emerged in the alternative reports was LGBT rights. A group of NGOs observed that LGBT rights defenders and the LGBT groups have been subjected to discrimination and violence (OHCHR 2008, p.4). Those NGOs demanded that the GOI investigate incidents of violence and bring perpetrators to justice.

¹³ Interview with Mohammad Hafiz, staff at the Human Rights Working Group - HRWG, 24 April 2014.

¹⁴ Interview with Mohammad Hafiz, staff at the Human Rights Working Group - HRWG, 24 April 2014; see also OHCHR (2012: 2, 8).

¹⁵ See for example the submissions of the European Centre for Law and Justice (ECLJ), Equal Rights Trust (ERT), Human Rights First (HRF), Jubilee Committee (JC), Open Doors (OD), and Pax Christi International (PCI).

The second cycle in 2012 produced 13 recommendations on minorities.¹⁶ Among the recommendations on religion was one introducing measures holding senior law enforcement accountable for their duties, including training for law enforcement officials at the local level to ensure an effective and adequate response to these incidents. This would also include reviewing laws and regulations that discriminate, directly or indirectly, against one's religion or beliefs, including in particular the Blasphemy Act. From the wording of the recommendations, it is clear that civil society alternative reports heavily influenced the content of the recommendations during the interactive dialogue. In this context, the Indonesian UPR experience has shown more positive results in terms of effectively capturing civil society concerns.

1.3.3 Freedom of speech and expression

Civil society organisations also made alternative recommendations pertaining to the freedom of speech and expression. Related to the principle of freedom of expression, AI and HRW brought up the issue of West Papua, mentioning the restriction or violation of the

¹⁶ There were 4 specific recommendations on discrimination against religious minorities:

1. Continue efforts to fight against all forms of discrimination and to respect the rights of religious minorities
2. Intensify efforts in taking all necessary measures to stop violence and discrimination against religious groups
3. Take resolute action against any act of religious violence and implement appropriate, efficient measures to prevent intolerance or discrimination on religious grounds
4. Undertake measures to protect members of religious groups, including Ahmadis, Bahais, Christians, and Shias from harassment and acts of violence

principle of freedom of expression against the Papuanese people and journalists and human rights defenders working in Papua (OHCHR, 2008, pp.3-4, 9). These organisations, including Komnasham, recommended that the government repeal laws that hinder or violate, either explicitly or implicitly, the freedom of speech and expression (Arus Pelangi, 2012, pp.1-2; OHCHR, 2012, p.3). AI also made recommendations on the issues of political prisoners and the elimination of all regulations that hinder the freedom of expression in Indonesia (Amnesty International, 2012).

Several recommendations pertaining to freedom of speech and expression emerged during the interactive dialogue in 2012. These recommendations mainly covered the issues of media entrance permits to Papua and regulations that unduly restricted freedom of speech and expression. It is encouraging to note that a few key recommendations presented by civil society found its way into the final list of recommendations. Critical recommendations include visits of special rapporteurs,

reviewing laws that restrict the freedoms of religion, opinion, and expression, examining the Indonesian Criminal Code articles 106 and 110,¹⁷ investigating violence against human rights defenders, ending prosecutions under Articles 106 and 110 of the criminal code, and increasing protection for human rights defenders.

¹⁷ Articles 106 and 110 of the Criminal Code and Article 6 of Government Regulation No. 77/2007 which prohibits the display of regional logos or flags which are also used by separatist organizations.

2.3.4 Follow up to the recommendations

The implementation of the recommendations produced in the UPR is coordinated through a multi-department forum coordinated by the Indonesian Foreign Ministry with the Ministry of Law and Human Rights as the main partner. This forum conducts reviews and monitoring of the implementation of the recommendations produced through the UPR. It also involves the NGOs and other institutions, such as Komnasham, that have mandates pertaining to the promotion of human rights in Indonesia. However, it must be appreciated that actual implementation depends on state action. Civil society participants are involved only as invitees and the state retains ultimate discretion on whether or not to take civil society inputs on board.¹⁸

In Indonesia, efforts to mainstream human rights have emphasised heavily on the legal-formal and the procedural, rather than on tangible outcomes. In this context, the implementation of the recommendations produced in the UPR session has been somehow vague. From a legal-formal perspective, the GOI seems to have produced various regulations that, on face value, comply with human rights norms including non-discrimination and freedom of speech and expression. This formal framework includes the law that ensures the quota for women political representation; the recognition of indigenous rights in the Law No. 32 of 2009 on Environmental Protection and

¹⁸ Interview with Indria Fernida Alphasonny, an activist with the KONTRAS-Indonesia, 3 May 2014.

