AFRICAN STATES AND THE UNIVERSAL PERIODIC REVIEW MECHANISM: A STUDY OF EFFECTIVENESS AND THE POTENTIAL FOR ACCULTURATION

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ADELAIDE LAW SCHOOL
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This thesis examines African states’ engagement with the United Nations Human Rights Council’s Universal Periodic Review (UPR) mechanism, at the completion of the first two cycles in 2016. Drawing from a number of interdisciplinary sources, this thesis seeks to introduce an original conceptual and theoretical framework to evaluate state engagement with the UPR mechanism. This research project undertakes case studies on Kenya, Nigeria and South Africa which address four core issues. First, a five-step approach to measuring the ‘effectiveness’ of state engagement is developed. Second, the potential for the UPR to influence human rights changes through the process of acculturation is examined. Third, the impact of regionalism, cultural relativism and ritualism on the UPR engagement of African states is assessed. Fourth, the role of NGOs/Civil Society Organisations in enhancing the UPR engagement of African States is analysed.

The central argument of this thesis is that a compliance-centred theory that relies exclusively on confrontational approaches to human rights implementation is inherently limited. This thesis argues that approaches to human rights implementation which neglect the potential value of cooperative mechanisms such as the UPR, are necessarily incomplete and may be blind to very important human rights mechanisms that emphasise cooperation. I substantiate this conclusion by reference to my major arguments. First, the UPR, which is based on cooperation, can help cause human rights changes within African states in subtle but significant ways, determined in this thesis by the percentage of recommendations that are implemented. Second, African states engage more effectively with the UPR than with other human rights monitoring mechanisms.

I argue that the theory of acculturation provides an appropriate theoretical framework to understand the potential impact of state engagement with the UPR mechanism as it does not incorporate any element of coercion. I highlight how the inclusive and cooperative framework of the UPR provides important and effective conditions for acculturation. Findings both within and outside the
formal timeframe of the reviews underscore the potential for the UPR to influence human rights changes within states over time. However, evidence of regionalism, cultural relativism and ritualism are aspects which have negatively impacted states’ engagement with the UPR in some instances. Nevertheless, I argue that regionalism can play a positive role, that cognitive reframing can help overcome cultural relativism, and that effective NGO engagement can help counter state ritualism in the UPR. Thus, I argue that the UPR mechanism is a valuable approach to monitoring the human rights implementation of African states.
DECLARATION

This work contains no material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

Some of the arguments in this thesis have been published during the course of research and writing. The themes emerging from African states’ engagement with the UPR including regionalism, cultural relativism and ritualism were first published in:


The analysis on the effectiveness of South Africa’s Engagement with the UPR was first published in:


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______________________________
Signed: Etone Damian

Date: 21 July 2017
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PART I: INTRODUCTION
CHAPTER ONE: GENERAL INTRODUCTION

1.1. INTRODUCTION

In 1948, the international community made a commitment to uphold human life and dignity through the adoption of the Universal Declaration of Human Rights (UDHR). Since then, a plethora of legally binding human rights instruments have emerged both regionally and internationally, receiving increasing state ratification. Over 80% of United Nations (UN) member states have ratified at least four of the main UN human rights treaties. In particular, more than 75% of African states have formally accepted most of the core UN human rights treaties, which is higher than the global average.\(^1\) Despite these ratifications, conflict, political instability, authoritarian regimes, terrorism, poverty and humanitarian disasters have resulted in serious human rights violations in many African states. This gap between the increasing number of human rights treaty ratifications and the actual human rights practices of states is a significant problem. International scholars through diverse empirical studies have sought to explain why states ratify human rights treaties without making an intrinsic commitment to their enforcement (which is referred to as ‘first order compliance’).\(^2\) The fear of economic sanctions and incentives in the form of aid are important factors which have indirectly coerced many African states to ratify human rights treaties.\(^3\) One study has concluded statistically that ratification of human rights treaties increases the Official

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Development Assistance received by a state,⁴ and some foreign governments have made their aid conditional on improved human rights performance.⁵ However, empirical evidence also indicates that the increasing treaty ratification has not improved the human rights situation on the ground.⁶

Monitoring state implementation of human rights treaty standards (which is referred to as ‘second-order compliance’) was pivotal to the UN human rights system at its birth. Specific human rights treaties established mechanisms to monitor state compliance with treaty obligations primarily through the examination of state reports.⁷ The hope was that the reports would foster ‘constructive dialogue’ between states and the various treaty bodies composed of human rights experts.⁸ With the competence to examine state human rights reports and consider individual and inter-state complaints, these bodies soon ‘evolved into quasi-judicial bodies, displaying a formalised and relatively rigid procedure’.⁹ However by 2000, the treaty monitoring system was in crisis as a result of the huge backlog of overdue reports, resource and financial constraints, and limited political support from states to improve the system.¹⁰

While there have been several proposals in recent years to strengthen the human rights treaty body monitoring system,¹¹ Olivier de Frouville, a member of the UN Human Rights Committee, notes that the development of the treaty

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⁴ See Maya Schmaljohann, ‘Pretending to be the Good Guy. How to Increase ODA Inflows while Abusing Human Rights’ (Discussion Paper Series No 549, University of Heidelberg Department of Economics, September 2013).
⁵ For example the US, under the Foreign Assistance Act, denies foreign assistance to states that ‘engage in a consistent pattern of gross violations of internationally recognised human rights’. See Foreign Assistance Act of 2000, 22 USC § 2151(a) (2000).
⁸ Ibid.
¹⁰ Crawford, above n 7, 1-12.
bodies has reached its limits. As of January 2017, there were an overall total of 588 overdue treaty body reports and African states represented the majority of the non-reporting states, owing about 39% of the total overdue reports.

Furthermore, there has been controversy from African states relating to the country specific and special procedures set up by the former UN Commission for Human Rights to deal with gross and systematic human rights violations, addressing thematic and country specific issues. These procedures were retained under the new HRC established in 2006. As of October 2016, the UN system has 43 thematic and 14 country procedures. However, African states, as well as many non-Western 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.

A new and distinctive addition to the UN human rights system is the Universal Periodic Review (UPR) established by the HRC in 2006 to review the human rights situation in all states. The first cycle of the review (UPR I) spanned from 2008-2011 and the second cycle (UPR II) was undertaken from 2012-2016. The distinctive feature of the UPR, as an approach to monitoring human rights implementation, is that it is based on cooperation and dialogue, and is inclusive, collaborative and a process controlled by states. However, some scholars have questioned the efficacy of the UPR, especially the level of state control over the UPR process. Manfred Nowak, former UN Special Rapporteur

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16 Human Rights Council, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Agenda Items 46 and 120, UN Doc A/Res/60/251 (3rd April 2006) (‘Resolution 60/251’) para 5 (e).
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’. According to de Frouville, the UPR cannot address the compliance problem of the UN human rights system. De Frouville contends that this problem can be effectively addressed by the creation of a World Commission of Human Rights with a strong institutional basis, and the powers to issue and enforce binding decisions. Similar desire for stronger and more confrontational approaches to human rights implementation is reflected in the argument that the best final model for securing human rights compliance is the establishment of a world court of human rights. For example, Manfred Nowak argues it is time for a world court of human rights because UN treaty bodies and other monitoring mechanisms have had little impact owing to their inability to issue and enforce binding decisions that would induce state compliance.

The notion that economic sanctions, adjudicative, legalistic and other confrontational approaches can best enforce human rights norms has undermined the potential for more cooperative mechanisms of monitoring human rights implementation. The main argument of this thesis is that the above approaches are inherently limited and do not capture the subtle and significant ways in which the Universal Periodic Review (UPR), based on cooperation and dialogue, can contribute to human rights changes within states. This thesis situates itself within the academic discourse on international human rights monitoring mechanisms, where the literature on the UPR is minimal. It contends that the UPR mechanism which relies on cooperation and gives the state some degree of control over the process can sometimes be at least as, if not more, effective than coercive mechanisms.

17 Manfred Nowak, ‘It’s Time for a World Court of Human Rights’ in M Cherif Bassiouni and William A Schabas (eds), New Challenges for the UN Human Rights Machinery (Intersentia, 2011), 23.
18 Frouville, above n 12, 250-5.
19 Ibid 264-5.
21 Nowak, ‘It’s Time for a World Court of Human Rights’ above n 17, 26.
The UPR is a unique mechanism of the Human Rights Council (HRC) which adopts a cooperative and inclusive approach to monitoring state implementation of human rights obligations. The review takes place every four and a half years in three main stages; the preparation of state reports, review of the state in Geneva and the implementation stage. The conclusion of UPR II (2012-2016) and the beginning of UPR III (2017-2021) therefore invites a scholarly examination of the extent to which the mechanism is contributing to human rights implementation within African states.

1.2. THE GOALS OF THIS THESIS

This thesis examines the engagement of three African states with the UPR to determine the potential of this cooperative and non-coercive mechanism to improve the human rights situation on the ground. It measures the effectiveness of the states’ engagement with the UPR and analyses the factors impacting on that engagement. In pursuit of this objective, this thesis examines the following issues:

i. The participation of the states in the pre-review national consultation process, as a state reviewer and as a state under review – to determine their level of engagement with the UPR mechanism;

ii. The extent to which the UPR recommendations were implemented – to determine whether the UPR can contribute to improvement of the human rights situation on the ground;

iii. The potential for the UPR to influence African states over time through the process of acculturation; and

iv. The impacts of civil society, regionalism, cultural relativism, and ritualism on the engagement of African states with the UPR.

The overarching question for this research is: Can the UPR as a cooperative mechanism contribute to promote human rights implementation within African states? The sub-questions are:

i. What is the best theoretical approach to evaluating state engagement with the UPR and for assessing its potential impact?
ii. Have African states effectively engaged with the UPR?

iii. What are the factors impacting on African states’ engagement with the UPR mechanism?

iv. Can the UPR potentially create a synergy with other human rights mechanisms?

The remaining part of this introduction provides justification for the selection of the three African states under examination, and the methodology and structure of this thesis.

1.3. JUSTIFICATION FOR CASE STUDY

Africa has been selected for this study because the continent continues to be confronted by entrenched human rights challenges, despite more than 75% of African states having ratified at least six of the seven core international human rights treaties.22 Africa has been said to have the worst human rights record of any region in the world.23 While many African states have experienced socio-economic development in recent years,24 conflict, political instability, authoritarian regimes, poverty and humanitarian disasters have contributed to serious human rights violations.25 Recently, human rights violations have increased as a result of the terrorist activities of al-Shabaab and Boko Haram and have been exacerbated by some of the corresponding state counter-terrorism measures.26

A further reason for selecting African states for this study is their expressed dislike and negative response to coercive human rights enforcement

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26 Ibid.
mechanisms, being the most sanctioned continent in the world.\textsuperscript{27} All African states voted in favour of UN resolutions condemning the use of unilateral coercive measures\textsuperscript{28} as a means of political and economic coercion against developing states.\textsuperscript{29} This justifies the use of Africa as a focus group when examining the extent of state engagement with the UPR, as a pacific and non-confrontational mechanism of human rights enforcement. This research limits itself to Sub-Saharan Africa; a 2013 study addressed most of North Africa.\textsuperscript{30}

The three case study states for this research are selected to ensure a regional representation of the key state players in sub-Saharan Africa and to effectively address some of the major themes identified from the literature as relevant to African states’ engagement with the UPR. These states are Nigeria, Kenya and South Africa. Nevertheless, in some parts of the thesis, reference is made to other states to further elaborate major themes such as regionalism and cultural relativism.

Nigeria (in West Africa) is the largest African state by population\textsuperscript{31} and has the largest economy in Africa.\textsuperscript{32} It has equally played a significant role in the Human Rights Council (HRC), having served as President in the 3rd Cycle of the HRC (2008-2009). The inclusion of Nigeria as a case study enables an


\textsuperscript{28} The term ‘unilateral coercive measures’ generally refers to economic measures taken by one State to compel a change in the policy of another States. These include trade sanctions in the form of embargoes, the interruption of financial and investment flows between sender and target countries and so-called ‘smart’ or ‘targeted’ sanctions such as asset freezing and travel bans. See \textit{Human Rights and Unilateral Coercive Measures}, GA Res 70/151, UN GAOR, 70\textsuperscript{th} sess, 80\textsuperscript{th} plen mtg, Agenda Item 72 (b), UN Doc A/RES/70/151 (7 March 2016); \textit{Human Rights and Unilateral Coercive Measures}, GA Res 53/141, UN GAOR, 53\textsuperscript{rd} sess, 85\textsuperscript{th} plen mtg, Agenda Item 110(b), UN Doc A/RES/53/141 (8 March 1999) para 2; Human Rights Council, \textit{Human rights and Unilateral Coercive Measures}, 50\textsuperscript{th} sess, UN Doc A/HRC/RES/15/24 (6 October 2010). Many states in Asia have voted in favour of these resolutions. However, Western European states have always voted against the above and any similar resolutions.

\textsuperscript{29} See Report of the Secretary-General, GAOR 54\textsuperscript{th} sess, A/54/486 (21 October 1999).

\textsuperscript{30} See Fateh Azzam, \textit{Arab States and the Universal Periodic Review} (UNDP Cairo, 2013); Sub-Saharan Africa comprises 49 of the 54 states in Africa. The five Arab states not part of Sub-Saharan Africa were examined in Azzam’s study which raised similar issues on regionalism and cultural relativism as will be examined in this study. This study is however more representative of Sub-Saharan Africa than Azam’s Study.

\textsuperscript{31} About 178 Million see, UN Department of Economic and Social Affairs Statistics Division, \textit{World Statistics Pocket Book} (United Nations, 2015) 146.

\textsuperscript{32} GDP of about $515 Million (US Dollars). See ibid 146.
examination of the potential effect of terrorism on human rights implementation and the limitations of applying certain theoretical approaches to state compliance with international human rights law. With the increasing anti-terrorism campaigns in Nigeria, Kenya and other parts of Africa, it is important to examine whether the fight against terrorism can impact on the engagement of African states with the UPR. Nigeria as a case study enables an examination of these issues.

Kenya is a major power in East Africa and exercises influence within the region. Importantly, Kenya is one of the most cited cases of a vibrant and successful civil society in Africa which is seen as a model within the continent. This success has been explained in terms of the significant contribution of Kenya’s civil society in toppling despotic regimes in Kenya; having the highest number of Civil Society Organisations (hereafter referred to as CSOs) and Non-Governmental Organisations (hereafter referred to as NGOs) in Africa; and as an agent of development. Kenya is therefore an ideal case study to examine the value of strategic and effective engagement by NGOs with the UPR, and in particular the potential for NGO engagement to help narrow the gap between UPR recommendations accepted and those implemented (UPR implementation gap), and the potential for NGOs to influence state recommendations to their peers.

Lastly, South Africa is representative of the Southern part of Africa. Being one of the longest serving members of the HRC, South Africa has been very vocal in showing its preference for the UPR as ‘the hallmark of the Council’s work.’ It is therefore important to examine whether this strong support for

33 Chapter II examines various theoretical approaches to human rights compliance.
38 Statement by Ambassador Baso Sangqu, Permanent Representative of South Africa on the Report of the Human Rights Council to the 42nd Plenary meeting of the United Nations
the mechanism can result in effective engagement with the UPR. Its inclusion in this thesis also serves to underscore the impact of a lack of effective NGO participation in the UPR and permits an examination of state ‘ritualism’ in the UPR.

1.4. METHODOLOGY AND STRUCTURE OF THESIS

This section of the introduction details the methodology through which the arguments advanced in this thesis will be developed and examined. It also explains how the arguments and findings of the thesis will be set out in the following Chapters.

This research adopts a socio-legal research framework that incorporates a theoretical and empirical analysis of the effectiveness of African states’ engagement with the UPR mechanism. According to the Economic and Social Research Council (UK) (ESRC), socio-legal research deals with the ‘social, political and economic influences on and impact of law and the legal system’. 39

In Part III of this thesis, I examine the impact of factors including regionalism, cultural relativism, and civil society on the engagement of African states with the UPR mechanism. The unique feature of this approach lies in its ability to create a bridge between the disciplines of law, sociology and political science and has been described as providing the space ‘where law meets the social sciences and humanities’. 40 Socio-legal approaches can broaden the scope of legal research by providing conceptual frameworks within which information can be evaluated and exposing power dynamics in a variety of social settings. 41

As such, legal scholars agree that socio-legal approaches are a suitable

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39 Economic and Social Research Council (UK) (ESRC), ‘Joint AHRC ESRC Statement on Subject Coverage - Interfaces between the Arts and Humanities and the Social Sciences’ <http://www.esrc.ac.uk/files/funding/guidance-for-applicants/interfaces-between-the-arts-and-humanities-and-the-social-sciences/>.


methodological framework to study international human rights law.\textsuperscript{42} This research draws on sociology, socialisation and international law theories such as acculturation, the transnational legal process theory and the five-stage ‘spiral model’,\textsuperscript{43} to determine the best theoretical approach to evaluating state engagement with the UPR and its potential impact.

The primary aim of this thesis is to examine the effectiveness of African states’ engagement with the UPR mechanism. This research is carried out mainly through a review of documents from the UN human rights system on the UPR mechanism and relevant secondary literature. Essentially, this research undertakes an analysis of the UPR recommendations made by states and other UPR stakeholders and it reviews the extent to which the three states under examination implemented the UPR recommendations. A documentary analysis of various UPR reports by states and NGO stakeholders is undertaken. This is done with the view of obtaining relevant data that would help in determining the effectiveness of state engagement and the extent to which the UPR recommendations were implemented to help improve the human rights situation on the ground. The various recommendations are classified following the action categories developed by McMahon and the outcome of each recommendation is measured using the Implementation Recommendation Index (IRI) used by UPR Info.\textsuperscript{44} Primary sources of data used in the empirical analysis in Part III of this thesis are derived from the databases of the UN Office of the High Commissioner for Human Rights (OHCHR) and from UPR Info.\textsuperscript{45} These are both credible and reliable sources of information on the UPR process, which have been used in several significant studies on the UPR.\textsuperscript{46}


\textsuperscript{43} See Chapter Three.

\textsuperscript{44} UPR Info is a Geneva-based NGO that works with raising awareness and promoting capacity building tools on the UPR Mechanism. See UPR Info https://www.upr-info.org/en; A detailed analysis of the classification by McMahon and the IRI is undertaken in Chapter Three.


This research is aware of the difficulty attempting to establish a precise causal link between UPR recommendations and the actions of states. This is difficult due to the fact that changes in the human rights practices of states can be motivated by multiple factors. However, the influence of the UPR recommendations is measurable with some confidence by analysing both state and NGO implementation reports to determine the extent to which the UPR contributed to human rights change within states. Other relevant studies on the UPR accept and use similar methodology.  

**Part II** of this thesis (Chapters 2 and 3) undertakes a review of the UPR mechanism and develops the conceptual and theoretical framework used to evaluate state engagement with the UPR. Chapter 2 reviews the UPR mechanism to outline its key features and identify the aspects relevant to my analysis. I consider four major issues: the efficacy of the UPR mechanism; the fundamental principles of the UPR mechanism; the modus operandi of the review; and the broad question of whether membership in international human rights institutions influences state compliance. What emerges from the literature is two broad perspectives of scholars in relation to the UPR mechanism. The first, which I call the ‘sceptical group’, argue that the UPR is institutionally weak and needs to be overhauled or replaced by an entirely new institution. The second, which I call the ‘evolutionary group’, contend that the UPR is an evolving mechanism whose effectiveness is only limited by factors such as politicisation, regionalism and ritualism. My analysis reveals three gaps: the lack of consideration given to the UPR consultation process, limited analysis of the impact of the UPR mechanism on human rights implementation and the paucity of theoretical engagement with the potential of the UPR to contribute to human rights changes within African states. With these deficiencies in mind, the thesis then turns to develop an appropriate conceptual
and theoretical framework for evaluating the effectiveness of state engagement with the UPR mechanism, which would address some of the gaps in the literature.

Chapter 3 expounds on the theoretical and conceptual framework of this thesis and demonstrates the theoretical and conceptual challenges in this area of research. These challenges, however, provide an opportunity to define the conceptual and theoretical framework used and contextualised in this thesis. On a theoretical level, Chapter 3 reviews five major theoretical approaches to state compliance – 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. I argue that while these theories are not mutually exclusive, the theory of acculturation provides the best theoretical framework to understand the potential impact of the UPR mechanism.48

Charlesworth and Larking provided the first sustained analysis of the UPR process that draws on socio-legal theory and underscores the interplay of rituals and ritualism in the UPR.49 By incorporating a theoretical conception of the potential impact of the UPR process, this thesis contributes to existing scholarship in this area which generally has limited theoretical engagement with the impact of the UPR process. These theories also inform my argument of the effectiveness of African states’ engagement with the UPR mechanism.

On the conceptual level, I examine the concepts of ‘compliance’, ‘implementation’ and ‘effectiveness.’ These are imprecise terms which have been subject to multiple interpretations and there is no settled definition of these terms in international law.50 In Chapter 3, I explain ‘implementation’ as a function of ‘compliance’, and narrow the focus of the research to implementation because it is a more measurable concept than compliance. I

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48 I examine the various theories in detail in Chapter 3 of this thesis. According to Goodman and Jinks, acculturation is ‘the general process by which actors adopt the beliefs and behavioural patterns of the surrounding culture.’ See Ryan Goodman and Derek Jinks, ‘How to Influence States: Socialisation and International Human Rights Law’ (2004) above n 3, 626.

49 I examine this theoretical conception of the UPR in Part II of this thesis and engage with it in Chapter 6. See Hilary Charlesworth and Emma Larking (eds), Human Rights and the Universal Periodic Review: Rituals and Ritualism (Cambridge University Press, 2015).

further develop a four-step approach to evaluating the ‘effectiveness’ of state engagement with the UPR mechanism which incorporates implementation along with other important measures of engagement with aspects of the review process. This four-step approach evaluates ‘effectiveness’ in terms of the level of a state’s commitment to the UPR pre-review consultation process, the quality of its UPR delegation, participation during the review sessions in Geneva and the aggregate percentage of implemented UPR recommendations. This contributes to existing scholarship by providing a holistic approach to assessing the effectiveness of state engagement with the UPR mechanism which incorporates measures of both implementation and engagement.

**Part III** of this thesis (Chapters 4, 5 and 6) applies the theoretical and conceptual framework developed in Chapter 3 to assess state engagement with the UPR by the three African states under examination. This part of the thesis applies the four-step approach to evaluating state-engagement with the UPR in analysing each of the three case studies in the respective Chapters. First, I determine the state’s commitment to the UPR pre-review national consultation process by considering the state’s approach to the consultation process, the inclusivity of the consultation process, both in terms of relevant stakeholders and relevant issues, and the timeframe utilised for the consultation. Second, I examine the quality of the state’s UPR delegation (in terms of the numbers, seniority and breadth of responsibility of the delegates) by considering the level of state representation at the review, and whether there was gender balance in the state’s UPR delegation (in terms of the representativeness of women in the delegation). This enables an assessment on the competency of the UPR delegation and contributes to a determination on whether the state considered the review as a foreign affairs exercise or as a process for the examination and improvement of the human rights situation on the ground.

The third aspect examined in each of the three case studies is the extent of the state’s participation in the review sessions as a state reviewer and as a state under review. I examine the state’s approach to cooperation, the quality and relevance of the recommendations it made to its regional peers compared to recommendations made to other groups of states, state receptiveness to UPR
recommendations, and the percentage of recommendations accepted or rejected by the state within and outside its regional group. In all three case studies, analysis of the states’ receptiveness to UPR recommendations is undertaken from the perspective of the themes of regionalism and cultural relativism. Lastly, I analyse the aggregate percentage of the recommendations that were implemented by each state, across three categories; fully, partially or not implemented. This approach is comprehensive and is a measure of the extent to which the UPR contributed to improve the human rights situation within the respective states.

There are additional areas of relevance examined in the three case studies. Chapter Four (Nigeria) examines the effect the fight against terrorism can have on a state’s engagement with the UPR by examining the impact of the fight against Boko Haram on Nigeria’s UPR engagement. Chapter Five (Kenya), examines two additional key issues in this research. First, it considers how NGOs can overcome the limitations to their direct participation in the UPR process to effectively engage in the UPR and whether there is a potential correlation between state and civil society UPR recommendations. Second, Chapter 5 assesses the applicability of one of the founding principles of the UPR – complementarity. It underscores the potential of the UPR to amplify and reinforce human rights concerns raised by various national, regional and international human rights mechanisms. This synergy can contribute to ensure that UPR recommendations are relevant and target the improvement of the human rights situation on the ground. Chapter Six (South Africa), in addition to examining the common themes, expounds on the negative impact of ritualism. Part III of the thesis therefore engages with the fundamental question of whether African states have effectively engaged with the UPR mechanism and the factors impacting on their engagement.

Finally, Part IV of this thesis (Chapter 7) draws together my conclusions on African states’ engagement with the UPR, the conceptual and theoretical framework within which such engagement can be assessed, and the issues affecting their engagement. I argue that approaches to human rights implementation which neglect the potential value of cooperative mechanisms
such as the UPR, are necessarily incomplete and may be blind to very important human rights mechanisms that emphasise cooperation. I substantiate this conclusion by reference to my major arguments: First, the UPR, which is based on cooperation, can help cause human rights changes within African states in subtle and significant ways, determined by the percentage of recommendations that are fully and partially implemented. Second, African states engage more effectively with the UPR than with other human rights monitoring mechanisms. I argue that the theory of acculturation provides an appropriate theoretical framework to understand the potential impact of state engagement with the UPR mechanism as it does not incorporate any element of coercion. As I argue, the inclusive and cooperative framework of the UPR provides important and effective conditions for acculturation. Findings of some of the UPR recommendations that were implemented outside the implementation timeframe underscore the potential for the UPR to contribute to influence human rights changes within states over time. However, evidence of regionalism, cultural relativism and ritualism are aspects which have negatively impacted states’ engagement with the UPR. Nevertheless, I argue that regionalism plays a positive role overall and also that cognitive reframing can help overcome cultural relativism. In addition, I argue that effective NGO engagement can help counter state ritualism in the UPR.
PART II: THE UNIVERSAL PERIODIC REVIEW AND THE APPROPRIATE CONCEPTUAL AND THEORETICAL FRAMEWORK

CHAPTER TWO:
THE UNIVERSAL PERIODIC REVIEW (UPR)

2.1. INTRODUCTION

In 2006, UN General Assembly Resolution 60/251 established the Human Rights Council (HRC) as a subsidiary organ of the General Assembly which replaces the Commission for Human Rights.\(^1\) One of the broad mandates of the HRC is to be ‘responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all.’\(^2\) The aim was to provide an alternative to the ‘politicisation’, ‘naming and shaming’ and practices of selectivity which contributed to the demise of its predecessor, the Commission for Human Rights.\(^3\) General Assembly Resolution 60/251 mandated the HRC, amongst other things, to undertake a universal periodic review of all member states in the spirit of cooperation and based on objective and reliable information.\(^4\) This Chapter undertakes a review of the UPR mechanism to outline its key features and identify the aspects relevant to my analysis. I consider four major issues: the efficacy of the UPR mechanism; the fundamental principles of the UPR mechanism; the modus operandi of the UPR; and the broad question in international law of whether membership in human rights institutions influences state compliance with human rights.

This Chapter is divided into five sections. The second section undertakes a general review of the existing scholarship on the UPR mechanism within two broad perspectives that I have identified: the ‘sceptical group’ who argue that the UPR is institutionally weak and needs to be overhauled or replaced by an

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\(^{1}\) Resolution 60/251, UN Doc A/Res/60/251, above n 16.

\(^{2}\) Ibid para 2.

\(^{3}\) For a detailed analysis of the failures of the former Commission for Human Rights and the transition to the HRC see Philip Alston, ‘Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council’ (2006) 7(1) Melbourne Journal of International Law 185.

\(^{4}\) Resolution 60/251, UN Doc A/Res/60/251, above n 16, para 5(e).
entirely new institution; and the ‘evolutionary group’ who contend that the UPR is an evolving mechanism whose effectiveness is only limited by factors such as politicisation, regionalism and ritualism, and can be improved within the existing cooperative framework. This section seeks to establish the attitudes of the existing literature to the question of whether the UPR, as a cooperative peer review process, might add something valuable to the existing human rights monitoring system. This review of the literature identifies a gap in the existing scholarship regarding the impact of the UPR, as a collaborative process, on the human rights situation in African states. I note that existing scholarship has given little consideration to the UPR consultative process and to a theoretical understanding of the potential impact of the UPR process on the human rights situation on the ground. I argue that the UPR is an evolving mechanism and that with the completion of UPR II, the empirical analysis in this thesis specifically considering the engagement of African states across both cycles of the UPR will significantly enhance the discourse on the impact of the UPR mechanism within states. Therefore the analysis undertaken in Part III of this thesis will make an important contribution to the debate on the impact of the UPR.

Section three of this Chapter reviews five fundamental principles of the UPR mechanism and their implications for this research. It examines the significance of these principles and highlights academic commentaries regarding them. This section notes that while these principles represent the strength of the UPR mechanism, factors such as regionalism and cultural relativism limit the effectiveness of the mechanism. It argues that existing literature does not devote sufficient attention to how the negative impact of regionalism and cultural relativism can be overcome within the existing cooperative framework of the UPR. This literature also does not address whether the UPR can potentially create a synergy with other national and international human rights mechanisms. In addition, section three highlights the ways in which NGOs can effectively engage in the UPR (a topic which is examined in greater detail in the case study on Kenya in Chapter 5).
Section four examines the operational framework of the UPR and considers the two core challenges to the central aspect of the review process – the lack of specificity in state recommendations and rights ritualism. These are important challenges to the effectiveness of the UPR, and their impact is examined in Part III of this thesis with specific focus on the three African states under examination.

The last section of this Chapter examines the relationship between membership of the HRC and compliance. It analyses the membership rules in the HRC and its UPR mechanism. I make a distinction between inclusive and restrictive membership and consider whether membership of the HRC does influence a state’s engagement with the UPR mechanism.

2.2. LITERATURE ON THE UPR MECHANISM

Some of the literature on the UPR since its inception in 2006 raises scepticism about the ability of a mechanism based entirely on cooperation to act as an effective global mechanism for monitoring the human rights compliance of states. Scholars and UPR stakeholders critique the UPR from different perspectives in an attempt to provide insights into the ability of the UPR mechanism to influence states and improve the human rights situation on the ground. I classify the literature into two main groups - the sceptical group and the evolutionary group.

The sceptical group contends 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. 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, UN Watch, one of the earliest critics of the UPR stated that:

the UN has little need for another toothless mechanism for “cooperative dialogue.” We call 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. UN Watch made the above statement during the HRC debate on the modalities for the UPR. It advocated for a ‘strong’ mechanism that can ‘name and shame’ state human rights violators and hold them accountable. UN Watch argued that any mechanism based on cooperation and dialogue would be ineffective in scrutinising human rights violations by states.

In 2009, Allehone M Abebe, 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 UPR I, expressed much criticism of the UPR, particularly the participation of African states. He argued that African states 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. 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. Abebe’s detailed analysis traces the role played by African states during the negotiations leading to establishment of the UPR, but on the actual participation of African states during the reviews, his analysis was limited only to the first two sessions. With the end of the UPR I and II, a comprehensive analysis of the extent of African states’ participation is required to properly assess the efficacy of the UPR mechanism.

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Mid-way through the first cycle of the UPR, de Frouville criticised the UPR on three major grounds. According to de Frouville, 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. 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.’ 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. However, their analyses 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.

Scholars within the sceptical group generally have based their views on the UPR and its architecture before the actual review started or at best examine a few sessions of the first cycle. Analyses of how the UPR mechanism has operated through the first and second completed cycles will provide a more comprehensive understanding of its effectiveness. However, scholars within this group provide an important contribution to the knowledge regarding the negotiations leading to the establishment of the mechanism, the structure of the mechanism, and what must be done or avoided to make it successful.

On the other hand, the evolutionary scholars/commentators view the UPR mechanism more positively. They contend that the UPR is an important and evolving mechanism with considerable potential, albeit that its effectiveness may be limited by factors such as politicisation, regionalism, and ritualism.

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62 Frouville, above n 12, 250-5.
64 Nowak, ‘It’s Time for a World Court of Human Rights’ above n 17, 23.
This group of scholars examine the UPR in action including state practice during the interactive dialogue and the recommendations made during the review process. McMahon undertook one of the first empirical analyses of the UPR. He 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. However, he criticised the lack of specificity and the complimentary approach adopted mostly by the African and Asian Groups in the review of their regional peers. Overall he has expressed optimism that the UPR will evolve into a robust mechanism because states are taking the process seriously.

The analysis of McMahon was ultimately a general evaluation of states’ UPR I participation in the interactive dialogue, the quality of state recommendations and the corresponding state response. 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. 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.

Since 2012, Rhona Smith, Helen Quane and Takele Bulto have analysed the impact of the UPR in different regions. Smith’s 2012 case study of Pacific
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nd states demonstrated that these states actively engaged with the interactive dialogue of their reviews during UPR I and were receptive to UPR 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.\(^71\) With regards to states within the Association of Southeast Asian Nations (ASEAN), Quane argued in 2015 that the UPR mechanism has enhanced the relationship between ASEAN states and the global human rights mechanisms.\(^72\) 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.\(^73\) 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.\(^74\)

In Bulto’s 2015 general analysis on 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.\(^75\) But he argues that their engagement lacks genuine commitment and is a manifestation of rights ritualism.\(^76\) 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.\(^77\) These matters will be addressed in the case

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\(^72\) ASEAN is an inter-governmental Asia regional arrangement comprising of 10 member states with the aim of promoting political, economic and social cooperation and regional stability. See Quane, ‘The Significance of an Evolving Relationship: ASEAN States and the Global Human Rights Mechanisms’ above n 70, 289.

\(^73\) Ibid.

\(^74\) Ibid 289-95.

\(^75\) Bulto’s analysis was a general evaluation of the participation of African states during UPR I. He did not engage in any specific case studies in his analysis. This is one of the gaps which this thesis seeks to fill. See Bulto, above n 70.

\(^76\) Ibid.

\(^77\) Ibid 247-51.
studies in Chapters 4, 5 and 6 of this thesis which evaluate engagement with the UPR by Nigeria, Kenya and South Africa respectively.

The vast majority of current scholarship focuses solely on the interactive dialogue and covers mostly the first cycle of the UPR (2008-2011). Little consideration has been given to the UPR consultative process and its potential impact on compliance with treaty body reporting obligations. Also, there are few empirical studies that consider the implementation of UPR recommendations by African states or how NGOs in Africa can strengthen state engagement with the UPR mechanism. In addition, little of the existing scholarship takes a theoretical approach to analysing the UPR process.\textsuperscript{78} This thesis seeks to fill those gaps by undertaking a comprehensive empirical analysis of the nature and effectiveness of three African states’ engagement with the UPR mechanism across UPR I and II. It adopts a socio-legal approach which incorporates a theoretical conception of the potential impact of the UPR process by arguing that the UPR may lead to an improved human rights situation over time through the process of acculturation. I examine how NGOs can engage effectively in the UPR process and their potential to influence state recommendations. Furthermore, I consider the ability of the UPR mechanism to reinforce and amplify the recommendations from other national, regional, and UN human rights mechanisms. Therefore, the analysis in this thesis takes an evolutionary view of the UPR but also considers how the negative impact of regionalism, cultural relativism and ritualism can be addressed – perhaps overcome within the existing cooperative framework of the UPR.

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

\textsuperscript{78} Charlesworth and Larking provide the first sustained analysis of the UPR process that draws on socio-legal theory and underscore the interplay of rituals and ritualism in the UPR. See Charlesworth and Larking (eds), above n 49.
treatment of all member states in monitoring human rights compliance. They recognise the ‘importance of ensuring universality, objectivity and non-selectivity… and the elimination of double standards and politicisation.’ 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. This section reviews the fundamental principles of the UPR and considers how factors including regionalism, cultural relativism and ritualism impact on them. It argues that while the inclusive, collaborative and cooperative features of the UPR help promote state engagement, consideration should be given to how various groups of states approach cooperation in the UPR. I also highlight the fact that more attention needs to be given to how the negative impacts of regionalism and cultural relativism can be overcome within the existing cooperative framework of the UPR, and whether the UPR can potentially create a synergy with other human rights mechanisms. This section also examines the extent to which the UPR welcomes the participation of NGOs in the review process.

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). Universality is a key principle of the UPR which is characterised not only in terms of 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 particular treaty.

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80 *Resolution 60/251*, UN Doc A/Res/60/251, above n 16, preamble.
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. It is truly universal since all UN member states are reviewed, regardless of whether the state has ratified any human rights treaties. With the exception of Israel which temporarily boycotted its UPR II in January 2013, all UN member states have been reviewed in the two cycles of the UPR, even North Korea. 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. The UPR mechanism ensures universal coverage of all states. This thesis argues that the principle of universality has contributed to an active engagement by African states with the UPR and benefits the acculturation process. African states have participated in the UPR process even when it was costly and inconvenient because of the inclusive nature of the UPR. In Part III of this thesis I undertake an examination of the extent of their participation with the UPR as reviewers and as states under review. However, I also examine the impact of regionalism and cultural relativism on their level of engagement.

2.3.1.1. 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. Rosa Freedman argues that regionalism is detrimental because it polarises and undermines the work of the UN. 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

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82 Resolution 5/1, UN Doc A/HRC/RES/5/1, para 1.
84 This is further examined in Chapter 3.
the HRC and in the UPR process. However, while there is a risk that regionalism may polarise the UPR and limit 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. I consider this aspect in Part III of this thesis, by arguing that regional alliances within the UPR may lead to some recommendations, that may otherwise be rejected, being accepted because they were made by allies in the same regional group. I support this argument by demonstrating the inclination of African states to participate more in the reviews of their regional peers and to accept their recommendations more than those from any other group of states.

2.3.1.2. 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. The argument of cultural relativism infringes on the notion of universality of human rights. 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.’ 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. This 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

87 Bulto, above n 70, 250-51.
western hegemony. 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. 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. Referring to the issue of gay rights at a debate in the HRC in 2011, the Nigerian delegate on behalf of the African Group (excluding South Africa) stated that:

The heads of states of governments of the African Union … resolved not to … accept or integrate concepts which have not been universally defined and accepted in international human rights law. The African leaders thereby rescind the obsession by other regions or groups to impose their own value system on other regions.

Therefore the central belief of strict cultural relativists in relation to human rights is that the existence and scope of human rights is determined by local cultural traditions and ‘no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable’. This view prioritises adherence to local values over compliance with international human rights law and undercuts the universality of rights espoused by the UPR. However, the widespread adoption of human rights language across different cultures in the world provides prima facie evidence for the cross-cultural validity of human rights norms.


94 Fernando R Tesón, above n 89, 870-1.
On the other hand, moderate cultural relativists argue that a ‘common’ culture of universal human rights is attainable because culture is subject to reform and influence due to the porous disposition of cultural boundaries. An-Na’im, one of the leading scholars in this area, argued that despite peculiar and diverse cultural characteristics, societies ‘share certain fundamental interests, concerns, qualities, traits and values that can be identified and articulated as the framework for a “common” culture of universal human rights’.

Consequently, a central premise of moderate cultural relativism is not to use culture as a tool to reject the universality of human rights but to formulate rights in a way that would be more acceptable and better implemented in various cultures, with the goal to achieving the cultural legitimacy of human rights. Concurring with this view, I argue that the UPR provides a forum for cross cultural dialogue and can be harnessed to socialise African states through a process of acculturation, by formulating certain rights which are culturally ‘radioactive’, such as gay rights, in a way that would be more acceptable and incrementally implemented within the African society.

A number of scholars have sought a middle ground between the universal and cultural relativist conceptions of human rights. 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. However, Michael 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

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97 Ibid 339.
99 Donnelly, above n 88, 281.
‘relative’ and ‘universal’. Nevertheless the UPR mechanism purports to engage with and promote a universal conception of human rights. States that are advocates 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.

The above debate highlights the tension between culture and human rights. However, Sally Engle Merry argues that the demonization of culture by human rights lawyers and the rush to the conclusion that universality is essential while relativism is bad, can be attributed to a lack of anthropological understanding of culture. She argues the misreading of culture promotes a loss of tolerance and respect for cultural differences, and hinders the global spread and local appropriation of human rights concepts. According to Engle Merry:

Considering cultures as changing and interconnected, and rights as historically created and transnationally redefined by national and local actors, better describes the contemporary situation. It also reveals the impossibility of drawing sharp distinctions between culture and rights or seeing relativism and universalism as diametrically opposed and incompatible positions.

The UPR offers an open platform to identify the cultural relativist players, contrast their cultural assertions with the universalist view of human rights and also to facilitate the acculturation of states. In each of the three state case studies in Part III of this thesis, I focus on the issue of same sex relations which is a culturally sensitive issue in most African states to examine (i) the

100 Michael Goodhart, above n 98,187-9
103 Ibid, 71-72.
105 I focus on this issue because Africa is the continent with the highest number of states (33 of 54 as of May 2016) that specifically criminalises same sex relationships and there have been specific legislations between 2013 and 2014 in Countries like Nigeria and Uganda that criminalises same sex conducts. See Aengus Carroll, State Sponsored Homophobia 2016: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition (ILGA, 2016) 57.
extent to which African states invoke cultural relativism in their engagement with the UPR by examining their responses to recommendations calling for the decriminalisation of same sex relationships; and (ii) whether the UPR can provide an appropriate framework to promote a transformation of the social and political culture against sexual minorities within African states. Examining the response of African states to these recommendations, which are hypersensitive in cultural terms, will contribute to an understanding of the limits of their UPR engagement and the approach needed to better engage African states on such issues.

2.3.2. Cooperation

Cooperation is one of the fundamental principles of the UPR which supports the framework for this thesis. The UPR recognises that the promotion and protection of human rights should be based on the principles of cooperation and genuine dialogue.\textsuperscript{106} This reflects one of the purposes of the UN stated in Article 1 of its Charter ‘to achieve international cooperation in solving international problems… and in promoting and encouraging respect for human rights and fundamental freedoms’.\textsuperscript{107} As earlier indicated, many scholars and practitioners, especially within the sceptical group, were sceptical about a mechanism rooted in cooperation and interactive dialogue. Those in the evolutionary group noted that the cooperative character of the UPR mechanism and the high level of state personnel that engage in it provide a unique context for the ‘formation, definition, clarification and consolidation of human rights customary rules.’\textsuperscript{108} According to Redondo and McMahon, 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.\textsuperscript{109}

\textsuperscript{106} Resolution 5/1, UN Doc A/HRC/RES/5/1, preamble.
\textsuperscript{107} Charter of the United Nations art 1 [3].
\textsuperscript{109} Redondo and McMahon, above n 98; De La Vega and Lewis highlight how the UPR transforms human rights monitoring by promoting state accountability for human rights policies and practices. See Constance De La Vega and Tamara N Lewis, ‘Peer Review in the Mix: How the UPR transforms Human Rights Discourse’ in M Cherif Bassiouni and William
Therefore, an important question which this research engages with is whether the UPR, which is based on cooperation, can significantly contribute to improving the human rights situation within African states. If it can, this has the potential to helpfully supplement or reduce the need for more coercive and confrontational mechanisms for human rights implementation.

However, there is evidence of diverging approaches to cooperation in the UPR. 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.\textsuperscript{110} According to Abebe, this approach results in weak recommendations and tends to ignore serious human rights concerns within states that require immediate attention.\textsuperscript{111} Heather Collister notes that ‘weaker’ UPR recommendations are as a result of the state-centric nature of the mechanism.\textsuperscript{112} However, she argues that state control is what induces states to cooperate with the UPR.\textsuperscript{113} African states tend to resist ‘tougher’ approaches.

In each of the three case studies in Part III, I provide evidence of diverging approaches to cooperation in the engagement of the three states under examination and consider whether a ‘soft’ approach to cooperation can produce a positive outcome. I argue that a ‘soft’ approach can be beneficial in realising incremental human rights progress, especially towards the decriminalisation of same-sex relations within African states.

\textsuperscript{110} A Schabas (eds), \textit{New Challenges for the UN Human Rights Machinery} (Intersentia, 2011) 353-76.
\textsuperscript{111} Ibid.
\textsuperscript{112} Heather Collister, ‘Rituals and Implementation in the Universal Periodic Review’ in Charlesworth and Larking, above n 49, 111-6.
\textsuperscript{113} Ibid.
2.3.3. Objectivity in the Preparation of Reports and the UPR National Consultation Process

In 2006 the UN General Assembly insisted that the UPR be based on ‘objective and reliable information.’\(^\text{114}\) The first phase of the review is characterised by the gathering of information relevant for the preparation of reports. Information from other sources outside of that provided by the state under review is gathered. Information on the human rights situation of the state under review is derived from three sources. The first source is the national report produced by the state under review. This is limited to 20 pages to guarantee equal treatment of all states and to not overburden the mechanism.\(^\text{115}\) This page limit represents a dramatic reduction in the number of pages states can send under the treaty body system and helps to reduce the burden of a state’s reporting obligation.\(^\text{116}\)

It is a further requirement that the report is prepared through a broad consultation with all relevant stakeholders at the national level.\(^\text{117}\) Consulting these stakeholders during the preparation of the report is important because of the usefulness of such engagement in producing a balanced report. Also, the state has to provide information on the extent of national consultation with UPR stakeholders that took place within the country in the preparation of the national report.\(^\text{118}\)

\(^\text{114}\) Resolution 60/251, UN Doc A/Res/60/251, above n 16.
\(^\text{115}\) Resolution 5/1, UN Doc A/HRC/RES/5/1, para 15(a).
\(^\text{116}\) The report of the treaty bodies can be more than 100 pages in length. For example in 2010, 30 state party reports to the treaty bodies were between 100 and 200 pages in length and 2 state party reports were over 200 pages. See Office of the High Commissioner for Human Rights, ‘Requirements and implications of the ongoing growth of the treaty body system on the periodic reporting procedures, documentation and meeting time’ (2011) 12 <https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwj1zbvpj_DOAhUEwqZKHg8OB6QFggkMAE&url=http%3A%2F%2Fwww2.ohchr.org%2Fenglish%2Fbodies%2FHRTD%2Fdocs%2FReportingUnderTtreatyBodies.doc&usg=AFQjCNvZ3J0m2wH-UcYBHG5yjw0Ls5SAQ&sig2=GVzTRh6duB0ml2pZblDvrA&bvm=bv.131669213,d.dGo>
\(^\text{117}\) Resolution 5/1, UN Doc A/HRC/RES/5/1, para 15(a).
The second source of information is the OHCHR compilation of UN information. This 10-page report consists of a collation of aspects of the reports of treaty bodies, special procedures and other relevant official UN documents. The last source of information is the OHCHR’s 10-page summary of stakeholders’ information. These stakeholders include NGOs/CSOs and National Human Rights Institutions (NHRI), and generally provide information which has the potential to be more critical of a state’s human rights commitment than the state report. In 2011, the HRC reviewed the modalities of the UPR. It now requires that the information contained in the OHCHR’s summary of stakeholder’s information should have a separate section for information by NHRIIs accredited in full compliance with the Paris Principles, and then information provided by other accredited NHRIIs and stakeholders.

Despite these stipulations, international scholars and UPR stakeholders have been critical of the objectivity of the process of gathering information for use in preparing UPR reports. Roland Chauville highlights concerns on the authenticity of domestic NGOs, especially whether they represent the civil society or are agents of their national government. Also, states have at times questioned the credibility of the information NGOs provide for the UPR. For example, during its UPR I in 2009, Nigeria characterised the information in some NGO reports as ‘preposterous’, ‘patently false’ and ‘unhelpful to the UPR process’. Some NGOs have complained about the lack of transparency.