Conservation; and Law No. 27 of 2007 on the Management of Littoral Areas and Small Islands.¹⁹

This situation, however, is in contrast with the daily socio-political life in Indonesia. Religious communal violence was rampant during the period of 2009 up to late 2012, particularly against religious minority groups such as Ahmadiyah, Syah, and Christians. Discriminatory laws and regulations, especially at the local level through the Syariah Local Regulation, still continue to be enforced unchecked (OHCHR, 2012, p.4). The state, especially at the national level, still has its role by omission in these cases of human rights violations (OHCHR, 2012, p.4; Arus Pelangi, et al, 2012). This also seems to contradict the exemplary image of the GOI in the field of human rights at the international level, especially in ASEAN and the Organization of Islamic Conference-OIC.²⁰

Several factors contribute to the emergence of the aforementioned state of human rights in Indonesia. First, human rights are not a mainstream issue and concern in Indonesia. For a majority of Indonesians, the fulfilment of what we articulate as human rights has been seen as an expression of state benevolence, instead of compliance with its constitutional duties. This is still a norm in Indonesian public life.²¹ Furthermore, the discourse of cultural particularism

¹⁹ Revised through the Law No.1 of 2014. This law and its revision, however, have been met with serious resistance from some NGOs working on indigenous rights and environmental protection. They maintain that these laws further open the way for capital penetration through privatisation of the littoral areas and small islands.

²⁰ Interview with Yuyun Wahyuningrum, senior advisor on ASEAN and Human Rights with the Human Rights Working Group-HRWG, 21 April 2014.

²¹ Interview with Mohammad Hafiz, staff at the Human Rights Working Group - HRWG, 24 April 2014.

is still firm in Indonesia. Many cases demonstrate that attempts to promote human rights in Indonesia, either by the state or civil society, attract counter-discourses articulating the particularity of Indonesian society and culture. These usually entail labelling human rights as an instrument of Western hegemony, neo-colonialism, and imperialism.²²

Second, there has been a strong tendency of legal-formalism in understanding and implementing human rights. This tendency occurs not only in the state domain, but also in the civil society domain. The adoption of international human rights conventions and instruments is often reduced to legal and procedural matters. To make matters worse, in the state domain human rights is treated as an exclusive public sector, unrelated to the other sectors. This trap of formalisation has greatly reduced the ability of human rights to influence other sectors in Indonesia.

On one occasion, an Indonesian NGO presented an alternative report on a case of discrimination against a minority religious group. The Ministries of Foreign Affairs and the Ministry of Law and Human Rights treated the alternative report as input for further discussion based on the usual bureaucratic procedures. However, another ministry holding the main responsibility on this issue, the Ministry of Religious Affairs, reprimanded the NGO for mentioning the issue at an international forum and accusing it of ‘tarnishing Indonesian image’ and ‘selling the nation’ to international powers.²³ This case indicates

²² Interview with Mohammad Hafiz, staff at the Human Rights Working Group - HRWG, 24 April 2014; Interview with Yuyun Wahyuningrum, senior advisor on ASEAN and Human Rights with the Human Rights Working Group-HRWG, 21 April 2014.

²³ Interview with Yuyun Wahyuningrum, senior advisor on ASEAN and Human Rights with the Human Rights Working Group-HRWG, 21 April 2014.

not only how human rights norms are treated differently based on bureaucratic procedures and mechanism, but also its precarious position as a discourse in Indonesian politics.

Furthermore, there has been a lack of a monitoring mechanism at both the national and international levels, to ensure compliance with ratified international treaties. At the national level, the National Human Rights Court's jurisdiction is restricted only to cases in the category of gross human rights violations and crimes against humanity. This lack of authority is also exacerbated by other clauses that restrict the authority of the National Human Rights Courts.²⁴ This is also the case at the international level where international monitoring mechanisms are weak. In this case, the GOI seems to resort to using political gimmicks by ratifying international human rights conventions and producing laws accordingly to build its good image at the international level without necessarily implementing them in reality.

Third, the lack of technical capacity among the state apparatus contributes to the current poor state of human rights in various regions in Indonesia. The somewhat elitist nature of human rights discourse in Indonesia has denied the further institutionalisation of human rights principles and procedures among the lower level of the state's bureaucracy. In fact, it is these levels of bureaucracy that have to deal with human rights in daily public life, but frequently they have not been given the capacity to do so. This lack of understanding on human rights principles and procedures greatly affects their performance in dealing with public matters and increases the risk of human rights violations.

²⁴ Komnasham brought this issue in its recommendation on the Indonesian UPR in 2008.

For Indonesia, it is necessary to deepen the institutionalisation of human rights both in the state domain and among civil society. Since within the region there are only weak monitoring mechanisms and no regional mechanism there is little to compel state compliance with human rights obligations. In this case, public monitoring, carried out by making human rights a mainstream discourse amongst civil society, is perhaps the best strategy to ensure compliance. By doing so, it is possible to push the state to effectively implement the laws it has promulgated in compliance with human rights principles and further ensure the human rights of Indonesians.

Conclusion

As the case studies of the three Asian countries and interviews with human rights defenders involved in the UPR process have shown, there is a mixture of success and weakness in the UPR process. On occasion, the process does successfully capture relevant human rights issues and succeeds in exerting pressure on states to comply with its legal obligations. However, the process has often been weak, particularly in terms of the follow up to recommendations. These weaknesses occur in two key areas: the nature of the recommendations themselves and the ad hoc process of monitoring the follow up. The concluding section of this article attempts to draw broad conclusions with regard to both these concerns, first, by analysing the country-specific studies detailed above, and second, by relying on interviews carried out with civil society activists and experts from the region.

The first major concern relates to the nature of recommendations. Both the quantitative data and the interviews appear to reveal that recommendations often missed their mark. Most commonly, as the data in this article demonstrates, recommendations were broad, unspecific, and sometimes more of a positive endorsement than a recommendation to improve the promotion and protection of human rights. Specific actions commonly make up only about a third of the recommendations.²⁵ The overly general nature of the recommendations, and the focus on ‘easy’ issues, means that the majority of recommendations can be accepted and promptly forgotten by States. Broad recommendations were often constructive, as a civil society activist involved in the Vietnamese stakeholder reports noted: ‘The recommendations were very broad but useful as they could be used in combination with recommendations from other technical bodies such as treaty bodies and special procedures.’²⁶

Some civil society activists noted that the phrasing of the recommendations did not make it easy to monitor implementation. It was noted that recommendations were often too general, unfocused, and difficult to evaluate.²⁷ For example, exactly how can the following recommendation to Nepal by the Netherlands be monitored and evaluated for follow up: “Take the necessary legal and policy measures to end discrimination, including of women, children and Dalits.” This recommendation would entail speculating on what the relevant laws and policies are, who the main groups of people are,

²⁵ For the states studied here, specific recommendations average around 34% (from a low of 32% for Sri Lanka to a high of 38% for Nepal).

²⁶ Interview with Nghiêm Kim Hoa, member of the drafting group for the Vietnam NGO submission.

²⁷ Interview with Cheery Zahou, member of the drafting group for the Myanmar NGO submission.

and what types of discrimination,- whether economic, social, family, work, or politics, were likely to occur.