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119 Resolution 5/1, UN Doc A/HRC/RES/5/1, para 15(b).
120 Ibid para 15(c).
122 For example, Chauville observed how government supported NGOs from Cuba and Venezuela flooded the OHCHR with UPR submissions that did not contain any criticism of the government. See Roland Chauville, ‘The Universal Periodic Review’s first cycle: successes and failures’ in Charlesworth and Larking (eds), above n 49, 105-6.
123 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review – Nigeria, 11th sess, Agenda Item 6, UN Doc A/HRC/11/26 (5 October 2009) (‘HRC UPR I Report – Nigeria’) para 8; Also Morocco condemned a report by Amnesty International (AI) which included Morocco among countries targeted by the anti-torture campaign as ‘biased and subjective’. According to Morocco’s UPR delegation, this report by AI ‘is driven by the will to downplay the current dynamic and the progress achieved in terms of fighting torture,
in the manner in which the OHCHR compiles the summary of stakeholders’ information and have raised concerns that the content of their submissions were ‘watered down’ in the OHCHR’s summary of stakeholders’ information. However, Julie Billaud examined this transformation process by the OHCHR and found that the discipline and techniques followed by the OHCHR breathe bureaucratic legitimacy into the documents, promote objectivity and impartiality and serve ‘to produce “the truth” on the human rights situation in a country.’ In Part III of this thesis, I analyse the full UPR reports submitted by various NGOs to ascertain the extent of their engagement, compare their recommendations with those of states, and assess the implementation outcome of each state recommendations in part based on NGO commentaries about state implementation.

As I mentioned earlier in this Chapter, little consideration has been given to the UPR consultative process and the extent of state consultation with domestic stakeholders in the preparation of their national report. This thesis seeks to fill this void. The extent of the states’ UPR consultation is an important indicator in my analysis in Chapters 4, 5 and 6 to determine the commitment of African states to the pre-review process of the UPR. Important factors taken into consideration include the approach to consultation adopted by the state, the inclusivity of relevant stakeholders, and the timeframe utilised for the consultation. In addition, in Part III of this thesis I examine the engagement of NGOs in the national consultation process and the extent to which they engage the state. This will shed light on the nature of the UPR consultation process and its impact on the review process.

2.3.4. 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

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125 Ibid 63-83.
in 2006. The principle of complementarity is reflected in UNGA resolution 60/251 which provides that the UPR mechanism ‘shall complement and not duplicate the work of treaty bodies.’ 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. It is used by the Rome Statute of the International Criminal Court to define that court’s relationship with national courts. 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.

Nadia Bernaz 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. This argument echoes some of the sentiments articulated by Australia and the African Group.

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127 Resolution 60/251, UN Doc A/Res/60/251, para 5(e).
128 Resolution 5/1, UN Doc A/HRC/RES/5/1, para 3(f).
130 Bernaz, above n 63, 78 and 88.
during the negotiations on the modalities of the UPR in 2006.\textsuperscript{131} They argued that a separate report for the UPR will be an unnecessary duplication of the reporting obligations required by the human rights treaty bodies and will represent an additional undue burden for states.\textsuperscript{132} This problem was resolved by limiting the state UPR report to a maximum of 20 pages but the complementarity of the UPR with the treaty bodies was far from being proved.

Sir Nigel Rodley, former UN HRC Member, took the second perspective on the relationship between the treaty bodies and the UPR which is that the UPR process has a debilitating effect on treaty body recommendations. He contended that the UPR enables states to evade their obligation to implement recommendations by treaty bodies.\textsuperscript{133} According to Sir Nigel, the fact that states have the freedom to reject certain UPR recommendations can negatively impact the work of the treaty bodies because states ‘will invoke the gentler diagnosis of the UPR to discredit the harsher diagnosis of the treaty bodies.’\textsuperscript{134} For example he found that by the end of 2009, a total of nine UPR recommendations explicitly quoted recommendations from the Committee against Torture, of which five were rejected.\textsuperscript{135} On this basis, Sir Nigel argued that the UPR process presents a risk to the work of the treaty bodies as states could use the process to undermine the validity of recommendations from the treaty bodies.\textsuperscript{136} In Chapter 5, I present evidence that the UPR in fact can give renewed visibility, amplify and reinforce the recommendations from other human rights mechanisms.

De Frouville criticises the UPR for oversimplifying the hard work of the treaty bodies by summarising their recommendations.\textsuperscript{137} According to de Frouville, there is no real interaction between the UPR and other human rights mechanisms.

\begin{footnotesize}
\begin{enumerate}
\item[131] Gaer, above n 126, 122.
\item[132] Ibid.
\item[134] Ibid 327.
\item[135] Ibid 329.
\item[136] Ibid; Heather Collister makes a similar argument when she finds that the UPR contradicts/weakens treaty body recommendations and enable states to use the process as a means of rejecting treaty body recommendations. See Collister, above n 112, 116-9.
\item[137] Frouville, above n 12, 251.
\end{enumerate}
\end{footnotesize}
mechanisms because states would only accept UPR recommendations that are consistent with their purpose.\textsuperscript{138} He argues that in the worst case, the UPR is overshadowing the work of the treaty bodies by taking away material resources from treaty bodies and attracting more media and public attention.\textsuperscript{139} But this raises the question of why the UPR has attracted more state attention and resources than the treaty bodies and whether that could have a positive impact on states’ human rights compliance. De Frouville’s analysis could not draw a definite conclusion on the impact generated by the interaction between the UPR and the human rights treaty bodies since it was undertaken in 2011 when the first cycle of the UPR was still ongoing.

The more recent work of Helen Quane provides evidence in the case of ASEAN states which supports the third point of view, and it offers a more positive appraisal of the relationship between the UPR and the treaty bodies. Quane demonstrates that the UPR has enhanced the nature and level of the relationship between ASEAN states and the human rights treaty bodies.\textsuperscript{140} She argues that by recommending that states enhance their engagement with treaty bodies, submit overdue reports and ratify specific human rights treaties, the UPR has contributed to greater and more constructive engagement between many ASEAN states and the human rights treaty bodies.\textsuperscript{141} In Part III of this thesis, I engage with this third viewpoint by examining the impact of the UPR process on the three African states examined, in terms of compliance with their treaty body reporting obligations. This is determined by the extent to which the UPR consultation process and relevant UPR recommendations have contributed to enhance the engagement of African states’ with the treaty bodies. In Chapter 5, I adopt an approach to the relationship between the UPR and the treaty bodies which has received little attention in the literature. This approach considers whether the UPR can potentially create a synergy with other national, regional and international human rights mechanisms by amplifying and reinforcing their recommendations. The potential for this

\textsuperscript{138} Ibid.
\textsuperscript{139} Ibid 250-1.
\textsuperscript{140} Quane, above n 70, 303-9.
\textsuperscript{141} Ibid 295-309.
synergy within a cooperative, inclusive and collaborative human rights mechanism can ensure that the recommendations are relevant and that they target the improvement of the human rights situation on the ground.

2.3.5. The Participation of Civil Society Organisations (CSOs)/NGOs and other Stakeholders in the UPR Process

Ensuring the participation of ‘all relevant stakeholders, including non-governmental organizations and national human rights institutions’ in accordance with resolution 5/1 of the HRC is an important principle guiding the UPR.\(^{142}\) Resolution 60/251 acknowledged that ‘non-governmental organisations play an important role at the national, regional and international levels, in the promotion and protection of human rights.’\(^{143}\) 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.\(^{144}\)

The inclusion of NGOs as participants in the UPR process was a compromise which included limiting the extent of their participation in the UPR process. During the negotiations for the modalities of the UPR, the African Group contended that NGOs (including NHRIs) are ‘detractors, not peers’, and that their role in the UPR should be limited to participation in the preparation of national reports.\(^{145}\) The Group took this position because its view of the UPR

\(^{142}\) Resolution 5/1, UN Doc A/HRC/RES/5/1, para 3(m).
\(^{143}\) Resolution 60/251, UN Doc A/Res/60/251, para 5(h).
\(^{144}\) Defining ‘NGO’ can be difficult and is sometimes considered an impossible task because many similar or slightly different terms are used to refer to it. Kenya, for example, uses the broad term ‘Public Benefit Organisations’ to include NGOs, CSOs and other groups that work for the benefit of the public. Within the focus of this research, I interchangeably use CSOs and NGOs to constitute ‘formal (professionalised) independent societal organisations whose primary aim is to promote common goals at the national or international level.’ See Kerstin Martens, ‘Mission Impossible? Defining Nongovernmental Organizations’ (2002) 13 International Journal of Voluntary and Nonprofit Organizations, 282; importantly, the UPR mechanism uses the broad term ‘stakeholders’ to include NGOs and CSOs. See Resolution 5/1, UN Doc A/HRC/RES/5/1, paras 3(m) and 66.
mechanism was one which would avoid confrontation and make the state the exclusive partner in the process.\textsuperscript{146} Also, the African and the Arab Groups jointly criticised the procedure adopted by the OHCHR to make the entire texts of NGO contributions available for consideration during the review.\textsuperscript{147} The position of the African group regarding the involvement of NGOs in the UPR is in contrast with that of the European Group (WEOG) that wanted greater NGO involvement in the process.\textsuperscript{148} WEOG advocated for a ‘full and effective involvement of all stakeholders, including NGOs, as well as openness to the public at large.’\textsuperscript{149} It was resolved that 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.\textsuperscript{150} Also, they can participate during the adoption of the outcome of the review during the plenary session of the HRC and make comments.\textsuperscript{151}

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.\textsuperscript{152} Bulto argues that by preventing NGOs from participating in the interactive dialogue, the UPR shields African states from open criticism from NGOs.\textsuperscript{153} 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.\textsuperscript{154} 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

\begin{footnotesize}
\begin{itemize}
\item[147] Abebe, above n 58, 27.
\item[149] Ibid.
\item[149] Ibid para 31.
\item[150] See Resolution 5/1, UN Doc A/HRC/RES/5/1, para 18(c).
\item[151] Ibid para 31.
\item[152] Abebe, above n 58, 29.
\item[153] Bulto, above n 70, 250.
\item[154] McMahon, above n 65, 26.
\end{itemize}
\end{footnotesize}
above. These include the formation of NGO coalitions, effective media engagement and a focused advocacy strategy. But they identify three obstacles to effective NGO engagement in the process, namely the political nature of the process, limited formal opportunities for NGOs, and the lack of knowledge among NGOs about the UPR process.

Part III of this thesis engages with the three issues recommended by Schokman and Lynch for effective NGO engagement. It examines the importance of the formation of NGO coalitions for the UPR and its impact on state engagement. I also consider the domestic operational environment and constraints, matters not addressed by Schokman and Lynch. However, I argue that the formation of a NGO coalition is not by itself sufficient. I argue that such a coalition needs to be broad and representative to provide more credibility and ensure better mobilisation and impact on a state’s UPR outcome. In Chapter 5, I examine the extent to which the Kenya Stakeholders’ Coalition (KSC), by its media and advocacy strategy, impacted on Kenya’s engagement with the UPR. I equally consider the extent to which the participation of the KSC in the review process of Kenya was affected by factors such as the NGO operational environment in Kenya. This will provide significant insights into how NGOs can contribute to the UPR mechanism during the national consultation process and the entire review cycle, despite the limitations on their direct participation.

2.4. THE MODUS OPERANDI OF THE UNIVERSAL PERIODIC REVIEW

The review of each state operates in five phases. The first phase involves gathering and collating information on the human rights situation of the state under review. This process ends with the submission of the three main reports, previously outlined, on the state under review. These are the state report, the OHCHR compilation of UN information and the OHCHR summary of

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155 See Ben Schokman and Phil Lynch, ‘Effective NGO Engagement with the Universal Periodic Review’ in Charlesworth and Larking (eds), above n 49, 132-44.
156 Ibid.
157 Ibid 144-6.
stakeholder’s information on the state under review.\textsuperscript{158} The objectivity in the gathering of this information was examined in section 2.3.3 of this Chapter. The guidelines for the preparation of state reports provides that such reports should, among other things, contain the legislative background of the state in the promotion and protection of human rights, and how the state proposes to overcome challenges and improve the situation of human rights on the ground and follow-up on the previous review.\textsuperscript{159}

In the second phase of the review, the state under review presents its national report before the HRC Working Group in a three and a half hour long interactive dialogue session in Geneva. During this time, the state under review responds to questions posed by its peers attending that session of the review. The review process in the HRC Working Group is facilitated by the troika. This is a group of three rapporteurs, randomly selected among the members of the HRC and from different Regional Groups.\textsuperscript{160} It is during the review in the working groups that recommendations are made by the peer-reviewing states.

Following the review in the working group of the HRC, a draft ‘outcome report’ of the state under review is then adopted.\textsuperscript{161} It is a summary of the interactive discussion during the review containing the questions and recommendations made by peer-reviewing states to the state under review and the latter’s responses. The outcome report is prepared with OHCHR assistance. At this third phase of the review, the state under review has an opportunity to respond or clarify its responses to recommendations made during the review. The state under review provides responses to the recommendations made, by either accepting or rejecting the recommendations from the peer-reviewing

\textsuperscript{158} Each of these reports has page limits. The national report by the state is limited to a maximum of 20 pages while the other two reports are limited to a maximum 10 pages each. See \textit{Resolution 5/1}, UN Doc A/HRC/RES/5/1, para 15.
\textsuperscript{159} \textit{HRC Decision 6/102}; for the required structure of the state report see ibid at paras IB, IC, and IG.
\textsuperscript{160} \textit{Resolution 5/1}, UN Doc A/HRC/RES/5/1, para 18(d); The legal framework for the review are the UN Charter, the UDHR, binding human rights instruments, voluntary pledges and commitments, and applicable international humanitarian law (IHL). For the contentions regarding the inclusion of IHL see Lijiang Zhu, ‘International Humanitarian Law in the Universal Periodic Review of the UN Human Rights Council’ (2014) 5 \textit{Journal of International Humanitarian Legal Studies} 186.
\textsuperscript{161} \textit{Resolution 5/1}, UN Doc A/HRC/RES/5/1, paras 26-32.
states during the adoption of the outcome report of the state’s review or prior to the next plenary session of the HRC.\textsuperscript{162}  

At the fourth phase of the review the final outcome of the report is debated and adopted at the plenary session of the HRC.\textsuperscript{163} Each of the 47 Member states of the HRC are allowed to express their opinion on the outcome report and other stakeholders such as NGOs, make general comments after which the outcome report is finally adopted.  

The fifth and final phase of the review is the follow-up stage where the state is expected to implement the accepted recommendations. This phase of the UPR process provides the pathway to the realisation of the ultimate objective of the UPR process, that is, ‘the improvement of human rights situation on the ground.’\textsuperscript{164} The responsibility for implementing the outcome of the UPR falls primarily on the state under review with some assistance from the international community on the implementation of recommendations which require capacity building and technical assistance.\textsuperscript{165} Many states have provided a mid-term implementation report on the extent to which they have implemented the UPR recommendations. It is required that subsequent reviews focus on the implementation of recommendations given during the previous session. Table 2.4.1 below summarises the various stages of the UPR process.

\textsuperscript{162} Resolution 16/21, para 16.  
\textsuperscript{163} Ibid.  
\textsuperscript{164} Resolution 5/1, UN Doc A/HRC/RES/5/1, para 4(a).  
\textsuperscript{165} Ibid paras 33 and 36.
A sincere and genuine engagement with all the various phases of the UPR is required to make the process effective. However, the interactive dialogue (Phase II) has been criticised for the lack of specificity with regard to state recommendations and the potential for rights ritualism. McMahon’s analysis of UPR I recommendations by states indicated that the majority were general recommendations. He argued that such recommendations give the implementing state freedom to determine the mode of implementation which can undermine the utility and impact of the recommendation. Abebe noted that African states often made recommendations which were too general to be implemented. There is merit to the above criticisms given that such general recommendations can be frustrating because they are vague in terms of the

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166 McMahon, above n 65, 26.
167 Abebe, above n 58, 16; Chauville also argues that broad recommendations without reference to specific actions are difficult to interpret. See Chauville, ‘The Universal Periodic Review’s First Cycle: Successes and failures’ in Charlesworth and Larking (eds), above n 49, 98.
means of implementation and the difficulties of measuring outcomes. However, with the end of UPR II, it is important to further determine whether the lack of specificity with regards to recommendations by states was only a challenge that featured in the first cycle of the review. In Chapter Three, I adopt and explain the five verb-based categorisation of UPR recommendations developed by McMahon. My analysis in Part III of this thesis applies this verb-based categorisation of UPR recommendations when examining the specificity and relevance of recommendations made to and by the three African states under study. I argue that the fact that a recommendation is general does not necessarily imply that it is not relevant and that such recommendations may translate into specific actions at the point of implementation.

2.4.1. Rights Ritualism

Rights ritualism has also been highlighted as one of the core challenges to the central aspect of the UPR process.\textsuperscript{168} John Braithwaite, Toni Makkai and Valerie Braithwaite initially developed the concept of ritualism in the context of aged care regulation. According to these authors, ritualism means the ‘acceptance of institutional means for securing regulatory goals, while losing all focus to achieving the goals or outcomes themselves.’\textsuperscript{169} Hilary Charlesworth draws on this conception of ritualism and applies it to the field of international human rights law. She argues that ‘in the field of human rights, rights ritualism is a more common response than an outright rejection of human rights standards and institutions.’\textsuperscript{170} 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.’\textsuperscript{171} In the context of the UPR, Charlesworth and Emma Larking, define ritualism as ‘participation in the process of reports and meetings but an indifference to, or even reluctance about, increasing the protection of human

\textsuperscript{168} See Charlesworth and Larking (eds), above n 49.
\textsuperscript{170} See Hilary Charlesworth, ‘Swimming to Cambodia: Justice and Ritual in Human Rights after Conflict’ (2010) 29 (1) Australian Yearbook of International Law 1, 12.
\textsuperscript{171} Ibid.
They identify elements of cynicism in states’ involvement during the interactive dialogue phase of the review. They argue that some states have claimed they recognise certain rights within their states when that is not the case. In my analysis in this thesis, I adopt the above definition of ritualism by Chalesworth and Larking and I argue that such disingenuous engagement can undermine the effectiveness of a state’s engagement with the UPR mechanism.

In contrast to Charlesworth and Larking, Milewicz and Goodin argue that the UPR is a deliberative success for peer-to-peer accountability because of its insistently cooperative and inclusive character which can facilitate a genuine discussion of existing human rights violations. According to Milewicz and Goodin, the interactive dialogue phase involving states, and to a limited extent civil society, effectively induces a cooperative and deliberative culture within the mechanism that is encouraging states to comply with human rights standards. However, the UPR tends to be inclined towards ritualism because of its political nature as an entirely state-driven process, and the risk of rights ritualism has been found to exist in the review of many diverse states including Canada, Indonesia and the United States.

I examine the phenomenon of rights ritualism with specific focus on three African states in my analysis in part III of this thesis. I identify aspects of ritualism by examining the states’ receptiveness to UPR recommendations. An example is when a state makes a particular recommendation to its peers but is unwilling to accept the same recommendation. I argue that such a disingenuous attitude undermines the extent of the state’s engagement with the UPR mechanism. In order for the UPR deliberation to be effective, states should genuinely engage in a constructive dialogue, avoid adopting a defensive

172 Charlesworth and Larking (eds), above n 49, 16.
174 Ibid.
176 Ibid 17.
177 See Charlesworth and Larking, above n 49, 169-217.
position and not remain in denial of existing human rights violations. Also, in my case study on Nigeria in Chapter 4, I consider the implications of conflicts on a state’s reluctance to increase rights protection by examining the potential regressive effect that the war against the terrorist group, Boko Haram, has had on Nigeria’s implementation of UPR recommendations.

2.5. MEMBERSHIP IN THE UN HUMAN RIGHTS COUNCIL (HRC) AND COMPLIANCE

The UN HRC is a subsidiary body of the UN General Assembly and was established in March 2006 by General Assembly Resolution 60/251.\(^{178}\) In total, 170 states voted in favour, four against and three abstained.\(^{179}\) It is important to note that no African state voted against or abstained, and African states actively participated in the negotiations leading to the adoption of GA resolution 60/251.\(^{180}\) Among other things, Resolution 60/251 addressed the HRC’s mandate, its interaction with the wider UN human rights machinery, membership, and elections.\(^{181}\) The HRC has the mandate to protect and promote universal respect for human rights.\(^{182}\) In addition to its promotion and protection mandate, Resolution 60/251 mandates the HRC to undertake a Universal Periodic Review of the human rights performance of all states.\(^{183}\)

As noted above, the work of the HRC is guided by the principles of ‘universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation.’\(^{184}\) However, regional groupings impact on membership in the HRC and have an influence on decision-making in the HRC. The five geographical groupings that were established in 1963 continue to be used within the UN system.\(^{185}\) These are Africa, Asia, Eastern

\(^{178}\) See Resolution 60/251, UN Doc A/Res/60/251, above n 16.

\(^{179}\) Belarus, Iran and Venezuela abstained while the US, Israel, Marshall Islands and Palau voted against the resolution. See UN GAOR, 60th sess, 72nd plen mtg, UN Doc A/60/PV.72 (15 March 2006) 6.

\(^{180}\) For details on the history leading to the establishment of the HRC see Alston, above, n 51; See also Abebe, above n 58.

\(^{181}\) Resolution 60/251, UN Doc A/Res/60/251, above n 16 paras 5-9.

\(^{182}\) Ibid para 5.

\(^{183}\) Ibid para 5(e).

\(^{184}\) Ibid para 4.

European Group (EEG), Group of Latin America and Caribbean states (GRULAC), and Western European and Others (WEOG). Equitable geographical distribution is a criterion for the distribution of seats in the HRC.\(^{186}\) Africa has 13 seats, Asia (13), EEG (6), GRULAC (8), and WEOG (7).\(^{187}\) Africa is the largest regional group in the UN with 54 member states.\(^{188}\) While these regional groupings ensure full and representative participation by all UN members, such groups promote regional alliances which have generally influenced voting within the HRC and state participation in the UPR mechanism of the HRC. In Chapters 4, 5 and 6, I examine the theme of regionalism and I argue that there is evidence of diverging approaches to cooperation with the UPR adopted by the different regional groups in their review of African states. In Part III of this thesis, I apply this regional grouping to determine the extent and approach of African states’ engagement in relation to the other regional groups.

### 2.5.1. Does Membership in the HRC Improve State Engagement with the UPR Mechanism?

Prior studies have examined whether being a party to international human rights treaties improves states’ human rights compliance and why states join international human rights treaties.\(^{189}\) Few studies have actually examined whether membership in inter-governmental human rights institutions actually influences state compliance with human rights monitoring mechanisms.\(^{190}\)

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See also Sam Daws, ‘The Origins and development of UN Electoral Groups’ in Ramesh Thakur (ed) what is Equitable Geographical Distribution in the 21st Century (United Nations University, 1999) 11-12.

\(^{186}\) Resolution 60/251, UN Doc A/Res/60/251, above n 16, para 7.

\(^{187}\) Ibid.

\(^{188}\) The Asian Group has 53 UN member states, 23 from EEG, 33 from GRULAC and 28 from WEOG.