There appears to be a logic in that the most common recommendations in the three case studies were justice, children, and treaty ratification, which make the top five in all the case studies. The reason is likely that these are 'easy' and more universal areas of concern. They are easy because doing research on treaty ratification is a simple google search; and they are universal in that every country in the region has ratified CRC and CEDAW. Moreover, issues of justice are similar in most countries across the region. Therefore, States with some generic knowledge of human rights issues in the region can easily make recommendations, even if they are unaware of the specific conditions within a country or the specific challenges to a state in terms of ratifying a treaty.

In determining if civil society recommendations get formally recognised, the roles of the West Europe and Others Group (WEOG) should be noted. Across all regions it can be seen that the WEOG are the most active in terms of presenting recommendations (they make up 16 of the top 20 recommending states). For human rights defenders in Asia, there are some positives and negatives that emerge from this trend. Many WEOG are willing to present recommendations that are specific and may be considered more critical than constructive. This trend runs contrary to the tendency for most states to offer general or weak recommendations, as the UN Human Rights Council tends to foster an atmosphere of constructive engagement, which in turn tends to be interpreted as non-critical responses.²⁸ This is the case

²⁸ The language of the GA Resolution 60/251 does not propose constructive engagement, though the review is expected to be carried out in a constructive and non-confrontational manner.

for Asian states, where in regional groupings, such as ASEAN and SAARC, there is a tendency to avoid directly criticising other states. From discussions with civil society activists, though WEOG states may not be in a position to have detailed and accurate knowledge on the human rights issues in specific countries, they do accept expertise from NGOs. While NGOs may be unable to make formal recommendations, it is an established practice for accredited NGOs in the region to approach sympathetic countries, mainly from the WEOG, and request them to present recommendations, whereas few, if any, Asian states are willing to do this.

In terms of the prioritisation of recommendations, this study demonstrates that what is often considered a crucial issue on the ground by civil society is not given priority in the recommendations. This trend can be seen in the cases detailed here on land seizure, discrimination, migrant workers, and religious intolerance. While these issues are often mentioned in the stakeholder's report, they often get lost in the UPR process, which is built more for covering a vast array of issues, rather than addressing priorities or major concerns.

The second major concern is the lack of structured and efficient follow-up mechanisms. Throughout the region the follow up is left to the country groups, most frequently the NGOs who are part of the stakeholder report. As Philip Robertson, Deputy Director of HRW in Asia comments, “States can just sit on the recommendations; there is no leverage to force action.”²⁹ While most respondents acknowledged that follow up practices were weak or non-existent in Asia, there was some follow-up on an ad hoc basis. As an actor and

²⁹ Interview with Philip Robertson, Deputy Director of Human Rights Watch in Asia.

member of the Vietnamese civil society notes, “Technically there was no follow up mechanism after the first review. A follow-up initiative is being discussed among a small group of civil society actors for the outcome of the second review in 2014.”³⁰

This does not mean that there are no follow-ups, as Debbie Stothard notes: “Various advocacy groups are keeping track of developments on the ground and comparing against recommendations in order to press member states on the issues.”³¹ However, as interviews with civil society activists revealed, there are reasons that explain why civil society groups have not prioritised the follow-up process. First, as noted above, most recommendations are too general or unspecific to undertake an accurate monitoring and evaluation of its implementation. Second, NGOs often don't have the research capacity to monitor all the recommendations. If a recommendation happens to fall into one of their active areas, they can use it for advocacy, but given the large number of recommendations, there is often just too many to follow up on. Finally, most NGOs approached for this study had little faith that the State would implement the recommendation anyway, and, in their opinion, devoting resources to prove the obvious appeared to be a waste of time.

There are other bodies, such as National Human Rights institutions (NHRIs) that are engaged in follow up, though NHRIs are not widespread in Asia. Only around seven countries of the twenty South East Asian and SAARC countries have NHRIs. The strength of these institutions varies greatly, from the weak and non-accredited

³⁰ Interview with Nghiem Kim Hoa, member of the drafting group for the Vietnam NGO submission.

³¹ Interview with Debbie Stothard, Secretary General, International Federation for Human Rights.

commission in Sri Lanka to the reasonably supported NHRCs of Nepal and Thailand. Only the Nepal NHRC seems to have an established programme to follow up on the recommendations.