\(^{190}\) Emilie M Hafner-Burton, Eduard D Mansfield and Jon C W Pevehouse, Human Rights Institutions, Membership, and Compliance’ (Paper presented at Midwest Political Science Association annual conference), 2-5 April 2009; Pamela A Jordan, ‘Does Membership Have
Emilie Hafner-Burton, Edouard Mansfield and Jon Pevehouse examined the reasons why states join inter-governmental human rights institutions but did not address the issue of whether membership improves state respect for human rights.\textsuperscript{191} Ryan Goodman and Derek Jinks argue that the ability of these human rights institutions to influence their members would depend on the way in which such institutions are designed.\textsuperscript{192} Membership rules are an important aspect in the design of human rights monitoring institutions. This is vital to the theory of acculturation which is ‘the general process by which actors adopt the beliefs and behavioural patterns of the surrounding culture’.\textsuperscript{193} According to Goodman and Jinks, the membership rules in a human rights monitoring institution can either facilitate or hinder the acculturation process.\textsuperscript{194}

Goodman and Jinks identify two types of membership rules – inclusive and restrictive.\textsuperscript{195} Inclusive or open membership allows newcomers to join and places negligible conditions for maintaining membership.\textsuperscript{196} In contrast, a restrictive membership would condition membership on meeting some prescribed human rights standards and member states could be rejected or expelled if they did not satisfy the prescribed standards.\textsuperscript{197} However, inclusive membership could be more beneficial to a cooperative mechanism if it could

\begin{itemize}
\item Ibid 626. The theory of acculturation is further examined in detail in Chapter 3.
\item See Goodman and Jinks, ‘How to Influence States: Socialisation and International Human Rights Law’ above n 3, 621, 626.
\item Goodman and Jinks, \textit{Socializing States: Promoting Human Rights through International Law} above n 192, 101-2.
\item Goodman and Jinks, Socializing States: Promoting Human Rights through International Law above n 192, 91; Emilie Hafner-Burton, \textit{Making Human Rights a Reality} (Princeton University Press 2013); Hathaway, ‘Do Human Rights Treaties make a Difference?’, above n 6, 2024.
\end{itemize}
facilitate the acculturation process. This is because the social and cognitive pressures that are necessary for acculturation can be maximised in an inclusive mechanism. Restrictive membership is punitive and not conducive to acculturation. Goodman and Jinks highlight three important benefits of inclusive membership which are relevant in the context of this research. These include the production of strong social effects; promoting the idea of universality of human rights norms; and maximising social pressure. As I argue in Chapter 3, the acculturation theory provides an appropriate theoretical framework to understand the potential impact of the UPR mechanism.

The HRC is formally restrictive since admission is limited to 47 states and there is a prescribed membership selection and retention criteria. Only states with a commitment to the promotion and protection of human rights can be admitted to the HRC and members must uphold the highest human rights standards. However, in practice, states with very poor human rights records have been elected to the HRC. In any case, there can only be 47 states in the HRC at any given time. In addition, states stand the risk of losing their membership in the HRC when they commit gross and systematic human rights violations.

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198 Goodman and Jinks, Socializing States: Promoting Human Rights through International Law above n 192, 109; See Chapter 3 for a detail analysis.
200 Ibid 102.
202 The 47 seats in the HRC are geographically distributed across 5 regional groups: Group of African States (13); Group of Asian States (13); Group of Eastern European States (EEG) (6); Group of Latin American and Caribbean States (GRULAC) (8); and Group of Western European and other States (WEOG) (7). See Resolution 60/251, UN Doc A/Res/60/251, above n 16, para 7.
203 Ibid para 9.
violations. For example, the UN General Assembly suspended Libya from the HRC in 2011 in response to the gross and systematic human rights violation by the Gaddafi regime.

On the other hand, the UPR mechanism is inclusive. The key principles of universality and equal treatment underpin the inclusive nature of the UPR. The three members of the HRC (the ‘troika’) that oversee the review of each state only act as facilitators for the review and a state under review may request that one of the troika members be from its own regional group or request the substitution of any troika member. In Chapter 3, I consider whether the UPR as an inclusive mechanism can facilitate the process of acculturation. Given that the members of the HRC ‘shall… be reviewed during their term of membership’, the analysis in Part III of this thesis considers whether membership in the HRC influenced the UPR engagement of the three African states examined.

2.6. CONCLUSION

This Chapter provides context to the analysis that follows in Part III of this thesis. It engages with two major groups of scholarly analyses on the impact of the UPR mechanism. As I argue in the above analysis, the desire for a ‘stronger’ human rights mechanism by scholars within the sceptical group, which would apply ‘real’ scrutiny and hold states accountable for human rights violations, might actually undermine the potential value of a cooperative mechanism. A major weakness of the analyses of the sceptical group is that they were conducted before there was sufficient empirical data upon which to make fundamental conclusions about the effectiveness of the UPR mechanism. While scholars in the evolutionary group are more positive of the potential benefit of the UPR mechanism to the human rights system, they identify a lack of specificity in state recommendations, regionalism, cultural relativism and

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205 UN GAOR, 60th sess., 72nd plen mtg, Agenda Items 46 and 120, UN Doc A/RES/60/251 (3 April 2006) [8].
206 Resolution 5/1, UN Doc A/HRC/RES/5/1, para 3.
207 Ibid paras 18(d) and 19.
208 UN GAOR, 60th sess., 72nd plen mtg, Agenda Items 46 and 120, UN Doc A/RES/60/251 (3 April 2006) para 9.
ritualism as aspects impeding the effectiveness of the UPR mechanism. These are important aspects with which I engage in my analysis in Part III of this thesis. But as I argue, the analyses of the scholarly works examined within the evolutionary group is limited only to UPR I. As a result, the impact of the UPR process on the ground is yet to be properly ascertained and there is considerable space to contribute to the discourse, especially, with the end of UPR II in 2016. A rigorous analysis of African states’ engagement across both reviews will contribute to understanding the impact of the UPR mechanism on the human rights situation on the ground and the potential benefit of this cooperative mechanism to monitoring human rights compliance.

As I indicated in this Chapter, little consideration has been given in the literature to the UPR consultative process and its potential impact on the treaty body reporting obligations of states. This issue forms an important indicator in my analyses of the nature of state engagement with the UPR in each of the three case studies in Part III. Important factors taken into consideration in analysing the extent of the state UPR consultation include the approach to consultation adopted by the state, whether there was broad and representative consultation with NGO stakeholders, and the timeframe utilised for the consultation.

In reviewing the fundamental principles of the UPR mechanism, this Chapter considered how regionalism and cultural relativism impacts on them. I highlighted the fact that more attention needs to be given to how the negative impact of regionalism and cultural relativism can be overcome within the existing cooperative framework of the UPR, and whether the UPR can potentially create a synergy with other human rights mechanisms. In Part III of this thesis, I engage with this issue by examining the extent to which the ‘soft’ approach to cooperation adopted by African states can help overcome the negative effect of regionalism, and to an extent, cultural relativism through cognitive reframing. This Chapter also considered the extent to which the UPR welcomes the participation of NGOs in the review process which is further examined in greater detail in Chapter 5 by examining the extent to which the KSC impacted on the UPR engagement of Kenya.
On the question of complementarity, this Chapter considered three viewpoints on the relationship between the treaty bodies and the UPR. Given that rejection of UPR recommendations cannot invalidate state obligations owed to the treaty bodies under the relevant treaties, this Chapter highlighted the need to view the relationship between the UPR and the UN treaty bodies more positively. The evidence which Quane provides on how the UPR has enhanced the nature and level of the relationship between ASEAN states and the treaty bodies underscores the need to undertake a similar analysis in the context of African states. Consequently, the analysis in Chapter Five of this thesis considers whether the UPR has the potential to create a synergy with other human rights mechanisms by amplifying and reinforcing their recommendations.

Lastly, this Chapter examined the membership rules in the HRC and the UPR mechanism. I noted that while membership in the HRC is restricted to 47 member states, the UPR mechanism includes all the 193 members of the UN. My analysis in Part III of this thesis considers whether membership in the HRC potentially influenced the engagement of any of the three African states with the UPR mechanism at any given time. I equally consider in the following Chapter whether the inclusive nature of the UPR mechanism can be beneficial to the process of acculturation.

This thesis undertakes a comprehensive empirical analysis of the effectiveness of three African states’ engagement with the UPR mechanism. It adopts a socio-legal approach which incorporates a theoretical conception of the potential impact of the UPR process by arguing that the UPR may lead to improved human rights situations over time through the process of acculturation. In the next Chapter, I analyse the theory of acculturation in detail and contrast this theory with other compliance law theories. Therefore, the analysis in this thesis takes an evolutionary view of the UPR but also considers how the negative impact of ritualism can be overcome within the existing cooperative framework of the UPR.
CHAPTER THREE:
THEORETICAL AND CONCEPTUAL FRAMEWORK

3.1. INTRODUCTION

Compliance is a mantra in international law. For many years scholars have questioned the extent to which states comply with human rights monitoring institutions at the international and regional levels. In most cases these scholars find that human rights monitoring institutions have limited, and sometimes insignificant impact, on the human rights practices of states. At the UN level, Heyns and Viljoen conclude that UN treaty monitoring bodies ‘had a very limited demonstrable impact’ within states.209 In 2010, Alebeek and Nollkaemper found only about 12% compliance with the views of the Human Rights Committee, which was declining over time.210 In 2014, a cross-country study of Finland, The Netherlands, and New Zealand found that the concluding observations and recommendations of the human rights treaty bodies have limited influence on the domestic human rights practices of these states.211 At the African regional level, Viljoen and Louw found an overall lack of state compliance with the recommendations of the African Commission on Human and Peoples’ Rights.212

At the heart of these studies is the question of state compliance with international human rights law and the broader question of how international human rights institutions can influence states. This thesis approaches these questions by focusing on ‘second-order compliance’ which relates to compliance with the recommendations of institutions monitoring

implementation of human rights treaties. This Chapter reviews five major theoretical approaches to state compliance to determine which best explains the potential impact of African states’ engagement with the UPR mechanism. It also clarifies the conceptualisation of ‘compliance’, ‘implementation’ and ‘effectiveness’ as used in the context of this thesis.

Section II reviews five major theoretical approaches to state compliance – 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. I argue that while these theories are not mutually exclusive, the theory of acculturation provides the best theoretical framework to understand the potential impact of the UPR mechanism. This is because unlike the other theories, the acculturation theory does not incorporate any element of coercion or confrontation. This mirrors the inclusive and cooperative framework of the UPR mechanism which I argue provides important and effective conditions for acculturation. By incorporating a theoretical conception of the potential impact of the UPR process, this thesis contributes to existing scholarship in this area which generally has limited theoretical engagement with the impact of the UPR process.

Section III of this Chapter examines the concepts of ‘compliance’, ‘implementation’ and ‘effectiveness’. These are imprecise terms which have been subject to multiple interpretations and there is no settled definition of compliance in international law.213 In this section, I conceive ‘implementation’ as a function of ‘compliance’ and narrow the focus of this research to implementation because implementation is more measurable and observable since it connotes state response to identified UPR commitments and recommendations. I develop a four-step approach to the ‘effectiveness’ of state engagement with the UPR mechanism. This approach evaluates ‘effectiveness’ in terms of the level of a state’s commitment to the UPR consultation process, representativeness during the review, participation during the review sessions and the aggregate percentage of implemented UPR recommendations. This contributes to existing scholarship by providing a holistic approach to

213 See Kingsbury, above n 50, 346.
assessing the effectiveness of state engagement with the UPR mechanism. Regarding ‘compliance’, this thesis only uses this term in the context of examining the theories of state compliance with international law. This section also considers the method for the categorisation of UPR recommendations and the Implementation Recommendation Index (IRI) which I apply in Part III of this thesis to determine the implementation outcome of UPR recommendations.

3.2. THEORETICAL FRAMEWORK

International scholars have extensively engaged with the question of why and when states obey international law. International law and international relations scholars have developed various theories to explain and answer this question but each arrive at mixed results. At the heart of this discourse is the problem of compliance. In the context of international human rights law, scholars have engaged with the specific question of whether ratification of human rights treaties has any effect on state behaviour. While some studies found that treaties have improved state behaviour, others found that treaties have no positive effect and sometimes even a negative effect. However, Roger Fisher’s work differs from these studies by making a distinction between first and second-order compliance. According to Fisher, ‘first order compliance’ relates to compliance with treaties while ‘second-order compliance’ deals with compliance with the decisions and recommendations of institutions monitoring compliance with international treaties.


studies focused on ‘first order compliance’ and until recently, little attention has been paid to ‘second-order-compliance’.218 My thesis is concerned with second-order compliance, which in this case relates to compliance with the recommendations of the UPR mechanism. By focusing on the UPR mechanism, this research contributes to the literature on state compliance with international human rights monitoring mechanisms.

This section reviews five main theories on state compliance with international human rights law – the coercive compliance-centred theory; ‘naming and shaming’; the transnational legal process theory; the five-stage ‘spiral model’; and the acculturation theory. This section critiques each of the theoretical approaches after outlining them in order to justify the use of the theory of acculturation in this thesis. This review is not exhaustive in coverage of compliance theories. It rather focuses on the theories that are relevant to my argument and important in framing the debate. I argue that the UPR mechanism, which relies on state dialogue and cooperation, embodies a sophisticated human rights approach whose impact cannot be appreciated by compliance theories that incorporate elements of coercion/confrontation. The coercive compliance-centred theory and other theories that incorporate elements of coercion are not suitable for assessing the UPR or other human rights cooperative mechanisms. Furthermore, I argue that the acculturation theory provides the best theoretical framework through which to understand the potential impact of the UPR process. This is because the acculturation theory does not incorporate any element of coercion or material inducement but focuses on the various social and cognitive pressures that influence states. This theory is most suitable in evaluating a monitoring mechanism that is inclusive, cooperative and collaborative. I argue that the UPR is such a mechanism and can influence human rights changes within states in a non-confrontational manner.

218 Many studies on the impact of the international human rights monitoring bodies generally found a low level state compliance (second-order compliance). See Alebeek and Nollkaemper, above n 210; Heyns and Viljoen, above n 209; Krommendijk, above n 211; Viljoen and Louw, above n 212; Open Society Initiative, ‘From Judgement to Justice: Implementing International and Regional Human Rights Decisions’ (2010).
3.2.1. The Coercive Compliance-Centred Theory

The theoretical starting point of this research follows the argument that human rights compliance mechanisms that rely exclusively on coercive/confrontational approaches are limited and 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 either through sanctions, punitive or other confrontational measures. Many scholars within international relations theory share this view and contend that human rights norms will be enforced only to the extent that it is in the strategic interest of powerful states to enforce them.

While the views of international relations scholars rely on the power of states to enforce human rights norms, international legal scholars generally rely on ‘powerful’ institutions to coerce states into compliance. According to Henry Steiner, ‘[i]nstitutions make rights more effective by threatening or taking actions that may lead a state to comply. Institutions with real power cut to the bone of sovereignty.’ Based on this view, Steiner argues that the UN Human Rights Committee will require restructuring to address its compliance problem. But 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

222 Ibid 15-53.
the monitoring institutions as basically weak and ineffective underscoring their inability to meaningfully advance human rights.\textsuperscript{223} While there have been several proposals in recent years to strengthen the human rights treaty body monitoring system,\textsuperscript{224} de Frouville argues that the development of the treaty bodies has reached its limits.\textsuperscript{225} To address the deficiencies of the UN human rights system, de Frouville advocates for the creation of a World Commission of Human Rights with a strong institutional basis and the power to issue and enforce binding decisions.\textsuperscript{226} Similar desire for stronger and more confrontational approaches to human rights compliance is reflected in the argument that the best final model for securing human rights compliance is the establishment of a world court of human rights.\textsuperscript{227} For example, Nowak argues it is time for a world court of human rights because UN treaty bodies and other monitoring mechanisms have had little impact owing to their inability to issue and enforce binding decisions that would compel state compliance.\textsuperscript{228}

The above arguments are not without merit. They are founded on the premise that human rights norms have a normative force. Hence failure to comply ought to attract a degree of ‘penalty’; international human rights monitoring bodies do not have the competence to punish rights violators or provide direct redress to victims of rights violation. It has also been argued that the monitoring process involves legal questions which political bodies like the UPR mechanism are ill equipped to deal with.\textsuperscript{229} This helps explain the above call


\textsuperscript{225} Frouville, above n 12, 264.

\textsuperscript{226} Ibid 264-5.


\textsuperscript{228} Nowak, ‘It’s Time for a World Court of Human Rights’ above n 17, 26.

\textsuperscript{229} Frouville, above n 12, 254.
for a judicial articulation of rights by a judicial body, the violation of which should attract punitive sanctions that will secure compliance. However, not all scholars agree. Jill Goldenziel underscores the need for flexibility in enforcing human rights norms.\(^{230}\) Goldenziel, like Laurence Helfer, argues that the ‘overlegalisation’ of international human rights law through rigid enforcement mechanisms can have a potential backlash.\(^{231}\) Drawing on the examples of Jamaica, Guyana, and Trinidad and Tobago, Helfer argues that when international human rights law is ‘overlegalized’ it will create a domestic backlash that may cause states to withdraw from a human rights regime.\(^{232}\) I argue that the UPR mechanism provides much needed flexibility through its cooperative, rather than adjudicative, framework, and that the potential value of a cooperative mechanism to human rights implementation should not be underestimated.

Within the governance matrix, De La Vega and Lewis argue that the UPR has the potential to transform human rights discourse.\(^{233}\) They take the view that the UPR introduces a distinctive environment that encourages human rights policy diffusion and the sharing of best practices among member states.\(^{234}\) According to Redondo and McMahon, more cooperative and inclusive approaches to human rights implementation can provide a middle ground between universalism and national sovereignty.\(^{235}\) They argue that voluntary and cooperative approaches if properly utilised can have a ‘prophylactic effect’ in promoting human rights, and help reduce the number of instances that would require ‘interventionist’ actions.\(^{236}\) De La Vega and Lewis describe the UPR as a ‘soft’ accountability mechanism that enables members to adjust their national practices in conformity with shared ideas on how effectively to

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\(^{231}\) Goldenziel, above n 230, 460-61; Helfer, above n 230.

\(^{232}\) Helfer, above n 230.

\(^{233}\) De La Vega and Lewis, above n 109, 353-85.

\(^{234}\) Ibid 357.

\(^{235}\) See Redondo and McMahon, above n 98, 61-97.

\(^{236}\) Ibid 88-97.
manage human rights in the 21st century. In Chapter Five, I underscore the ability of the UPR to impact domestic human rights mechanisms by amplifying and reinforcing their recommendations.

Exclusive reliance on ‘strong’ compliance mechanisms, whether through sanctions or adjudication, not only undermines the potential value of cooperative mechanisms, but also has significant limitations and negative impacts on human rights. Empirical studies have well documented the adverse impact of economic sanctions on human rights. An empirical analysis from 1981-2000 concluded that ‘economic sanctions deteriorate citizens’ physical integrity rights especially when directed towards dictatorial regimes. Recent empirical studies equally indicate that even the so-called ‘targeted sanctions’ have unintended adverse consequences on the respect for human rights. Carneiro and Apolinário analysed targeted sanctions against African states between the years 1992-2008. Their findings indicate that targeted sanctions had similar adverse effects as conventional sanctions, and that the level of human rights protection in the country is likely to worsen under an episode of targeted sanction. Africa is the most sanctioned continent in the

237 Vega and Lewis, above n 109, 363.
239 Peksen, above n 238, 59.
242 Carneiro and Apolinário, above n 241.
world and yet there is little improvement on the human rights situation on the ground.\textsuperscript{243} This is an indication that this coercive compliance paradigm has not been effective in the continent. Legal theorists and social psychologists have reasoned that if the ultimate goal of the international human rights system is to improve the human rights situation on the ground, then voluntary obedience, not coerced compliance, must be the preferred mechanism of enforcement.\textsuperscript{244}

As I argue in this thesis, more attention needs to be given to the potential value of cooperative human rights mechanisms. I argue that the UPR mechanism which relies on cooperation and gives the state some degree of control over the process can be sometimes at least as, if not more, effective than coercive mechanisms.

3.2.2. The ‘Naming and Shaming’ Approach

Compliance mechanisms based on the coercion model are unsatisfactory in explaining state engagement with the UN treaty monitoring bodies.\textsuperscript{245} 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.\textsuperscript{246} As pointed out by Geir Ulfstein, UN human rights treaty bodies have no coercive power except for ‘naming and shaming’.\textsuperscript{247} 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

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\textsuperscript{244} Koh, ‘Why Do Nations Obey International Law’ below n 290, 2645. See also different empirical studies by Tom Tyler and Raymond Paternoster et al which concluded that people obey the law not because of fear of sanctions but because they considered it to be legitimate. See Tom R Tyler, \textit{Why People Obey the Law} (Princeton University Press, 2006); Raymond Paternoster et al, ‘Perceived Risk and Social Control: Do Sanctions Really Deter?’ (1983) 17 \textit{Law and Society Review}, 457.

\textsuperscript{245} For other theories which may explain state engagement with the UN human rights treaty bodies see Jasper Kromendijk, ‘The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies. The Case of the UN Human Rights Treaty Bodies’ (2015) 10(4) \textit{the Review of International Organisations} 489.

\textsuperscript{246} Redondo, above n 108, 687.

\end{footnotes}
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’.248 This involves public reporting of the violation and possibly condemnation.249 While the findings by the relevant experts may be justified, states at the receiving end of the scrutiny tend to perceive such an approach as confrontational and they dismiss the finding as a foreign imposition. This is, in some way, the result of the fact that mechanisms like the UN treaty bodies and special procedures rely on foreign human rights experts and engage in a highly technical review process.250 Even though the independent treaty body experts are nominated by states, the fact that they are not peers sometimes helps create the perception of ‘us’ (as in states) versus ‘them’ (as in human rights experts).

Redondo classifies ‘naming and shaming’ as a confrontational approach, especially when it calls for a country-specific resolution or requests country-specific actions.251 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.252 For example, South Africa adheres to the belief that ‘naming and shaming’ is 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).253 In 2006, the African Group in the HRC opposed a strong HRC action on Darfur in favour of a fact-finding mission and wanted the mission to consist of state representatives, reflecting their dislike of independent experts.254 In March 2009, an attempt by the EU

249 Ibid.
250 This has been seen to contribute to low state engagement with human rights bodies and a seemingly low rates of state conformity with their recommendations and findings. See United Nations High Commission for Human Rights, United Nations Reform: Measures and Proposals, UN GAOR, 66th sess, agenda Item 124, UN Doc a/66/860 (26 June 2012) 8-26.
251 Redondo, above n 108, 687.
252 Redondo, ‘Rethinking the Legal Foundations of Control in International Human Rights Law-The Case of Public Special Procedures’ above n 15, 274-5.
to reinstate the UN country mandate on the DRC through a draft HRC resolution was opposed by the African Group who later introduced its own resolution which was eventually adopted.\textsuperscript{255} The African Group’s resolution neither condemned the DRC government nor made any call for the establishment of a country mandate on the DRC.\textsuperscript{256}

According to the African Group, the HRC’s founding principle of non-selectivity is opposed to selective country-specific resolutions which contributed to the demise of the former Commission for Human Rights.\textsuperscript{257} Algeria, on behalf of the African Group, stated that ‘[o]ne of the reasons why the Commission was not successful was because of the naming and shaming [of states].’\textsuperscript{258} The opposition of African states to ‘naming and shaming’ through country-specific resolutions partly stems from their view that it is a neo-colonial tool having little to do with human rights concerns.\textsuperscript{259} In 2006, James Lebovic and Eric Voeten examined ‘naming and shaming’ by the former UN Commission for Human Rights from 1977-2001.\textsuperscript{260} They found evidence of bias as over half of the resolutions condemning human rights abuses only targeted Israel, Chile, South Africa, Equatorial Guinea and Cambodia, and avoided public condemnation of politically powerful countries like China and Saudi Arabia.\textsuperscript{261}

As I argue, there is the need for a more inclusive and cooperative approach and the UPR mechanism provides such a platform. According to Surya Subedi,
UN Special Rapporteur on the situation of human rights in Cambodia, a more constructive approach focusing on cooperation among peers towards improving human rights rather than naming and shaming, would help dissipate ‘the perception of “us” versus “them” held by states in relation to human rights experts’.\(^{262}\) This approach, he noted, is supported by developing states.\(^{263}\)

Moreover, the ‘naming and shaming’ approach to human rights implementation has largely been seen as a failure.\(^{264}\) Emilie Hafner-Burton analysed the relationship between ‘naming and shaming’ and the human rights practices of 145 states.\(^{265}\) She finds that perpetrators do not change their human rights practices after being shamed and sometimes instead ramp up those abuses.\(^{266}\) According to Haidi Willmot et al, human rights strategies cannot be limited to ‘naming and shaming’.\(^{267}\) They argue that the limited strategy of blaming the Sri Lanka government for the human rights abuses during the conflict (2002-2009) contributed to the UN’s failure to protect the rights of civilians during the conflict.\(^{268}\)

International scholars have underscored the tendency of states to react to threats by redefining ‘their interests in the direction of resisting the threat’, and that extrinsic incentives in the form of rewards or punishment undermine the intrinsic motivations of states to

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\(^{262}\) Surya P Subedi, ‘Protection of Human Rights through the Mechanism of UN Special Rapporteurs’ (2011) 33 *Human Rights Quarterly*, 228; Former UN High Commissioner for Human Rights, Sergio Vieira de Mello, also observed that ‘it is not enough to blame. It is also necessary to help governments or regimes to emerge from their own mistakes or their own contradictions.’ See Paulo Sergio Pinheiro, ‘Being a Special Rapporteur: A Delicate Balancing Act’ (2011) 15(2) *The International Journal of Human Rights*, 167.

\(^{263}\) Subedi, above n 262.


\(^{266}\) Ibid.

\(^{267}\) Willmot et al, above n 264, 369.

\(^{268}\) Ibid.
comply. This risks trading long-term commitment in favour of short-term compliance.

Many scholars have argued that ‘naming and shaming’ is less effective today than in the 1970s when it was first used. Roth criticises the ‘naming and shaming’ methodology of international organisations as ineffective, particularly for addressing violations of economic, social and cultural rights because these rights have limited clarity about violation and remedy. Molly Land argues that if ‘naming and shaming’ is a limited technique, consideration should be given to other approaches ‘given the urgency of addressing human rights violations resulting from global inequalities.’ These concerns have given rise to calls for new approaches to monitoring human rights compliance, particularly in the context of socio-economic rights. A key observation in my analysis in Part III of this thesis is that socio-economic rights figured prominently among state and NGO recommendations to African states and that African states prioritised socio-economic progress in their recommendations to their African peers. As I argue, the UPR provides a new approach to address these issues and its potential impact cannot be gauged by compliance theories that are confrontational.

Luis Rodrigues-Pinero draws a connection between the general failure of the human rights system to elicit compliance and its predominant naming and

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270 Ibid.


shaming approach. Rodigues-Pinero advocates for a more sophisticated approach to rights implementation which focuses on cooperation, empowers rights-holders, reinforces duty-bearers’ capacities and the role of technical cooperation. As I argued in Chapter 2, the UPR mechanism embodies this sophisticated approach by emphasizing state cooperation as the cornerstone of the mechanism. The ‘naming and shaming’ approach is a particularly unsuitable framework for the UPR because the aim for the establishment of the HRC and its UPR mechanism was to provide an alternative to the ‘naming and shaming’ and practices of selectivity which contributed to the demise of the former Commission for Human Rights.

### 3.2.3. The Transnational Legal Process Theory

The transnational legal process 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. 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. Legal internalisation occurs when the international norm is

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276 Ibid.
277 Ibid 330.
278 See Alston, ‘Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council’ above n 53, 185-224; Resolution 60/251, UN Doc A/Res/60/251, above n 16, para 5(e).
281 Ibid.
282 Ibid.
incorporated into the domestic legal system either via executive action, legislation, judicial interpretation or a combination of the three.\textsuperscript{283}

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).\textsuperscript{284} 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.\textsuperscript{285} 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.\textsuperscript{286}

The transnational legal process theory is a comprehensive theory. As Kent argues, it is an inclusive theory in a structural sense because ‘it comprehends all levels of state and non-state interaction, influence, and compliance – the international and the domestic, the vertical and the horizontal.’\textsuperscript{287} However, the transnational legal process theory is limited in many respects. According to Guzman, the transnational legal theory fails to explain why states comply with international human rights law but rather it provides an empirical pathway to compliance.\textsuperscript{288} While legal internalisation can be achieved through constitutionalisation of human rights norms, Koh’s theory does not explain

\begin{itemize}
\item \textsuperscript{283} Ibid.
\item \textsuperscript{284} Harold H Koh, ‘How is International Human Rights Law Enforced?’ (1999) 74 (4) Indiana Law Journal 1397, 1411.
\item \textsuperscript{285} Ibid 1410.
\item \textsuperscript{286} Ibid; for an example of a state where the transnational legal process theory was proven to be at work see Caleb J Stevens, ‘Hunting a Dictator as a Transnational Legal Process: The Internalisation Problem and the Hissène Habré Case’ (2012) 24 (1) Pace International Law Review 190.
\item \textsuperscript{287} Ann Kent, Beyond Compliance: China International Organizations and Global Security (Stanford University Press, 2007) 10.
\item \textsuperscript{288} Guzman ‘A Compliance based Theory of International Law’ above n 214, 1835-836.
\end{itemize}
how to ultimately achieve social and political internalisation. It fails to account for the process by which a norm acquires public legitimacy. As I argue below, the theory of acculturation fills this gap by identifying the cognitive and social pressures that drive states to adopt socially legitimate attitudes, beliefs and behaviours (social and political internalisation). Koh acknowledges this limitation of his theory and argues that the theory of acculturation closes the gap by identifying the micro processes of social influence that affect his process of ‘norm internalisation’.  

Also, while the UPR provides an interactive process, through a three and a half hour long interactive dialogue (Phase II of the UPR), it does not provide a forum for the interpretation of the relevant international law. In the UPR, states only make human rights recommendations to peers and do not undertake a legal interpretation or clarification of the content of those rights. Koh’s theory does not explain whether any of the three forms of internalisation (legal, political and social) can occur in the absence of an interpretive community or a law-declaring forum to create, legally interpret or clarify the relevant rights. States tend to be less cooperative with such interpretive and law declaring fora. This contributes to their limited, and sometimes insignificant impact on states, as I highlighted at the beginning of this Chapter.

The UPR is a non-adjudicative and non-confrontational mechanism which does not serve as an interpretive community. As such, the transnational legal process theory does not provide a suitable theoretical framework to understand the impact of the UPR process on the human rights situation on the ground. Nevertheless, Koh notes that the various theoretical explanations for compliance are complementary, not mutually exclusive. The process of interaction in the transnational legal process theory which includes the participation of both state and non-state actors is an important component of the five-stage spiral model and underscores the significance of NGO participation in the UPR process.

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3.2.4. 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.\textsuperscript{291} 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.\textsuperscript{292} 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.\textsuperscript{293} 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.

In the spiral model, there are five phases to human rights change. The first phase of the spiral model begins when there is repression by authoritarian regimes.\textsuperscript{294} The situation progresses to the second phase when transnational advocacy groups exert pressure on the state to respect human rights.\textsuperscript{295} This places the state on the international spotlight. In the second phase, once the repressive state has been put on the international agenda, the state, in order to avoid international scrutiny and diffuse pressure, raises the flag of national sovereignty by claiming that its behaviour is not subject to international scrutiny.\textsuperscript{296} The target state remains in denial about the validity of human rights norms and rejects the demands of international groups.\textsuperscript{297} It is at this phase that

\textsuperscript{292} Risse et al, \textit{The Power of Human Rights}, above n 35, 11.
\textsuperscript{293} Ibid.
\textsuperscript{294} Risse et al, \textit{The Persistent Power of Human Rights: From Commitment to Compliance}, above n 291, 5-6.
\textsuperscript{295} Ibid.
\textsuperscript{296} Ibid.
\textsuperscript{297} Ibid.
coercive strategies in the form of economic sanctions, and ‘naming and shaming’ are employed.

As pressure increases from both domestic and transnational actors, the targeted state enters into the third phase of the spiral model by making some ‘tactical concessions’ or ‘cosmetic’ changes such as signing international treaties. This ushers the state into the fourth phase of the spiral model known as ‘prescriptive status.’ This is characterised by state recognition of the validity of human rights norms through the establishment of human rights institutions and domestic law reform. This is a result of state interaction with the interpretive and law declaring fora at the international law – the first two stages of Koh’s transnational legal process theory. By becoming a party to an international human rights treaty, which Risse et al argue is a consequence of domestic and international pressure, the state achieves what Koh refers to as legal internalisation.

The fifth phase is ultimately achieved through the institutionalisation and habitualisation of human rights norms. This is characterised by conformity and sustained compliance with international human rights norms. This is in line with Koh’s concepts of social and political internalisation, but while Risse et al argue from an international relations standpoint of norm socialisation, Koh argues from an international law perspective of norm internalisation. Nevertheless, neither Koh nor Risse et al address the micro processes that influence social and political internalisation (socialisation).

The spiral model offers important insights into the process of change in repressive states. It recognises the importance of human rights discourse, and the central role of non-governmental actors. It has been tested in over 20 case studies, including Kenya and South Africa that have been selected for this research. Jasper Krommendijk argues that unlike coercion, the spiral model

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298 Ibid.
299 Ibid.
300 Ibid 8.
301 Ibid.
302 For examples on Uganda, Kenya, Morocco, Tunisia, Chile, Guatemala, Indonesia, Philippines and South Africa see Risse, Robb and Sikkink, The Power of Human Rights, above n 35; for the USA and China see Risse, Robb and Sikkink, The Persistent Power of Human Rights
provides a satisfactory theoretical framework to explain the effectiveness of
the UN human rights treaty bodies. Based on empirical analysis on the study
of The Netherlands, New Zealand and Finland, Krommendijk contends that
the greater the level of transnational NGO mobilisation, the higher the
effectiveness of the concluding observations of the treaty bodies. The aspect
of this model that has relevance for my thesis is the recognition of the
significance of civil society/NGO engagement in human rights mechanisms.
This has particular relevance to my analysis in Chapter Five which considers
the impact of effective NGO engagement on Kenya’s engagement with the
UPR mechanism.

However, the spiral model has theoretical shortcomings and is an inappropriate
theoretical framework to consider the impact of state engagement with the
UPR Mechanism. As pointed out by Eran Shor, Risse et al consider that once
the spiral process has started, there can be no regression because violations are
bound to decrease. According to Shor, Risse et al fail to closely look into
the possibilities of regression and to consider the role of serious conflicts and
security threats in shaping states’ repressive policies and hindering norm
compliance. When conflicts within or between states pose a threat to the
nation and/or citizens, governments easily justify repressive measures and
human rights considerations are weakened. In 1999, Morocco was
transitioning to the 4th phase of the spiral model. However in 2003, it
reverted to repression. After the May 2003 terrorist attack in Casablanca, the

Rights, above n 291; see also Ahmed Shahid and Hilary Yerbury ‘A Case Study of the
Socialisation of Human Rights Language and Norms in Maldives: Process, Impact and
Challenges’ (2014) Journal of Human Rights Practice 1; Alejandro Anaya, ‘Transnational and
domestic processes in the Definition of Human Rights Policies in Mexico’ (2009) 31(1)
Human Rights Quarterly 35; Caroline Fleay, ‘Australian Foreign Policy, Human Rights in
China and the Spiral Model’ (2006) 41(1) Australian Journal of Political Science 71; Raed A
Alhargan ‘The impact of the UN human rights system and human rights INGOs on the Saudi
Government with special reference to the spiral model’ (2012) 16 (4) The International Journal
of Human Rights 598.

Krommendijk, ‘The Domestic Effectiveness of International Human Rights Monitoring in
Established Democracies. The Case of the UN Human Rights Treaty Bodies’ above n 245,
492.

Ibid 504-508.

Eran Shor, ‘Conflict, Terrorism, and the Socialization of Human Rights Norms: The Spiral

Ibid.

Risse et al, above n 35, 125.
Moroccan government passed new anti-terrorism laws and resumed ordering death sentences and torture (between 2000 to 5000 arrests were carried out and 17 of the 903 persons convicted were sentenced to death).\textsuperscript{308} The increased threat of terrorism globally is an issue not addressed by the spiral model. As I argue in Chapter Four, the escalation of the conflict between the terrorist group, \textit{Boko Haram}, and the Nigerian government has had a regressive effect on Nigeria’s engagement with the UPR mechanism.

Moreover, the fact that the spiral model incorporates elements of coercion/confrontation in the second and third phases makes it an inappropriate theory to test the impact of a mechanism based entirely on cooperation. These two phases are characterised by pressure, denunciation, and shaming which, as argued earlier in this Chapter, have been proven to be ineffective. In addition, the five-stage spiral model is only focused on civil and political rights and covers a very limited subset of human rights issues. Consequently, the impact of the UPR mechanism with cooperation as its hallmark cannot be adequately explained by the five-stage spiral model although aspects of the model that underscore the significant role of NGOs/CSOs are relevant when considering the impact of the UPR mechanism.

\textbf{3.2.5. 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.’\textsuperscript{309} A psychologist’s perspective to 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.\textsuperscript{310} In 2004 and 2005, Goodman and Jinks transferred the concept of acculturation

\begin{footnotesize}
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\item\textsuperscript{308} Jamil Dakwar, \textit{Morocco: Human Rights at a Crossroads} (Human Rights Watch, 2004) 25.
\item\textsuperscript{309} R Redfield, R Linton and M J Herskovits ‘Memorandum on the Study of Acculturation’ 56 \textit{American Anthropologist} (1936) 973.
\item\textsuperscript{310} Theodore D Graves, ‘Psychological Acculturation in a Tri-Ethnic Community’ (1967) 23(4) \textit{Southwestern Journal of Anthropology} 337, 338.
\end{itemize}
\end{footnotesize}
to states and international regimes. They define acculturation as ‘the general process by which actors adopt the beliefs and behavioural patterns of the surrounding culture, without actively assessing either the merits of those beliefs and behaviours or the material costs and benefits of conforming to them.’

Goodman and Jinks argue that their theory of acculturation is ‘an extension of Koh’s and other’s work on transnational norm diffusion’ which they intend to supplement by ‘isolating the micro processes of social influence.’ Acculturation, as used by Goodman and Jinks, therefore draws on a relationship between law and sociology, in contrast to the five stage spiral model influenced by international relations theory.

The theory of acculturation 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 monitoring institutions. Central to the acculturation theory is that power is not merely prohibitive, material and centralised but also productive, cultural and diffuse. 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.’ 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’ mechanisms but does not call for a complete abandonment of coercive mechanisms. Rather, it argues that acculturation, like coercion, is more likely to succeed under certain conditions or when combined with other mechanisms.

312 Ibid.
313 See the views of Nowak and Frouville discussed above. See Frouville, above n 12, 254; Nowak, ‘It’s Time for a World Court of Human Rights’ above n 17, 23.
316 Ibid 699.
The ‘microprocesses’ of acculturation which include ‘mimicry’ and ‘identification’ propel cognitive and social pressures which drive a state to adopt socially legitimate attitudes, beliefs and behaviours.\textsuperscript{318} Mimicry relates to states copying the behaviour of other states. Acculturation involves a social pressure to conform to the behaviour of a reference group and conformity produces mimicry. This mimicry model proposed by Goodman and Jinks has been applied to other areas of international law.\textsuperscript{319} In particular, James Munro argues that acculturation explained the creation of the ASEAN Intergovernmental Commission on Human Rights (AICHR), whereby ASEAN states copied other states and regional organisations in the process and effectively mimicked a pattern of global behaviour.\textsuperscript{320} According to Goodman and Jinks, ‘identification’ is the touchstone of the theory of acculturation.\textsuperscript{321} By identifying themselves with a reference group, states generate varying degrees of social and cognitive pressures to conform to the norms of that group.\textsuperscript{322} In the analysis in Part III of this thesis, I consider the positive impact of regionalism and the extent to which African states identifying themselves with their regional peers in the UPR can facilitate the process of acculturation.

The social environment within which states act propels internal cognitive and social pressures which drive a state to adopt socially legitimate attitudes and beliefs. The adoption of socially legitimate attitudes, beliefs and behaviours by states can contribute to the attainment of what Koh calls social and political norm internalisation. In his review on the theory of acculturation, Koh validates the theory of acculturation as a case study of internalisation through

\textsuperscript{318} ‘Status maximization’ is an additional microprocess of acculturation which considers how international status such as membership in a restrictive membership organisation might motivate recalcitrant states to conform to the norms of the organisation. As the UPR process is voluntary and inclusive, based on the universal and equal treatment of all member states, this element of status maximisation is not considered in my analysis. See Goodman and Jinks, ‘How to Influence States: Socialisation and International Human Rights Law’ above n 3, 639-42.


\textsuperscript{321} Goodman and Jinks, ‘How to Influence States: Socialisation and International Human Rights Law’ above n 3, 626.

\textsuperscript{322} Ibid.
He argues that by focusing on acculturation over coercion, Goodman and Jinks unmask a new approach to influence state compliance with human rights law through a ‘complex interaction between process and ideas.’

Social and cognitive pressures can push the language of human rights into some moral commitments within particular cultures even in terms that challenge one or more aspects of that culture. Benjamin Gregg has employed a cognitive approach rather than a normative one to show how human rights norms can be advanced as rights internal to any given community’s culture by means of cognitive re-framing. He argues that ‘an idea once external can become internal through system-level learning.’ While examining the issue of female genital mutilation in Africa, he noted that a cognitive rule can be deployed that revises local normative rules that justify female genital mutilation, but that such a cognitive rule has to be locally owned. For example, reframing female genital mutilation as a technical, health issue rather than a normative human rights concern, can advance the human rights issue as internal to the African culture.

I argue in this thesis that a similar approach can be utilised in the UPR to transform the belief that same sex relationships are un-African and an imposition of ‘white Euro-American sexual norms and gender expressions.’ There may be an ‘African’ way for realising LGBTIQ rights within the context of the UPR by focusing on recommendations which seek to transform the social and political culture against sexual minorities. In Part III of this thesis, I examine the receptiveness of African states to UPR recommendations on sexual orientation and make a distinction between their responses to recommendations focusing on raising public awareness and sensitization, and raising awareness and sensitization, and

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324 Ibid.
326 Ibid.
327 Ibid 304.
328 Ibid.
329 S Ekine ‘Contesting narratives of queer Africa’ in Ekine and Abbas (eds), Queer Africa Reader (Pambazuka Press, 2013) 78.
their responses to recommendations demanding immediate decriminalisation. Such an approach that focuses on transforming the social and political culture through social and cognitive pressures can contribute to incrementally improving the human rights situation on the ground, as opposed to immediate decriminalisation. This can contribute to achieving the social and political internalisation which propels Koh’s process of norm internalisation. This is particularly relevant in the context of South Africa where ‘the vast majority of South Africans’ condemn sexual minorities, despite progressive policies and interpretation of the protection of the rights of sexual minorities in the South African Constitution.\textsuperscript{330}

The UPR mechanism shows the power of peer pressure and global culture in enforcing human rights law through state influence. Acculturation particularly favours the UPR mechanism because it is based on peer review and not configured to involve a selected group of insiders (experts), examining or reviewing those considered as outsiders (states). This helps to dispel the perception of ‘us’ versus ‘them’. According to Goodman and Jinks, the cognitive and social pressures generated by the acculturation micro process of identification is more effective when an International Governmental Organisation provides universal membership and subjects all member states to review.\textsuperscript{331} Maria Stavropoulou has examined the acculturation theory in the context of refugee protection. She found that refugee protection regimes could explore the benefits of inclusive membership through the creation of additional fora building on acculturation techniques.\textsuperscript{332}


\textsuperscript{331} Ryan Goodman and Derek Jinks, Socializing States: Promoting Human Rights through International Law above n 192, 103.

100% state cooperation rate.\textsuperscript{333} The cornerstone principles of the UPR – universality and cooperation, can be effective in harnessing the social and cognitive pressures associated with acculturation which can facilitate the social learning process of African states as they engage with the UPR process.

However, as observed by Goodman and Jinks, acculturation can produce a ‘decoupling’ situation where public conformity with human rights norms is disconnected from local practice.\textsuperscript{334} This is akin to the problem of ‘ritualism’ identified by Charlesworth and Larking in the context of the UPR.\textsuperscript{335} They define ‘ritualism’ as state ‘participation in the process of reports and meetings but an indifference to, or even reluctance about, increasing the protection of human rights.’\textsuperscript{336} In Part III of this thesis, I consider this phenomenon in relation to the three case studies by examining the relationship between state commitment to the review process and the extent to which states implemented accepted UPR recommendations. In addition, I argue that over time acculturation may help narrow the UPR implementation gap through effective participation of CSOs in the UPR process. This reinforces the participation of CSOs underscored in the transnational legal process theory and the five-stage spiral model.

Acculturation provides the most appropriate theoretical framework to understand the potential impacts of the UPR mechanism. I apply this theory in this thesis to argue that over time the UPR can influence positive human rights changes within states and help to narrow the UPR implementation gap through the process of acculturation. The inclusive, cooperative and collaborative framework of the UPR process are important and effective conditions for acculturation. Acculturation is a process and through this process, continuous engagement with the UPR mechanism can over time transform the shallow human rights commitment of states into a deeper commitment. Charlesworth

\textsuperscript{333} With the exception of Israel which temporarily boycotted its UPR II in January 2013, all UN member states have been reviewed in the two cycles of the UPR. In October 2013, Israel returned and undertook its UPR II.
\textsuperscript{334} Goodman and Jinks, \textit{Socializing States: Promoting Human Rights through International Law} above n 192, 140.
\textsuperscript{335} Charlesworth and Larking (eds), above n 49.
\textsuperscript{336} Ibid 16.
argues that human rights compliance strategies that focus on a learning culture rather than a culture of blame are useful in achieving improved human rights protection. According to Charlesworth:

the idea of continuous improvement, which emphasises incremental, constantly monitored steps can be achieved by moving from a culture that administers blame to a culture that encourages learning.

The UPR provides such a platform for acculturation that promotes cooperation and encourages continuous improvement of the human rights situation within states. This thesis examines the extent to which the UPR, a mechanism based entirely on cooperation, can help cause human rights changes within African states. In Part III of this thesis, I find evidence of UPR recommendations that were subsequently implemented outside the UPR I implementation timeframe and argue that this suggests potential for the UPR mechanism to influence states over time through acculturation. Applying the theory of acculturation contributes to an understanding of the efficacy of human rights strategies based on cooperation. I argue that this cooperative mechanism can be beneficial in realising incremental progress in human rights, as opposed to immediate, especially towards the decriminalisation of same-sex relations which is culturally sensitive issue within African states.

3.3. COMPLIANCE, IMPLEMENTATION AND EFFECTIVENESS

3.3.1. Compliance and Implementation

Any human rights law study which sets out to evaluate compliance and effectiveness faces measurement problems because compliance and effectiveness are imprecise terms that have been subject to multiple interpretations. It is therefore essential to clarify what it is that this study seeks to measure. The literature on international law makes a distinction

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339 Benedict Kingsbury argues that there is no single correct definition of the concept of compliance in international law because the different theories of law result in divergent notions of compliance. See Kingsbury, above n 50, 346.
between the terms ‘compliance’ and ‘implementation’. Compliance is defined as behaviour or conduct which conforms to the requirements of a specified rule, motivated by factors such as avoidance of sanctions, reputation or obedience deriving from internalisation of the rule.\footnote{340} Implementation, on the other hand, is defined as specific action taken by states in response to voluntary international commitments\footnote{341} or actions by state and non-state actors which help translate state international commitments into domestic practice.\footnote{342} In the context of international human rights law, the OHCHR defines implementation as:

> Moving from a legal commitment, that is, acceptance of an international human rights obligation, to realization by adoption of appropriate measures and ultimately the enjoyment by all of the rights enshrined under the related obligations.\footnote{343}

Accordingly, implementation is a function of compliance since it deals with the measures adopted by a state to achieve compliance with its international obligations.\footnote{344} Implementation is typically a vital step towards compliance.

This research is concerned with the engagement of African states with the UPR mechanism of the HRC. Thus, it envisages specific actions taken by each of the three states under study in relation to recommendations from their engagement with the UPR mechanism. The focus is therefore on implementation and not on compliance. Implementation in this research is defined as actions taken by a state to fulfil the recommendations by its peers during the UPR process and improve the human rights situation on the ground.

In my analysis in Part III of this thesis, I consider whether the states took

\footnote{340} See Kal Raustiala and Anne-Marie Slaughter ‘International law, international relations and compliance’ in Walter Carlinas et al (eds), The Handbook of International Relations (SAGE, 2002) 539; Oran R Young, Compliance and Public Authority, A Theory with International Application (Johns Hopkins University Press, 1979) 4.


specific actions to fulfil each of the UPR I recommendations accepted. While compliance and implementation are inter-related terms, implementation in the context of this research is more measurable and observable since it connotes state actions in response to accepted UPR commitments.