The criticisms made in this section do not imply that there is no value to the UPR process. Rather, the emphasis should be on the pre-review rather than the post-review process. For many organizations, the utility of the UPR is in building national level coalitions on human rights issues. As Debbie Stothard notes, “the process of getting the organizations together to submit the stakeholder report was definitely the most useful part of the process for NGOs.”³² Similarly, in Vietnam, the process of getting the organisations together was a useful learning process and developing leadership among NGOs and civil society actors. One interviewee from Vietnam observed: “The review did not take many points in our submission (though its recommendations were included in the OHCHR summary of stakeholders submissions), but the national process was fruitful in terms of getting people’s interest and engagement in human rights issues.”³³

While this is not clearly the case in Nepal and Sri Lanka, in countries with nascent human rights civil society such as Vietnam, Myanmar, and Cambodia, the UPR process of writing the stakeholder report can allow groups to meet, familiarise themselves with broad national-level issues, and strategise advocacy. For Vietnam, the OHCHR enabled perhaps the first ever national-level meeting of human rights NGOs. One observer noted: “The UPR was

³² Interview with Debbie Stothard, Secretary General, International Federation for Human Rights.

³³ Interview with Nghiem Kim Hoa, member of the drafting group for the Vietnam NGO submission.

hardly known among Vietnamese civil society during and after the first cycle. Most NGOs heard about UPR the first time when they were mobilized to contribute to a stakeholder submission for the second review.³⁴ For larger countries like India, the process allows for the thousands of organisations working across hundreds of sectors to meet, gain understanding on human rights issues in other parts of India, and prioritise and strategise human rights activities. The challenge for a country like India in reducing its huge variety of human rights issues into a ten-page stakeholder report may seem facile; yet it forces NGOs to consider priorities.

Another advantage is that the process gives a platform for NGOs to define problems in human rights. As Philip Robertson of HRW observes, “it is an opportunity for them to get a shot at both framing the human rights concerns, and criticising governments in an official forum.”³⁵ The channels for most NGO advocacy tend to be media, social networking, or other non-official forums. The UPR is one of the few NGO to government forums available. Attempts to provide a venue for NGOs at regional meetings at SAARC and ASEAN have proved extremely difficult.³⁶ However, accredited NGOs can be heard at the UN, which gives substance to their advocacy on human rights.

The environment of human rights promotion and protection in SAARC and ASEAN does call for a different understanding of

³⁴ Interview with Nghiem Kim Hoa, member of the drafting group for the Vietnam NGO submission.

³⁵ Interview with Philip Robertson, Deputy Director of Human Rights Watch in Asia.

³⁶ This can be seen at the recent ASEAN Civil Society Interface in May 2014, where the CSOs eventually walked out after the governments attempted to replace some NGOs with pro-government civil society organizations.

the UPR process and recommendations. Within Asia, most human rights work is taken up by NGOs. The regional commissions, which exist only in some sub-regions, do not have any protection mechanisms, and mostly function weakly around human rights promotion. The NHRIs, which number around 15 in the region, are also mostly promotion-focused and, with some exceptions, not strong on acting on complaints or other human rights protection actions. Domestic courts are often not the preferred route for human rights protection because they often lack capacity. Further, given that many governments are relatively unstable, this study shows most governments discussed have recently undergone significant changes or crises, there is limited capacity and interest to act on recommendations. Most governments tend to concentrate on stability and are therefore unwilling to engage in legislative and policy reform or pursue politically sensitive issues such as impunity. These tasks are taken up by NGOs, as they are the main actors in the promotion and protection of human rights in the countries analysed in this article. Hence advocacy will take priority over monitoring and evaluating legislative and policy reform. Because of the tendency towards advocacy, there appears to be little interest in UPR recommendations and their follow up, unless they already fit within pre-existing advocacy programmes. Hence, for NGOs, the activities before the UPR process take on greater importance in strategising human rights priorities.

In summary, the UPR recommendations themselves may not be an effective way to encourage states to promote and protect human rights in the Asia-Pacific region, though the process does provide a valuable platform for civil society actors to form collations and advocate for human rights.

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