In analysing the empirical evidence of implementation in Part III of this thesis, this research does not view implementation as necessarily binary - either implemented or not implemented, but rather locates it along a continuum. There are categories of compliance. I borrow and adapt the categorisation of compliance identified by Viljoen and Louw in their study on state compliance with the recommendations of the African Commission on Human and People’s Rights (ACHPR). 345 They identified five broad categories of compliance. These are full compliance, noncompliance, partial compliance, situational compliance and unclear cases of compliance. 346 When a state was in full compliance, it meant the state fully implemented the recommendations from the ACHPR or had undertaken significant steps in the process of compliance. 347 Non-compliance occurred when the state did not implement any of the recommendations and at times challenged their legal and factual basis. 348 When part or some of the recommendations were implemented, it amounted to partial compliance. Partial or full compliance which resulted from a transition from a repressive or undemocratic government to a more stable and democratic system of government was known as situational compliance. In other words, the compliance was merely coincidental in the sense that responsive changes occurred not as a result of any deliberate action on the part of the government on the recommendation, but as result of changing circumstances within the state. 349

This research modifies the above categorisation of compliance to denote implementation and adopts the following three broad categories of implementation:

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345 Viljoen and Louw, above n 212, 5.
346 Ibid.
347 Ibid.
348 Ibid.
349 Ibid 6.
‘Fully Implemented’ (FI) which connotes that the action taken by the state is to a large extent responsive to the UPR recommendation;

‘Partially Implemented’ (PI) which connotes that the action taken by the state is to some extent responsive to the UPR recommendation but does not implement certain aspects of the recommendation; and

Not Implemented (NI) which connotes that no action has been taken regarding the particular UPR recommendation or where a contrary action was taken.

In my assessment of implementation in Part III of this thesis, my analysis does not assert a direct causal link between a state’s action and specific UPR recommendations. Rather, it considers the extent to which the UPR contributed to the realisation of human rights changes within states. As such, the full or partial implementation of a UPR recommendation could also be ‘situational’ or ‘coincidental’. Consequently, my analysis on the question of implementation is limited to the above three categories of FI, PI and NI.

In measuring the level of implementation, this research relies on the Implementation Recommendation Index (IRI) developed by UPR Info. The responses used to calculate the IRI of each of the three states under study are gleaned from various UPR reports. These include reports submitted by the state, National Human Rights Commissions and other UPR stakeholders on the implementation of various UPR recommendations. These can be found in the OHCHR database and the database of UPR info. This methodology focuses on UN, state and NGO UPR stakeholders’ reports on implementation. By using multiple stakeholder information on implementation the analysis on the extent of state UPR implementation in the case studies in Part III of this thesis was able to check for ambiguities and disagreements among the UPR stakeholders on the outcomes of UPR recommendations. The categories of ‘fully

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350 UPR Info is a Non-Governmental Organisation with the mission to promote and strengthen the UPR by raising awareness, providing capacity-building tools, and bridging the different actors of the UPR process in order to ensure the universal advancement of human rights. See UPR Info, http://www.upr-info.org/en; See Appendix I for details on the methodology for calculating the IRI.

implemented’, ‘partially implemented’ and ‘not implemented’ are applied in my overall analysis of implementation and impact in Chapters Four, Five and Six to determine the extent of the actions taken by the case study states to implement each of the accepted UPR I recommendations.

3.3.2. Effectiveness

Weiss and Jacobson define ‘effectiveness’ as the extent to which a treaty causes changes in the behaviour of states that further the goals of the treaty.\(^{352}\) According to Oran Young, it is the degree to which an agreement impacts on states.\(^{353}\) Consequently, the starting point of this research is the recognition that the ‘effectiveness’ of state engagement with the UPR mechanism will be 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, while implementation in this thesis only examines specific actions taken by the state in relation to each accepted recommendation, ‘effectiveness’ considers the overall impact of their engagement and the aggregate number of implemented recommendations. This will determine the extent of the state engagement with the UPR mechanism which is a fundamental question raised by this thesis. I do not equate ‘effectiveness’ with efficiency and neither does it refer to the ability of the UPR process to cause immediate implementation of all UPR recommendations. Rather, it examines the degree to which the UPR mechanism has been able to cause observable changes in the domestic human rights situation of states.

To evaluate the ‘effectiveness’ of state engagement with the UPR, I have developed a four-step approach which is applied in my analysis in Part III of this thesis. This approach evaluates ‘effectiveness’ in terms of the level of state commitment to the UPR national consultation process, representativeness


during the review, participation during the review sessions and the aggregate percentage of implemented UPR recommendations. To determine state commitment to the UPR national consultation process, I consider the state’s approach to the consultation; the inclusivity of the national consultation process, both in terms of relevant stakeholders and relevant issues, and the timeframe utilised for the national consultation. These factors will help determine whether the requirement for the state to undertake a ‘broad consultation process’ at the national level was satisfied.\textsuperscript{354} The second step of my approach examines the representativeness of a state during its review by considering the level of state representation and whether the requirement to ‘fully integrate a gender perspective’ in the review, as required by HRC Res 5/1, was achieved.\textsuperscript{355} This will enable a determination on the competency of the delegation for the review and whether the state views the UPR process as a foreign affairs issue or considers it as a process for internal examination and improvement of the human rights situation on the ground.

The third step of my approach to ‘effectiveness’ considers the extent of state participation in the review sessions as a reviewer and as a state under review. When considering the state as a state reviewer, I examine the state’s approach to cooperation, and the quality and relevance of the recommendations it made to its regional peers compared to recommendations made to other groups of states. As a state under review, I examine state receptiveness to UPR recommendations and consider state responses to UPR recommendations by determining the percentage of recommendations accepted or rejected within and outside its regional group. The last step of my approach analyses the aggregate percentage of the recommendations that were fully, partially or not implemented in each of the three state case studies.

My original four-step approach is significant because it enables a comprehensive assessment of state engagement with the UPR mechanism by examining state engagement at the key stages of the UPR process. As I mentioned in the review of literature in Chapter Two, little consideration has

\textsuperscript{354} Resolution 5/1, UN Doc A/HRC/RES/5/1, para 15(a).
\textsuperscript{355} Resolution 5/1, UN Doc A/HRC/RES/5/1, para 3(k).
been given to the UPR national consultation process. By incorporating this stage, my approach to effectiveness closes the gap and contributes to a comprehensive understanding of the ‘effectiveness’ of African states’ engagement with the UPR mechanism.

3.3.3. Categorisation of UPR Recommendations

The recommendations made by states during the UPR process are sometimes phrased in a way that makes it difficult to identify the expected outcome of a recommendation. Categorising these recommendations assists the state and other stakeholders to identify whether or not the expected outcome of each recommendation was achieved at the end of each review cycle. Also, it enables a determination on a state’s responsiveness to each of the categories which serves as an indication of its level of engagement and helps identify the category in which the state is more engaged at the implementation stage. McMahon has developed a verb-based action category which provides a semantic analysis of categorisation. This thesis adopts McMahon’s method of categorising UPR recommendations because it has been used successfully by organisations and scholars such as UPR Info, Roland Chauville, David Frazier, Judy McGregor, Sylvia Bell and Margaret Wilson. The Peace, Democracy and Human Rights Directorate of International Organisation of La Francophonie has also found this categorisation very useful to resolve challenges in grouping recommendations and recommends its use.

McMahon ranks the recommendations into five different categories. Rank 1 represents recommendations requiring only minimal action from the state under review. Recommendations under this category call on the state under

356 McMahon, above n 65.
review to either request technical assistance or share information. States making recommendations which fall under this category use verbs such as ‘call on’, ‘seek’, and ‘share’ when phrasing the recommendations. An example is when Malaysia recommended to South Africa during the second review cycle to ‘seek necessary technical assistance from OHCHR, other relevant UN agencies and funds with a view to effectively implement its key national priorities for 2009-2014 related to health, education, land reform and food security.’ This category requires little or no cost on the part of the state under review and can be implemented with minimal effort.

Rank 2 includes recommendations which emphasise continuity. They require that the state under review ‘continue’ certain actions it had already commenced. In this category, ‘continue’, ‘maintain’, ‘persevere’, ‘persist’, and ‘pursue’ are the verbs used in making the recommendations. For example, in Nigeria’s second cycle review, Nicaragua recommended that Nigeria ‘Continue working to harmonise its normative framework with obligations of international instruments recently adhered to.’

In rank 3, the state is required to give consideration to the recommendations made. Key verbs such as ‘analyse’, ‘consider’, ‘explore’, ‘examine’, ‘envisage’, ‘reflect upon’, ‘and ‘study’ are used by states in the construction of the recommendations. Rwanda, for example, recommended to Nigeria during the second cycle review to ‘Consider the abolition of the death penalty.’

Recommendations that are categorised in rank 4 are those that request the state to undertake a general action. Examples of verbs used in their construction include ‘accelerate’, ‘encourage’, ‘intensify’, ‘promote’, ‘strengthen’ and ‘take actions’. Such a verb was used by Australia when it recommended during the

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361 Ibid para 137.12.
first cycle review that Kenya should ‘Strengthen protection for women and children against violence and exploitation.’  

Rank 5 recommendations are often those that are most costly for the state under review to implement and require much effort on their part. It is also the most specific recommendation that is made to the SuR and it is easy to identify its outcome because it requires specific action to be taken. Recommendations of the specific action category call upon the state to ‘eliminate’, ‘abolish’, ‘adopt’, ‘amend’, ‘accede’, ‘ratify’, ‘implement’ or ‘enforce’ such as when Australia recommended that Nigeria should ‘Implement a moratorium on the death penalty.’

In accordance with the principles that guide this categorisation, where there are two different action categories present in a given recommendation, emphasis is placed on the first action. When a recommendation begins with two verbs such as ‘continue and strengthen’, privilege is given to the second verb and the recommendation categorised in that category. When a recommendation begins in the fourth category (rank 4) but followed by category five verbs, such a recommendation is placed in category five. An example is ‘improve women’s rights by amending the family code’.

When the recommendations have been classified, it is necessary to determine state responsiveness to the recommendations by classifying their responses into those that were ‘accepted’, ‘rejected’ and those which received a ‘general response’. When a state clearly uses the word ‘accept’ the recommendation is considered as accepted. Similarly, when the state clearly uses ‘reject’ or ‘do not accept’ or ‘not in a position to accept’, the recommendation is classified as rejected. Responses which cannot be placed in the above two classes are classified as a general response. This categorization has been used in many studies as indicated above, and I use it in Part III of this research in categorizing the recommendations made by and to each of the three African states under examination. The recommendations are categorised into the above five

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categories to determine the specificity and relevance of the recommendations and the approach adopted by African states in the review of their regional peers, compared to other groups of states. This is significant in examining the nature of the states’ engagement with the UPR mechanism as a reviewer and as a state under review. This is determined by the extent of their participation as a state under review; the specificity and relevance of the recommendations made by each of the three states; and the receptiveness of these states to the various categories of recommendations made to them during their review cycles.

3.4. CONCLUSION

This Chapter has examined the theoretical and conceptual approaches adopted by this research. Section II of this Chapter reviewed five main theoretical approaches to compliance to justify the theoretical framework for this research. I argued that the coercive compliance-centred theory, the ‘naming and shaming’ approach, the transnational legal process theory and the five-stage ‘spiral model’ do not provide an appropriate theoretical framework to understand the impact of the UPR mechanism. This section underscored the limitations of coercive/confrontational approaches to human rights monitoring, their impact on socio-economic rights and the potential backlash that may result from the ‘over-legalisation’ of human rights monitoring mechanisms. The deficiencies and failure of the ‘naming and shaming’ approach was also examined. I noted the overlap between the various compliance theories and argued that while these theories are not mutually exclusive, the theory of acculturation provides the best theoretical framework to understand the potential impact of the UPR mechanism. This as I argue is because the inclusive, cooperative and collaborative framework of the UPR process provides important and effective conditions for acculturation. Nevertheless, I highlighted how the theory of acculturation builds on Koh’s transnational legal process theory by identifying the micro processes of social influence that affects Koh’s process of ‘norm internalisation’. I equally identified how both the theory of acculturation and the five stage spiral-model recognise the
significance of civil society engagement in human rights mechanisms which is incorporated as an important aspect of my analysis in Part III of this thesis.

As I argue in this Chapter, acculturation provides the best theoretical framework to understand the impact of the UPR mechanism. This is because it is non-coercive, non-confrontational and can fully harness and maximise the social and cognitive pressures generated by the UPR mechanism. The inclusive, cooperative and collaborative framework of the UPR process are important and effective conditions for acculturation. This can help promote a learning culture rather than a culture of blame which can achieve incremental improvement of the human rights situation on the ground.

The next part of this thesis (Chapters 4, 5, 6) examines the engagement of three African states with the UPR mechanism. In the analysis, I adopt a common empirical approach in examining each of the three states in the different Chapters and apply the theory of acculturation developed in this Chapter. When examining the case studies in Chapters Four, Five and Six, I apply the four-step approach to evaluating the effectiveness of state engagement with the UPR mechanism developed in this Chapter. The first and second steps of the four-step approach require an analysis of a state’s commitment to the UPR national consultation process, and the quality of its UPR delegation. The third step examines the state’s participation during the review sessions in Geneva as a reviewer and as a state under review. In the analysis in step three, I apply McMahon’s categorisation of UPR recommendations and the IRI framework to determine the specificity and quality of the recommendations made, received, and implemented by the three states under examination. This enables a determination of whether a state’s engagement is active or passive and the potential for acculturation. The fourth-step of my approach to assessing the effectiveness of state engagement requires a measurement of the aggregate percentage of implemented UPR recommendations, to make a determination of the extent to which the UPR contributed to improve the human rights situation on the ground. In all three cases, I examine the themes of regionalism and cultural relativism in their engagement with the UPR. Further, each of the three case studies addresses a specific issue in detail. Chapter 4 on Nigeria
examines the potential for acculturation within the UPR and also the regressive effect of the fight against terrorism on a state’s UPR engagement. Chapter 5 on Kenya examines the impact of effective NGO engagement and provides evidence of the ability of the UPR to reinforce and amplify recommendations from various national, regional and international human rights mechanisms. Chapter 5 on South Africa addresses the theme of ritualism in greater detail.
PART III: STATE ENGAGEMENT WITH THE UPR

CHAPTER FOUR:

NIGERIA AND THE UNIVERSAL PERIODIC REVIEW

4.1. INTRODUCTION

The evolution of human rights in Nigeria can be traced from the pre-colonial, colonial and post-colonial eras. While the existence of human rights in pre-colonial Nigerian society cannot be denied, the catalogue and scope of human rights protected during that era was greatly limited and did not subscribe to the contemporary notion of universality. This is because the rights recognised then were significantly influenced by the laws, customs and beliefs of the individual group or tribe within the society. Many of these customs and beliefs were repugnant to human rights such as human sacrifices, the killing of twins and trial by ordeal.

The colonial era brought about some advancement of human rights within Nigerian society. Nigeria was colonised by Britain for over 60 years. Britain’s positive influence on human rights was can be seen in the enactment of the Native Law Ordinance in 1948 which abolished customary practices that were repugnant to natural justice, equity and good conscience. By abolishing certain objectionable cultural practices, like human sacrifices, the British colonial regime contributed to the progressive development of human rights in Nigeria. However, colonialism is by definition the negative of human rights, and the subjugation of people to alien domination and exploitation constituted a very serious denial of human rights.

Upon gaining independence from British colonial rule in 1960, considerable efforts were made to promote and protect human rights in Nigeria. The post-independence Constitutions of Nigeria guaranteed human rights and instituted

366 Native Law Ordinance (Nigeria), cap 211 of 1948, laws of Nigeria, s. 19.
mechanisms for their enforcement.\textsuperscript{367} The Nigerian National Human Rights Commission was established in 1995 and today enjoys an ‘A’ status.\textsuperscript{368} However, from 1966 to 1999, eight military coups destabilised Nigeria and negatively impacted on human rights protection in the country.\textsuperscript{369} There has since been a return to civilian rule with some relative gains in the promotion and protection of human rights. However, extra-judicial killings, impunity by security forces and prolonged pre-trial detention have remained a human rights challenge.\textsuperscript{370} These have recently become more challenging due to the terrorism activities of \textit{Boko Haram}, and the anti-terrorism efforts of the government in striking a balance with respect for human rights. Many of these human rights issues have featured prominently in the engagement of Nigeria with the UPR.

Nigeria was one of the 47 members of the HRC for the period 2009-2012 and 2014-2017. It undertook its UPR I in 2009 when it was a member of the HRC and UPR II in 2013 when it was not a member. This Chapter provides a critical analysis of Nigeria’s engagement with the UPR mechanism at the conclusion of UPR I and II. I apply the four-step approach to evaluating the effectiveness of state engagement with the UPR which was developed in the previous Chapter. The four-step approach evaluates the effectiveness of state engagement with the UPR in terms of the level of state commitment to the UPR national consultation process; quality of state representation during the review; participation during the review sessions; and the extent of state implementation of UPR recommendations. This Chapter integrates a number of arguments into its assessment.

\textsuperscript{367} See Section 32, 1963; 42, 1979; and 46, 1999 Constitutions of Nigeria.
\textsuperscript{368} It was established by the National Human Rights Commission (Amendment) Act, 1995. In 2010, it was amended by the National Human Rights Commission Act, 2010, to enable it to reattain ‘A’ Status in accordance with the Paris Principles.
Section II applies the first two steps in my four-step approach to evaluating the effectiveness of state engagement by examining Nigeria’s commitment to the UPR national consultation process and the quality of its UPR delegation. To determine Nigeria’s commitment to the UPR consultation process, this Chapter considers the government’s approach to the pre-review national consultation process, the inclusivity of the consultation process and the timeframe utilised for the national consultation. The quality of state representation is determined by considering the level and competency of the state’s UPR delegation. I argue that Nigeria effectively engaged with the UPR national consultation process and constituted a competent delegation for its review. This level of engagement, I further argue, is in contrast with its previous engagement with the UN human rights treaty bodies and the African Commission on Human Rights (ACHR).

In section III, the third step in evaluating the effectiveness of state engagement with the UPR is applied by examining the participation of Nigeria in UPR I and II, first as a reviewer then as a state under review. As a reviewer, I consider Nigeria’s approach to reviewing its African peers compared to other states, the extent of its engagement across various regional groups of states and the quality and relevance of the government’s recommendations. As a state under review, this section examines Nigeria’s receptiveness to peer recommendations and the extent to which the government’s responses to peer recommendations is influenced by regionalism and cultural relativism. I argue that Nigeria effectively engaged as a reviewer and as a state under review by particular reference to its participation in the review of various groups of states and by the quality of UPR recommendations it made and accepted. However, I find evidence of double standards and cultural relativism which limited the engagement of Nigeria at this stage of the review.

Section IV engages with the last step of the four-step approach to assessing the effectiveness of state engagement with the UPR by analysing the extent to which Nigeria implemented its UPR recommendations and the implementation of the UPR pledges it made. Effective engagement at the review stage which may be indicated by a high percentage of accepted recommendations does not
automatically translate into actual implementation. This section provides an analysis of Nigeria’s implementation of UPR I recommendations with particular focus on issues such as justice and detention, women’s rights, torture and extra-judicial execution which featured prominently in the review of Nigeria. I argue that the UPR mechanism has the potential to contribute to human rights implementation through its inclusive, cooperative and collaborative framework. However, I find a significant implementation gap but argue that the gap can be progressively narrowed over time by the process of acculturation.

Section V examines the regressive effect of the fight against *Boko Haram* on Nigeria’s UPR engagement. When conflicts within or between states pose a threat to the nation/or citizens, governments easily justify repressive measures and human rights considerations are weakened. This section considers whether the escalation of the conflict between the government and *Boko Haram* terrorist group after the incidents on 16 June 2011 and 26 August 2011 had a regressive effect on Nigeria’s subsequent engagement with the UPR.

### 4.2. COMMITMENT TO THE PRE-REVIEW PROCESS AND THE QUALITY OF NIGERIA’S UPR DELEGATION

#### 4.2.1. Nigeria’s UPR National Consultation Process

According to HRC Resolution 5/1,371 states are expected to undertake broad consultation with all stakeholders in the preparation of their national report. This is important because the approach a state takes to the national consultation process impacts on its final report and is an indicator of its commitment to the UPR process. Undertaking a broad consultation with all stakeholders will enable the state to have a better understanding of the underlying human rights issues within its jurisdiction.372 The nature of consultation undertaken by a

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371 *Resolution 5/1*, UN Doc A/HRC/RES/5/1, para 15(a).
372 This is an important indicator of a state’s effective engagement because the influence of other stakeholders will help provide (i) a real and comprehensive picture of the actual human rights situation in the country, (ii) the efforts made by the state to progressively improve it and (iii) that the proposed recommendations to improve the situation are important, relevant and substantial. See Lisbeth Arne Nordager Thonbo et al, *Universal Periodic Review First Cycle*: 93
state in the production of its UPR report is often detailed in the introductory paragraphs of its final report.

In preparation for its UPR I, Nigeria organised a National Consultative Forum (NCF) on 3 and 4 November 2008. This brought together stakeholders from state ministries, human rights NGOs, professional bodies, the National Human Rights Commission (NHRC) and faith based organisations. This was organised with the assistance of the NHRC. Chaired by the Director of the Ministry of Foreign Affairs, the two day workshop produced a draft report to be submitted by the state. The strong support expressed by the government of Nigeria to this consultative process was demonstrated by the participation of the Foreign Minister during the two-day NCF. The inclusion of all human rights issues during the forum’s interactive sessions, including sexual orientation, the death penalty and ‘traditional practices’ like female genital mutilation, the rights of widows, and child marriage was an indication of the government’s conscientious engagement with the process. Perhaps the fact that Nigeria was a member of the HRC and the Nigerian ambassador, Martin Ihoeghian Uhomoibhi, was at the relevant time for UPR I serving as the President of the HRC, was an added incentive for Nigeria to actively engage in the pre-review process.

While the two-day workshop was a positive initiative of the government and an indicator of effective engagement at the pre-review stage, it is too small a time period to comprehensively engage with stakeholders such as CSOs and government ministerial departments. More so, judicial personnel were not involved or given any prominent role during the consultation process, limiting

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*Reporting Methodologies from the Position of the State, Civil Society and National Human Rights Institutions* (Danish Institute for Human Rights, 2011).


374 LGBTS issues are rarely spoken of in public gatherings and mostly considered a taboo within Nigeria. Persons found guilty of entering into same sex marriage are sentenced to 14 years imprisonment and persons found to directly or indirectly making show of same sex relationships in Nigeria are sentenced to 10 years imprisonment. See Same Sex Marriage Prohibition Act 2013, section 5 (1) and (2).

375 H.E. Mr. Martin Ihoeghian Uhomoibhi was President of the Human Rights Council in its third session, 2008-2009.
the government’s ability to address legal and law reform questions which may have arisen from discussions on sensitive subjects. A preferable approach adopted by other states is to set up a national committee with key representatives from across the three branches of government, NGOs/civil society organisations and the national human rights commission.\footnote{See Working Group on the Universal Periodic Review, \textit{National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council Resolution 5/1 – Kenya}, 21\textsuperscript{st} sess, UN Doc A/HRC/WG.6/21/KEN/1 (6 November 2014) (‘\textit{HRC UPR II State Report – Kenya}’) paras 1 and 2.}

In preparation for UPR II, Nigeria made improvements to the quality of its consultation process and the timeframe for the consultation. It set up an Inclusive National Committee on the UPR.\footnote{Working Group on the Universal Periodic Review, \textit{National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council resolution 5/1 – Nigeria}, 17\textsuperscript{th} sess, UN Doc A/HRC/WG.6/NGA/1 (30 July 2013) (‘\textit{HRC UPR II State Report – Nigeria}’) para 4.} The Inclusive National Committee on the UPR comprised eight representatives from various federal ministries and two representatives from NGOs/CSOs.\footnote{The Inclusive National Committee on the UPR is sometimes referred to as the Inter-ministerial Committee on the UPR Reporting Process, see Federal Ministry of Justice (Nigeria), \textit{Members of Inter-Ministerial Committee on the UN Universal Periodic Review (UPR) Reporting Process} (International and Comparative Law Department, 2016).} Its primary task was to undertake a national UPR consultation process, prepare the state report and review the UPR outcome on Nigeria. This was chaired by the Solicitor-General of the Federation who by delegation exercises the powers and duties of the Attorney-General of the Federation and Minister of Justice. Further, the period of consultation and validation of the UPR state report was extended to 12 months and ran from July 2012 through June 2013, marking a significant improvement from the previous consultation timeframe.\footnote{Ibid.}

Nigeria, therefore, effectively engaged with the pre-review process of the UPR. None of the 10 NGO reports on Nigeria during UPR I and the 34 NGO submissions during UPR II questioned the consultative process undertaken by Nigeria during any of its UPR pre-review processes. When the UK requested information on the consultative process undertaken by Nigeria during UPR
I, Nigeria’s UPR delegation elaborated on the process during UPR I interactive dialogue. The response provided could explain why no state raised an issue on the consultative process during UPR II. Algeria during UPR I positively commented on Nigeria’s consultative process and recommended that Nigeria considers making the National Consultative Forum an annual event as a tool to promote dialogue and comprehension in the field of human rights.

This level of engagement with the UPR is in sharp contrast with its engagement with the UN treaty bodies. The pre-review UPR process culminates in the submission of the national report. While Nigeria has submitted both UPR reports on time, it presently (as of February 2017) has an appalling record of UN treaty body reporting being the UN member state with the highest number of overdue UN human rights treaty body reports. Nigeria has 10 pending reports all of which are more than five years overdue, three of which are more than 10 years overdue. Also, while the state has been able to satisfy the reporting guidelines under the UPR, it fails to comply with new UN treaty bodies’ reporting guidelines and has an under-developed primary data collection mechanism.

On the part of NGOs, there was lack of strong mobilisation during UPR I and little effort was made by them to engage the government and raise awareness on the UPR process. In April 2008, Nigeria’s CSO Coalition on the UPR was established. However, its membership was composed of only seven organisations and its most significant activity was the submission of its UPR report which did not comprehensively address the various human rights issues.
in Nigeria. This is largely because NGOs focusing on issues such as socio-economic rights and the death penalty were not represented in the coalition. It would appear the Coalition disintegrated after UPR I as it neither followed-up on the implementation of Nigeria’s UPR I recommendations nor submitted any UPR II report for Nigeria. However, a new national NGO Coalition for the UPR emerged during Nigeria’s UPR II alongside other regional and thematic NGO coalitions for Nigeria’s UPR. The Coalition of Nigerian Human rights CSOs on UPR (nigerianhrcsos-UPR) was established after Nigeria’s UPR I in 2009 with a goal of monitoring the implementation of the recommendations accepted by Nigeria during UPR I. Nigerianhrcsos-UPR in 2013 released a press statement reminding the government on the implementation of the 32 recommendations accepted during UPR I. In August 2014, the Coalition organised a two day conference on the national action plan and the UPR aimed at strengthening the capacity of human rights advocates to participate in the UPR process and to create awareness about the UPR II recommendations accepted by Nigeria.

While this UPR II national coalition has engaged in more activities than its predecessor, the coalition lacked a broad and representative mandate. The Coalition presently has 13 coalition members, eight of whom are from the South Western part of Nigeria and representing very few human rights thematic issues. Such a Coalition cannot be considered as broad and representative when considered against the background that Nigeria has more than 1000 active human rights NGOs/CSOs involved in human rights activities. Notwithstanding, there was a significant increase in the number of joint submissions from two during UPR I to 14 during UPR II. In addition, two

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388 *A broad and representative NGO Coalition on the UPR can enhance a state’s engagement with the state and influence the outcome of its review. This was the case with the Kenyan Stakeholders Coalition for the UPR as examined in the next chapter.*
regional coalitions - The Niger Delta UPR Coalition and the UPR Coalition of Southeast Nigeria made submitted reports which addressed human rights issues specific to the relevant parts of Nigeria.\textsuperscript{389} There was one other national NGO UPR coalition called Civil Society Coalition on Minority Protection, Indigenous Peoples Issues and Children’s Rights (CS-COMIC) which focused on addressing human rights issues affecting minority communities, Indigenous peoples and children.\textsuperscript{390} However, each of these regional and thematic coalitions only had between three to nine member organisations as part of the coalition. The lack of a broad and representative membership in these NGO coalitions for the UPR limits their ability to effectively engage the government in its review processes. As will be argued in Chapter 5, a broad and representative NGO Coalition for the UPR can empower NGOs and enhance their credibility and capacity to influence state engagement with the UPR.

The above analysis therefore indicate that the quality of Nigeria’s pre-review consultation process have improved across UPR I and II especially in terms of extending the time allocated for the consultation, assigning a legal/judicial personnel to head the consultation and allowing for the inclusion of culturally sensitive human rights issues in the government’s deliberation with UPR stakeholders. However, a broad and representative NGO coalition for the UPR can contribute to achieving a broad and inclusive national consultation process.

\section*{4.2.2. The Quality of Nigeria’s UPR Delegation}

Another indicator of effective engagement with the UPR is the level of state representation. A high level of participation of state delegates will reaffirm the seriousness with which a state regards the process and provide an opportunity


for effective dialogue. It is vital that state delegates are not only present but are able to respond to questions directed to them during the examination of the state report. The quality of the delegates essential. The African Commission has faced serious problems on this issue. Many African states have sent their reports to the Commission but failed to send representatives during the report examination. For example, the state report of Nigeria was not examined during the twelfth session of the African Commission because the state failed to send delegates.391

In contrast, Nigeria has sent a high-level delegation for the UPR in the first two cycles. Its delegations in both UPR I and II were represented at the ministerial level and composed of parliamentary representatives, judicial and academic personnel. UPR I delegation for Nigeria was headed by the Minister of Foreign Affairs and composed of 26 members among which included the Minister of Justice and members of the National Assembly. However, Sweeny and Saito are critical of such a delegations headed by the foreign ministries rather than the ministries of justice or human rights.392 They argue that the former indicates that the state views the review ‘as a foreign affairs rather than a national process for the examination and improvement of human rights protection and promotion.’393 This argument is valid given that the state delegation should constitute persons empowered to alter the political behaviour of the represented state.

An examination of Nigeria’s UPR II delegation indicates that the Nigerian government took the process seriously and did not simply consider the review as a foreign affairs exercise. The delegation was headed by the Attorney General of the Federation and Minister of Justice and composed of 34 representatives. These included the Minister of State for Foreign Affairs, representatives of other ministries, members of parliament and a representative from academia. The inclusion of a representative from academia is significant because it can increase the expert knowledge brought into the review and therefore enhance the quality of the discussions and the outcome of the review. This comprehensive representation is not surprising given that Nigeria is a large and powerful state within the African region and has a permanent mission to the UN in Geneva. However, the contrast in its engagement with the African Commission shows the government’s particular preference for the UPR, which is arguably as a result of the inclusive, cooperative and collaborative framework of the UPR.

The representation of NGOs, by their oral submissions during the plenary session of the HRC further engaged the government of Nigeria with the UPR. Generally, many states are not self-critical of the negative aspects of their human rights protection. Despite the limitations to NGO participation in the UPR,394 NGO submissions and intervention during the plenary sessions help to complement the state reports by identifying areas overlooked. During UPR I, 10 NGOs submitted written reports in relation to Nigeria and this more than tripled to 34 during UPR II. Eight NGOs made oral submissions during Nigeria’s UPR I plenary session and nine during UPR II. There is a general increase in the number of NGO submissions during UPR II arguably as a result of increased knowledge about the UPR process among NGOs. The review of other African states such as South Africa and Kenya have witnessed an increase in the number of NGO written submissions.

However, there were few domestic NGO reports in the collection of reports submitted by NGOs in relation to Nigeria. A majority of the submissions were

394 NGOs cannot question states during the interactive dialogue and often do not make a very significant contribution to the final state UPR report.
made by international NGOs. Only 3 out of 10 submissions during UPR I were from domestic NGOs.\textsuperscript{395} Many African countries question the legitimacy of international NGOs and the credibility of the information issued by these NGOs that are not from their respective countries or regions. Nigeria for example characterised the allegations in some International NGOs reports as ‘preposterous’, ‘patently false’ and ‘unhelpful to the UPR process’.\textsuperscript{396} While many domestic NGOs may be able to submit reports, very few are able to participate in the plenary sessions in Geneva. This is explained by the difficult process of obtaining consultative status; the high financial costs and the unavailability of staff to participate in the sessions in Geneva; little familiarity with the HRC’s workings and procedure and the lack of access to information on the review process. None of the domestic NGOs that submitted a written report made oral submissions at Nigeria’s UPR I, further underscoring the limitations to their participation.

Given these challenges, domestic NGOs have tried to be innovative by forming coalitions and making joint submissions.\textsuperscript{397} In this way, they can coordinate strategies and develop joint initiatives which will strengthen individual actions, maximise resources and share UPR experiences at home and in Geneva. The formation of NGO coalitions for the UPR can also contribute to enhance their credibility and capacity to engage the state. The significance of NGO coalitions and their impact on the UPR process is examined in greater detail in Chapter 5 with particular focus on the Kenyan Stakeholders’ Coalition (KSC) for the UPR. Nevertheless, the quality of Nigeria’s UPR delegation is indicative of the government’s commitment to the UPR process, which as highlighted above is

\textsuperscript{395} The situation however improved during UPR II with domestic NGO submissions representing more than half of the total NGO submissions. This changed may probably be explained by the fact that domestic NGOs are increasingly gaining knowledge of how the UPR mechanism operate.

\textsuperscript{396} HRC UPR I Report – Nigeria, UN Doc A/HRC/11/26, para 8; Similarly, Morocco has condemned Amnesty International’s report as ‘biased and subjective’ by including Morocco among countries targeted by Amnesty’s anti-torture campaign. See Morocco World News, ‘Morocco Condemns ‘Biased, Subjective Amnesty International Report’ (19 May 2015) http://www.moroccoworldnews.com/2015/05/158792/morocco-condemns-biased-subjective-amnesty-international-report/; I noted in section 5.4.2 of Chapter Five that it is important to be wary of NGOs that are in reality ‘government mouth pieces’ or those that prioritise the agenda of their donors which may not necessarily be the priority of the people they claim to serve.

\textsuperscript{397} There was an increase in the number of joint submissions by civil society from two during UPR I to 13 during UPR II.
in contrast with its level of engagement with both the African Commission and the UN human rights treaty bodies.

4.3. NIGERIA AS A REVIEWER AND AS A STATE UNDER REVIEW

Nigeria, like many African states, aligns itself with the approach favoured across the African UPR regional group which points to a cooperative and non-confrontational discussion of progress towards human rights compliance among peers. This is, in fact, what the UPR process was established to be.\(^{398}\) This soft and supportive approach is largely applied in the review of their regional peers and generally produces ‘friendly recommendations.’\(^{399}\) However, this approach has been criticised for not being critical enough of the human rights situations of states.\(^{400}\) Despite the merit of this critique, the approach yields some dividends. It opens the gateway for a good number of recommendations to be accepted by the state, including critical recommendations which were framed in a positive and supportive way. The follow-up stage may seem meaningless if states do not accept recommendations. Nigeria’s participation was significant both as a reviewer and as a state under review.

4.3.1. Nigeria as a Reviewer

An examination of Nigeria’s engagement with the UPR as a reviewer indicates that while the government has engaged in the review of various groups of states, it has exercised stronger solidarity with the review of African states. During UPR I, Nigeria participated in all 12 sessions of the UPR Working Group and made a total of 108 recommendations to 60 states. Fifty-one of these total recommendations were made to 26 African states and 86% of these recommendations were accepted. During UPR II, Nigeria participated in 11 of the 14 UPR sessions and made a total of 172 recommendations to 64 states. Fifty-two of its 55 UPR II recommendations to African states were accepted.

\(^{398}\) Resolution 5/1, UN Doc A/HRC/RES/5/1, para 3(b).
\(^{399}\) Recommendations in rank 1 and 2, see categorisation of recommendations in previous chapter.
\(^{400}\) Abebe, above n 58, 16.
During UPR I, 86% of the 51 recommendations by Nigeria to African states were accepted compared to 53% of the recommendations accepted by states in WEOG. Similarly during UPR II, 94% of the total 55 recommendations made by Nigeria to its African peers were accepted, compared to 60% of the total 23 recommendations Nigeria made to WEOG states. During UPR I, Nigeria made more recommendations to African states than to Asian, WEOG and EEG states combined. This echoes the theme of regionalism which is subsequently developed in this thesis. In addition, Nigeria adopted a cultural relativist approach in its review of African states, an attitude embraced by many African states.\footnote{This is in relation to their receptiveness to recommendations on sexual orientation. With the exception of Madagascar, no Africa state made a recommendation on sexual orientation to its regional peer during both cycles of the UPR.} While most of the Western states in their review of African states focused on the rights of sexual minorities,\footnote{One reason why so many western states focused on this could be because of the low level of tolerance towards sexual minorities in this region. See Neville Hoad, African Intimacies: Race, Homosexuality, and Globalization (University of Minnesota Press, 2007); See recent example in Nigeria, Same Sex Marriage Prohibition Act 2013, section 5 (1) and (2).} none of the 54 African states (with the exception of Madagascar during UPR II) made any recommendation on sexual orientation. Figures 4.1 and 4.2 below provide an overview of Nigeria’s engagement with both cycles of the UPR as a reviewer.
As figure 4.1 and 4.2 above indicate, Nigeria engaged as a reviewer during UPR I and II and made a high number of recommendations to its peers. However, in this thesis, the extent of its engagement as a reviewer is not determined by the quantity of recommendations states make alone, but by the extent of its participation, the specificity and the relevance of such recommendations.

4.3.1.1. The Extent of Nigeria’s Participation as a Reviewer

Some states either do not attend the review sessions of their peers or are very selective in reviewing their peers. This raises questions on the universality of the UPR process and allow states to rely on their regional groupings to shield themselves from proper scrutiny, where such a review is dominated exclusively by states from the same region. Kenya as examined in Chapter 5 is an example of a state that did not participate as a reviewer during UPR I and participated selectively during UPR II. As indicated in figure 4.1 and 4.2, Nigeria actively engaged within and outside the African Group. The majority of its UPR I and II recommendations (about 47% and 32% respectively) were
made to its African regional peers. Nevertheless, it made recommendations across GRULAC, EEG and WEOG groups.

While Nigeria may be actively engaging as a reviewer, it has exhibited a double standard in its engagement with other states. For example during UPR I, it recommended that Argentina ‘[r]atify the Second Optional Protocol to the International Covenant on Civil and Political Rights already signed by Argentina, aiming at the abolition of the death penalty’. Argentina accepted this recommendation. However, when the same recommendation was made by Brazil and Montenegro to Nigeria during UPR II, Nigeria did not accept the recommendation. Notwithstanding this double standard, the state implicitly asserts the validity, legitimacy and relevance of the human rights invoked in each recommendation it makes.

4.3.1.2. Specificity and Relevance of Recommendations

Abebe has argued that African states largely make recommendations which are at times too general (R4) to be implemented. However, they have in some cases not hesitated to make specific recommendations (R5), even to their African peers. Also, the fact that states make general recommendations does not necessarily imply that such recommendations are not valuable, and they may sometimes translate into specific actions at the point of implementation. Figures 4.3 and 4.4 below provide an analysis of the various categories of recommendations to determine the quality of recommendations Nigeria engaged its peers with. Although these recommendations were largely ‘friendly recommendations’, they cut across the five categories of recommendations, from those requiring minimal actions (R1) to the more specific ones (R5).

405 Abebe, above n 58, 16. The pacific approach adopted by most African states to the UPR largely prompts them to make general recommendations.
As indicated in figure 3 and 4, Nigeria engaged its peers with various categories of recommendations. While it made more general (R4) than specific (R5) recommendations, this does not necessarily undermine the relevance of such recommendations. For example Nigeria made a general recommendation (R4) that Burundi should reform the judicial system.\footnote{UN Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review – Burundi’, 10\textsuperscript{th} sess, UN Doc A/HRC/10/71 (8 January 2009) para 20.} This is particularly relevant given that reports from Amnesty International and NGO other studies indicate that Burundi’s judiciary is weak, under-resourced and suffers from political interference and allegations of corruption.\footnote{Human Rights Watch, ‘World Report 2014: Burundi’ (2014) 1 <https://www.hrw.org/world-report/2014/country-chapters/burundi>; Tracy Dexter and Philippe Ntahombaye, The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations The Case of Burundi (The Centre for Humanitarian Dialogue, 2005) 28.}

Nigeria equally engaged its peers with specific recommendations (R5) in both UPR I and II (about 12\% respectively). However, this was directed more towards non-African states. During UPR I, Nigeria made more recommendations to African states (about 47\% of the total 108 recommendations) but only one of these recommendations was a specific recommendation (about 2\% of the total 51 recommendations to African states). Comparatively, about 24\% of the total recommendations made by Nigeria to states within GRULAC during UPR I were specific recommendations. Out of
a total of 101 recommendations made by Nigeria to African states during UPR I and II, only 7% were specific recommendations. In contrast, 20% of the 35 recommendations made to states within the WEOG in both cycles of the UPR were specific recommendations. This indicates that Nigeria adopts a softer approach in addressing human rights issues within its regional group and a tougher approach outside the African group. Having said this, based on Abebe’s observation, this tendency may not only exist within the African group as ‘groups never issue statements that are critical of one of their own’, including WEOG.\textsuperscript{408} Nevertheless, the percentage of specific recommendations made by Nigeria to its African peers increased by about 10% during UPR II (from about 2% to 12%). This underscores the potential for state engagement with the UPR to evolve over time.

4.3.2. Nigeria as a State under Review

Nigeria was reviewed by the UPR WG in February 2009 and October 2013 respectively. As a result of its membership of the HRC, the Nigerian government entered voluntary pledges and commitments which are included as part of the assessment basis for its review. Fifty-two states made recommendations to Nigeria during UPR I, 13 of which were African states. Out of a total of 32\textsuperscript{409} recommendations, 30 were accepted by the government of Nigeria. It accepted all the recommendations from African states. During UPR II, all states made a total of 219 recommendations to Nigeria of which it accepted 84%. The high acceptance level evident in both UPR cycles indicates an active engagement with the recommendations which cut across the various categories of recommendations. Some states like Botswana, China and South Sudan rejected more than 50% of recommendations made to them during UPR I. South Sudan in particular rejected more than 80% of the recommendations.

\textsuperscript{408} Abebe, above n 58, 19.
\textsuperscript{409} These recommendations were gleaned from the WG reports. See \textit{HRC UPR I Report – Nigeria}, UN Doc A/HRC/11/26, paras 18-24; several of these recommendations include more than one category of recommendation covering one or more issue(s). In the analysis in figure 4.5, these recommendations were separated to identify each in its own category and to easily identify implementation level. This totalled 115 recommendations. This total matches with that stated by UPR info. See UPR Info <http://s.upr-info.org/IG1cXQV>. 

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made to it during UPR I.\(^{410}\) Figures 4.5 and 4.6 below provide an analysis of Nigeria’s engagement as a state under review. It depicts its review by African states compared to other groups of states. The category of recommendations and areas where Nigeria was most engaged are further examined in figures 4.7 and 4.8.

Figures 4.5 and 4.6 above indicate that Nigeria engaged with recommendations within and outside its regional group. However it maintained a stronger engagement within its African regional group. As seen in figure 4.5, Nigeria accepted all the recommendations from African states during UPR I. This constituted 21% of the total recommendations made to Nigeria during UPR I. Figure 4.6 shows that during UPR II it rejected only about 1% of recommendations from African states compared to about 9% of the recommendations rejected from WEOG. This finding would indicate that Nigeria is more receptive of intra-African recommendations and more likely to reject recommendations from Western states. This strengthens the theme of

regionalism which is reinforced in Chapters 5 and 6 in relation to Kenya and South Africa.

There was a remarkable increase in the total number of recommendations made to Nigeria across both cycles of the review, from 32 during UPR I to 219 during UPR II. The increase in the number of recommendations made to Nigeria may reflect the general increase in the number of recommendations which was evident during UPR II.\textsuperscript{411} However there may be other particular factors which may explain the rise in the number of recommendations to Nigeria. These are the escalation of the conflict between the government and \textit{Boko Haram} after UPR I,\textsuperscript{412} the enactment of the Same Sex Marriage Prohibition Act in 2013 and the resumption of the death penalty in Nigeria.\textsuperscript{413} 38 recommendations during UPR II were dedicated to addressing these three issues. The last two issues constituted the total 35 recommendations which were rejected by Nigeria during UPR II and the two rejected during UPR I. No recommendation on sexual orientation and gender identity was made by an African state (with the exception of Madagascar) and none of the recommendations made by non-African states on this issue were accepted by the Nigerian delegation. These recommendations were found by many African states to be ‘hyper-sensitive in political, social and/or cultural terms’\textsuperscript{414} and ‘contravened deeply held beliefs or policy positions of governments.’\textsuperscript{415} Three African countries made specific, general and consider action recommendations related to the abolition of the death penalty.\textsuperscript{416} While Nigeria did not accept recommendations which related to the abolition of the death penalty, it surprisingly made a similar recommendation to Argentina.\textsuperscript{417} Figures 4.7 and 4.8 below examine the

\begin{footnotesize}
\begin{enumerate}
\item About 600 people in early 2015 were on death row see Roger Hood and Carolyn Hoyle, \textit{The Death Penalty: A Worldwide Perspectice} (Oxford University Press, 2015) 274.
\item McMahon, above n 65, 18.
\item Ibid.
\item The recommendations were made by Togo, Benin and Rwanda respectively.
\item \textit{HRC UPR I Report – Argentina}, UN Doc A/HRC/8/34, para 64.21.
\end{enumerate}
\end{footnotesize}
categories of recommendations and issues raised during Nigeria’s UPR I and II.

As figures 4.7 and 4.8 indicate, Nigeria was receptive to both general (R4) and specific (R5) recommendations. A majority of the recommendations accepted by Nigeria were general recommendations (R4) and this constituted about 37 and 39% of the total recommendations during UPR I and II respectively. As earlier pointed out, the fact that such recommendations are general does not mean that they are meaningless. Nigeria also engaged with a good number of specific recommendations but only to the extent that they did not involve issues of the death penalty and sexual orientation which have tended to be politically contentious in social-cultural terms within Nigeria. About 23% of the 26 specific recommendations (R4) rejected by Nigeria during UPR I were on the death penalty and discrimination based on sexual orientation. Similarly during UPR II, recommendations on the death penalty and sexual orientation accounted for 95% of the 24 specific recommendations rejected by Nigeria. This indicates a cultural relativist tendency in the engagement of Nigeria with the UPR. This theme of cultural relativism is reinforced in the subsequent Chapters of this thesis.

However, while the Nigerian government was not receptive to recommendations on the above two issues, it was receptive to other human
rights issues that dominated both cycles of its review. The table below lists the top 15 issues that received recommendations during Nigeria’s UPR I and II. The human rights issues on the table are clustered based on the frequency with which states made recommendations. A similar classification has been used by UPR Info and by the Nigerian Human Rights Commission.418

Table 4.1

<table>
<thead>
<tr>
<th>Rank</th>
<th>UPR I</th>
<th>UPR II</th>
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<tbody>
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<td></td>
<td>Issue</td>
<td>Issue</td>
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<td></td>
<td></td>
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<tr>
<td>1</td>
<td>Women’s Rights</td>
<td>24</td>
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<tr>
<td>2</td>
<td>Rights of the Child</td>
<td>17</td>
</tr>
<tr>
<td>3</td>
<td>Torture and other CID Treatment</td>
<td>17</td>
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<tr>
<td>4</td>
<td>Justice and Detention</td>
<td>17</td>
</tr>
<tr>
<td>5</td>
<td>International Instruments</td>
<td>13</td>
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<tr>
<td>6</td>
<td>Death Penalty</td>
<td>12</td>
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<tr>
<td>7</td>
<td>Minorities</td>
<td>8</td>
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<td>8</td>
<td>Human Rights Education and Training</td>
<td>8</td>
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<tr>
<td>9</td>
<td>Technical Assistance and Cooperation</td>
<td>8</td>
</tr>
<tr>
<td>10</td>
<td>Right to Education</td>
<td>6</td>
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As indicated on the table above, the three issues which came up prominently during the UPR I of Nigeria were women’s rights, the rights of the child and torture and other cruel, inhumane and degrading treatment. None of these recommendations were rejected by Nigeria. The NGO UPR I Coalition of Nigeria prioritised similar recommendations including women and children rights, torture and extra-judicial execution.\(^\text{419}\) During UPR II, women and children’s rights were predominant recommendations by states to Nigeria as indicated on Table 4.1, as well as by NGOs.\(^\text{420}\) The government therefore was receptive to recommendations on these prominent issues that arose during UPR I and II, and by engaging with the recommendations of its peers, the state may be indirectly engaging with NGO recommendations.\(^\text{421}\) It accepted recommendations such as to ‘[c]riminalize torture and establish an independent monitoring system of detention places,’ ‘[e]nact legislation to prohibit FGM,’ ‘Fully implement its national action plan... to meaningfully involve women in peace process and to combat gender-based violence and discrimination’ and ‘[s]ign and ratify the Optional Protocol to the ICESCR and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.’\(^\text{422}\) Such an outcome shows that states are willing to rethink their policies and consider adopting international human rights treaties as a result of constructive dialogue and their participation in a cooperative mechanism, but also depending on whether the outcome was followed up.

\(^\text{419}\) Nigeria’s Civil Society Coalition on the UPR, above n 386, 1-5.
\(^\text{421}\) In Chapter Five, I further develop this point by examining the potential for NGOs to influence state recommendations in Kenya’s UPR and whether there’s a possible correlation between state and NGO recommendations.
\(^\text{422}\) HRC UPR II Report –Nigeria, UN Doc A/HRC/25/6, paras 135.73, 135.56 and 135.1.
While sexual orientation did not feature among the top 15 issues raised during the review of Nigeria, the death penalty came up among the top six issues raised during both cycles of Nigeria’s review. Recommendations on the death penalty represented about 10% of the total recommendations made during UPR I and about 11% of the recommendations made during UPR II. This underlines the importance of the death penalty in the review of Nigeria which has across both reviews gained more prominence (from 6th to 4th position). The Nigerian UPR delegation rejected all the recommendations during UPR I and II which directly called for the abolition of the death penalty except the UPR I recommendations by Argentina and Benin that Nigeria considers the possibility of abolishing the death penalty in the near future.\textsuperscript{423} This shows limits to Nigeria’s receptiveness on this important UPR recommendation.

Overall, it is observable from the above analysis of Nigeria’s engagement that the Nigerian government effectively engaged in UPR I and II. As a reviewer, it participated and made recommendations across the various regional groups thereby demonstrating the universality principle underlying the UPR mechanism. In terms of the relevance and specificity of the recommendations made by Nigeria, it was evident that the Nigerian government engaged the various regional groups with the various categories of recommendations. However, it made fewer specific recommendations to its African regional peers compared to other groups of states. But as argued, the fact that a recommendation is non-specific does not undermine the relevance of such a recommendation. Nevertheless, it provided evidence of a diverging approach to reviewing states, with Nigeria adopting a softer approach in reviewing its regional peers compared to the approach adopted in reviewing Western states. As a state under review, Nigeria was generally receptive to various categories of recommendations from its peers, evidenced by the high acceptance level across both UPR I and II. In particular, the Nigerian government’s acceptance of all UPR I recommendations from African states and only about 1% rejection of their UPR II recommendations when compared to about 9% rejection from WEOG states, provided evidence of regionalism and dislike of stringent

\textsuperscript{423} Report of the HRC on its 25\textsuperscript{th} Session, UN Doc A/HRC/25/2, paras 1 and 14.
language from former colonial rulers. However, cultural relativism, in relation to issue of sexual orientation limited the effectiveness of Nigeria’s engagement at this stage of the review.

4.4. IMPLEMENTATION OF NIGERIA’S UPR RECOMMENDATIONS

Implementation is an important component of the four-step approach to evaluating state engagement with the UPR developed in Chapter 2. State engagement with the UPR process will not be effective if it does not result in the implementation of recommendations that would contribute to the improvement of the human rights situation on the ground. This section examines the extent to which Nigeria implemented its UPR recommendations and the gap between the accepted and the implemented recommendations. It argues that the number of fully and partially implemented recommendations underscore the potential of the UPR process to contribute to human rights changes within states through a cooperative and collaborative process. While the gap between the accepted and implemented recommendations signals that the government needs to engage more effectively with implementation, I argue that acculturation can potentially narrow the gap over time through effective NGO engagement.

The Implementation Recommendation Index (IRI) is used in this thesis to measure state implementation of UPR recommendations. The IRI is an index developed by UPR Info which brings together an average of stakeholders’ responses. The value of this index is that it takes into account the comments of both states and stakeholders on the implementation of UPR recommendations. A major challenge in measuring state UPR implementation is that the UPR is a dynamic and on-going process. As such recommendations

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424 When all stakeholders agree that a recommendation was fully implemented the recommendation is scored 1. Whenever a stakeholder claimed that no aspect of a recommendation was been implemented, the index score is 0. The score is 0.75 when the state under review claims that the recommendation has been fully implemented but a stakeholder says it has only been partially implemented. The average of the scores is then transformed into an implementation level where 0-0.32 = Not Implemented, 0.33-0.65 = Partially Implemented and 0.66-1 = Fully Implemented. See appendix I for more details on the IRI methodology.
which this index may classify as implemented or not implemented may have at the conclusion of this research changed status. To control the changes which may subsequently occur, the implementation measured is restricted to the implementation timeframe allocated for each review. It is also difficult to draw a direct causal link between UPR recommendations and the actions of states.

The implementation timeframe for Nigeria to implement its UPR I recommendations ran from February 2009 when the UPR working group adopted its UPR report till July 2013 when it submitted its UPR II report.\footnote{Since UPR II implementation stage was still ongoing, I limited the analysis on implementation to UPR I.} Within this period Nigeria implemented either fully or partially about 43% of the commitments made during its UPR I. With regard to the pledges and commitments it made to the HRC, Nigeria fulfilled some of them. From among the stakeholders, only the Nigerian NHRC in its UPR II report\footnote{See National Human Rights Commission of Nigeria, ‘Report on State of Compliance with International Minimum Standards of Human Rights by Nigeria under the Universal Periodic Review Mechanism’ <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=556&file=EnglishTranslation> 2.} directly addressed the level of implementation. However, some of the pledges and commitments made by Nigeria corresponded to some of the recommendations made by states during Nigeria’s UPR I review.\footnote{For example Nigeria undertook to accelerate the process full domestication of international human rights treaties and this correspond to its second UPR I recommendation made by Ghana, Norway, Niger, Algeria and Brazil. For details on the pledges and commitments made by Nigeria see OHCHR, ‘Human Rights Council: Nigeria’s Voluntary Pledges and Commitments’ www.un.org/ga/60/elect/hrc/nigeria.pdf.} Other stakeholders indirectly provided responses to the pledges in their reports on Nigeria’s implementation of UPR recommendations.

Nigeria fulfilled some of the pledges and commitments it made when it sought membership in the HRC in 2008. It ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW); deposited its National Action Plan (NAP) which amended the National Human Rights Commission Act to grant the NHRC independence,
investigative and enforcement powers; and diplomatically intervened to restore peace and democracy in Guinea, Guinea Bissau and Mali.428

On the UPR recommendations, actions were triggered on some of the recommendations at the end of UPR I. Out of a summary of 30 recommendations accepted by Nigeria, 10% were fully implemented (FI), about 33% were partially implemented (PI), about 53% were not implemented (NI) and about 3% of the recommendations were not assessed because UPR stakeholders did not provide any information in relation to their implementation. Figure 4.9 below represents percentages of the recommendations that were FI, PI and NI.

As indicated above, about 43% of the UPR recommendations Nigeria accepted was either fully or partially implemented while about 53% was not implemented. On the FI recommendations, the state, the NHRC, domestic and some international NGOs agreed on the full implementation of some of these

recommendations. For example the state, NCHR and Amnesty International were in agreement that recommendation 4 relating to the amendment of the Human Rights Commission Act to grant the NHRC independence, investigative and enforcement powers had been fully implemented. This greatly contributed to the Commission attaining an ‘A’ status at the International Coordinating Committee of Human Rights a year after. Similarly the response of Human Rights Agenda Network (HRAN), a leading domestic NGO, did not dispute that the government had continued to invest in education within the relevant time. As such the recommendation in this regard was fully implemented.

On the partially implemented recommendations, the government of Nigeria had triggered the process of implementation on some of the recommendations even though not yet completed. In some of the recommendations, both the state and the stakeholders were in agreement that the recommendation had only been partially implemented. On others there were dispute not only between the state and the stakeholders but equally among the stakeholders. For example HRAN, NHRC and the government of Nigeria all accepted that recommendation 1 relating to accession to human rights instruments to which Nigeria is not yet a party had only been partially implemented. This featured among the top five recommendations that were made to Nigeria (See Table 4.1). Recommendation 28 required the government to take steps to bolster the

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433 Ibid 2.
national health system. While the NHRC\textsuperscript{436} and the state\textsuperscript{437} agreed that steps have been taken in this regard, HRAN’s response was not in agreement with this.\textsuperscript{438} Relevant studies on the Nigerian health system indicated that the system was deplorable and the attitude of health care workers towards patients was very poor.\textsuperscript{439}

The few recommendations that were fully implemented covered issues on the National Human Rights Institution, education and raising awareness among cultural and religious leaders. Many of the recommendations which had not been implemented concerned issues such as justice and detention, women’s rights, torture and extra-judicial executions. With the exception of extra-judicial executions, they were among the 5 prominent issues that received the most recommendations during Nigeria’s UPR 1, and constituted about 42\% of the total recommendations made to Nigeria during UPR I (See Table 4.1 above). The relevance and effects of the non-implementation of these four issues is examined below. While the state took some steps towards implementation outside the UPR I implementation timeframe, these issues still raise serious human rights concern in Nigeria.

4.4.1. Justice and Detention

Access to justice and detention conditions have been persistent problems in Nigeria. Mary Robinson, former UN High Commissioner for Human Rights, pointed out that the ‘way in which justice is administered is a key benchmark of a country’s commitment to human rights.’\textsuperscript{440} The right to fair trial and freedom from arbitrary arrest are enshrined in sections 35 and 36 of the 1999 Constitution of Nigeria but these provisions have largely not been

\begin{thebibliography}{999}
\bibitem{436} The National Human Rights Commission of Nigeria, above n 430, [28]
\bibitem{437} Working Group on the Universal Periodic Review, above n 429, [102].
\bibitem{438} Human Rights Agenda Network (HRAN), above n 432, 7.
\bibitem{440} Mary Robertson, \textit{A Voice for Human Rights} (University of Pennsylvania Press, 2010) 255
\end{thebibliography}
implemented. In its 2010 report on the state of human rights in Nigeria, the Nigerian NHRC recommended that the justice administration should be overhauled. A 2012 national prison audit undertaken by the Nigerian NHRC highlighted major issues. The prisons were old and dilapidated, congested and appalling prison facilities. More than 18,000 detainees had spent a long time awaiting trial with some having spent up to 16 years awaiting trial. Another prison audit exercise undertaken by the NHRC in 2014 at the Kuje Medium Security Prison, Abuja, reported that 86 detainees have been awaiting trial for at least 3 years. In 2009 there were 71 cases of unlawful arrest and detention reported by the NHRC. In 2010, this number rose to 497 and in 2012, there were 3,642 reported cases. While these increase numbers may simply reflect an increase in reporting rather than occurrences, they do unveil the underlying problem and underscore the relevance of the recommendations which states made during Nigeria’s UPR I. France recommended that Nigeria ‘[i]mprove the conditions of detention within prisons, access to health and the respect for the most elementary rights of detainees.’ The UK recommended that Nigeria ‘[t]ake action to tackle the backlog of prisoners who have been detained without trial or beyond the end of their sentence’ and Belgium recommended that Nigeria ‘[t]ake specific measures in order to address the disfunctioning of the judicial system and the lack of internal and external monitoring of the police.’ As indicated on Table 4.1 above, this was the fourth most prominent issue during Nigeria’s UPR I, accounting for about 5% of the total recommendations.

442 Ibid.
443 The audit report revealed that out of 50,645 persons detained, about 70% were awaiting trial. See The National Human Rights Commission Nigeria, National Prison Audit 2012 (The National Human Rights Commission, 2014) 3-11.
444 The audit report revealed that out of 50,645 persons detained, about 70% were awaiting trial. See The National Human Rights Commission Nigeria, National Prison Audit 2012 (The National Human Rights Commission, 2014) 5 and 17.
446 After 2012, there was decline in the number of cases reported. See ibid, 52.
448 Ibid para 25.
449 Ibid para 64.
However, in terms of implementation, very little progress was made by the state within the implementation period. There were efforts to reform the criminal justice system with new judges appointed at all levels.\textsuperscript{450} However, according to the NHRC, Nigeria’s pre-trial system continues to violate human rights, the prison system is below UN Standard Minimum Rules for the Treatment of Prisoners and police oversight bodies remain weak and unable to monitor the excesses of the police.\textsuperscript{451} Nevertheless, in 2015, the \textit{Administration of Criminal Justice Act} was enacted to reform the criminal justice sector.\textsuperscript{452} While this falls outside the implementation period for UPR I, it lends more support to the acculturation argument (further examined in the section 4.4) which underscores the potential for the UPR to, over time, influence changes within states.

\subsection*{4.4.2. Women’s Rights}

According to the Nigerian NHRC, reports of violence against women grew by alarming proportions within the first cycle of the UPR. In 2009, the NHRC received 30 reported cases of domestic violence.\textsuperscript{453} In 2010, this number rose to 325 and in 2011 and 2012, there were over 2,500 reported cases of domestic violence.\textsuperscript{454} Also, Nigeria has the highest number of reported female genital mutilation (FGM) cases in the world, accounting for about one-quarter of the estimated 115-130 million circumcised women worldwide.\textsuperscript{455} Therefore states were justified to place women’s rights issues at the top of Nigeria’s UPR I recommendations, receiving more recommendations (about 21\%) than any other issue (see Table 4.1 above). Many of these recommendations required the Nigerian government to implement legislation against sexual and gender

\textsuperscript{450} See The National Human Rights Commission of Nigeria, above n 430.
\textsuperscript{451} Ibid.
\textsuperscript{452} \textit{Administration of Criminal Justice Act, 2015} (Nigeria).
\textsuperscript{453} This continues to prevail despite section 46 (1) of the 1999 Constitution of Nigeria which protects women against violence and discrimination. See The National Human Rights Commission Nigeria, \textit{Annual Report 2014}, above n 445, 52.
\textsuperscript{454} Ibid 52.
\textsuperscript{455} NPC and UNICEF Nigeria, ‘Children's and Women's right in Nigeria: A wake up call - Situation Assessment and Analysis of Harmful Traditional Practice (FGM)’ (Abuja 2001) 195-200.
based violence, undertake awareness raising campaigns to eradicate FGM and enact legislation to prohibit FGM.\textsuperscript{456}

Implementing these recommendations within the UPR I implementation period proved challenging for the state. As observed by the NHRC, few state governments within Nigeria enacted laws on FGM but there was no federal legislation on FGM, discrimination against women, child marriage and betrothal or gender based violence.\textsuperscript{457} Many of these recommendations which were not implemented were vital in improving the human rights situation on the ground. However, as earlier noted, over time some of these recommendations have been implemented, even though outside the UPR I implementation timeframe. In 2015, the \textit{Violence against Persons Prohibition Act} was passed into federal law. This Act specifically addresses violence against women including FGM in Article 6 and prescribes a penalty of up to 4 years imprisonment and or a fine.\textsuperscript{458} While the Act can be criticised for its failure to recognise the particular vulnerability of women to violence by replacing the word ‘women’ with ‘persons,’ it nevertheless demonstrates a positive move by the government of Nigeria in its fight against violence against women and other vulnerable persons. This is supplemented by a 4 year National Policy and Plan of Action for the Elimination of FGM in Nigeria which identifies and engages key stakeholders at the federal, state and community levels.\textsuperscript{459} However, there has been no evidence of their enforcement and reports indicate that the practice of FGM ‘remain widespread, with low rates of reporting’.\textsuperscript{460}


\textsuperscript{457} See The National Human Rights Commission of Nigeria, above n 430, para 18.


\textsuperscript{460} Immigration and Refugee Board of Canada, ‘Nigeria: Prevalence of female genital mutilation (FGM) among the Urhobo, including the consequences for refusing to undergo this procedure, particularly pregnant women; state protection available (2014-March 2015)’ (2015) \url{http://www.refworld.org/docid/56498d834.html}.
4.4.3. Torture, Cruel Inhuman and Degrading Treatment

In 2006, the UN Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions observed that torture was an intrinsic part of law enforcement methods in Nigeria.\textsuperscript{461} Section 34 (1) of the 1999 \textit{Constitution of Nigeria} expressly provides that ‘no person shall be subjected to torture or to inhuman or degrading treatment.’\textsuperscript{462} Furthermore, Article 4 of the \textit{Convention against Torture} provides that ‘[e]ach state party shall ensure that all acts of torture are offences under its criminal law.’\textsuperscript{463} This is a non-derogable right and a peremptory norm of international law. Despite these, the number of cases reported to the Nigerian NHRC between 2009 and 2012 was on the rise. In 2009, the number of reported cases was at 94 but in 2010 the number had risen to 1,403 and in 2012 the number stood at 2,230.\textsuperscript{464} It was in this light that states like Benin, Ukraine, The Netherlands and Denmark, recommended that Nigeria should ‘establish a national preventive mechanism to align itself with its neighbours positive practices’; ‘[s]tep up its efforts to halt torture and ill-treatment’; adopt legislative measures to prevent and prosecute acts of torture and other ill-treatment; and ‘[p]revent using cruel, inhuman and degrading punishment.’\textsuperscript{465} These recommendations accounted for about 15\% of the total recommendations made to Nigeria during UPR I.

With regard to their implementation, in 2009, Nigeria set up the National Committee Against Torture (NCAT) as a national preventative mechanism.\textsuperscript{466} The NCAT is mandated amongst other things to receive and consider

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\textsuperscript{462} \textit{Constitution of the Federal Republic of Nigeria} (1999), s 34 (1).

\textsuperscript{463} \textit{Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment}, opened for signature 10 December 1984, UNTS 1465 (entered into force 26 June 1987); Nigeria ratified the Optional Protocol of the Convention against Torture (OPCAT) in 2009. See also Article 5 of the African Charter on Human and Peoples’ Rights.


\textsuperscript{466} Federal Ministry of Justice (Nigeria), ‘Mandate of the National Committee on Torture’ (2010) <\textit{http://www.apt.ch/content/files/npm/africa/Nigeria_NPM_ToR.pdf}>.
\end{footnotesize}
complaints on torture; conduct visits to places of detention and examine allegations of torture therein; review the treatment of persons in detention with a view to prevent torture; develop a national anti-torture policy and propose anti-torture legislation.\textsuperscript{467} The NCAT has partnered with the NHRC to organise training workshops and sensitize relevant actors on the UN \textit{Convention against Torture} (CAT) and its \textit{Optional Protocol}.\textsuperscript{468}

Despite these efforts, torture continues to persist. The Nigerian Criminal and Penal code does not explicitly prohibit torture and the NCAT does not have investigatory or prosecutorial powers.\textsuperscript{469} This is arguably inconsistent with the constitutional provision and international obligation earlier mentioned. Force Order 237 of Nigeria’s Police Regulations contributes to the ongoing use of torture by permitting police officers to shoot detainees and suspects who attempt to escape or avoid arrest, regardless of whether they pose a threat to life.\textsuperscript{470} Nevertheless, the work undertaken by the NCAT is a significant step. There has recently been a decline in the number of reported cases of torture and other cruel inhuman and degrading treatment between 2012 and 2014, from 1920 reported cases to below 400.\textsuperscript{471} But Nigeria is yet to recognise the competence of the Committee against Torture to receive communications from individuals under article 22 of CAT.

It can be observed from the above analysis that the Nigerian government engaged with the implementation of many of its UPR I recommendations. This underscores the potential for cooperative mechanisms to contribute to human rights changes within states. While this section demonstrates the potential for the UPR to improve the human rights situation on the ground, it examined the implementation gap between the recommendations accepted on the one hand and those implemented on the other (including both FI and PI). This is


\textsuperscript{469} See The National Human Rights Commission of Nigeria, above n 430, para 22.

\textsuperscript{470} See Federal Ministry of Justice (Nigeria), ‘Mandate of the National Committee on Torture’ (2010) <http://www.apt.ch/content/files/npm/africa/Nigeria_NPM_ToR.pdf>.

represented by more than 50% of recommendations not implemented within the implementation timeframe. The implementation of recommendations, especially on justice and detention, women’s rights and torture, as examined above still represent significant challenges, which as I argue in the next section, may yet be narrowed over time.

4.4.4. Narrowing the UPR Implementation Gap: Acculturation and the Internal/External Audience Effects

Nigeria has made major commitments in its UPR engagement and is a party to major international human rights instruments. Despite this, implementation has often proved problematic. As the findings above indicate, more than half of the UPR I recommendations were not implemented by Nigeria. Narrowing the gap between a government’s human rights rhetoric and its human rights actions is crucial for the human rights situation on the ground to be improved. But can this gap be narrowed?

The gap between compelling human rights rhetoric and meaningful political change is often a sizeable one.\textsuperscript{472} However, it is arguable that over time, shallow or rhetorical human rights commitments will resonate to deeper commitments through a process that Jon Elster refers to as the ‘civilizing force of hypocrisy.’\textsuperscript{473} Elster reasoned that rhetorical commitments, though hypocritically made, can lead to some positive outcomes over time because an actor would hardly deviate from the principled position to which he has publicly committed himself.\textsuperscript{474} States respond to global cultural forces just like individuals and organisations respond to cultural forces within their wider environment. By identifying themselves with a reference group, states generate varying degrees of social and cognitive pressures to conform to the norms of that group.\textsuperscript{475} Identification as a microprocess of acculturation has been exploited to drive states to make human rights commitments. Identification

\textsuperscript{474} Ibid 104.
\textsuperscript{475} Ibid 4.
occurs ‘when an individual accepts influence because he wants to establish or maintain a satisfying relationship with another person or group.’ The social environments within which states act propel internal cognitive and social pressures which drive states to adopt socially legitimate attitudes and beliefs. The interest of Nigeria to identify itself with the cooperative and inclusive UPR mechanism, can over time facilitate its acculturation.

In the analysis on Nigeria’s UPR engagement, acculturation through identification was evident in a number of ways. Identifying itself with the African Group generated internal social and cognitive pressures which induced Nigeria to accept a high percentage of recommendations from its referenced group. While acceptance of UPR recommendations does not yield automatic implementation, it is a positive step towards implementation. While some may see the existence of this regional alliance as detrimental to the UPR process, I argue, it could favour the process of acculturation. States may tend to be more receptive to sensitive recommendations coming from the regional group they identify with, than from other groups. An example of the power of identification was evident during Nigeria’s review. During UPR I, Nigeria accepted a general recommendation (R 4) touching on the death penalty from Benin, but rejected similar general recommendations from Western states such as the UK and Sweden. Also, during UPR II, Chad accepted a

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477 For example, within the framework of the UPR, even though China rejected all its UPR I recommendations relating to the abolition of the death penalty, it thereafter reduced the scope of its application by excluding 13 non-violent economic crimes. See Dui Hua, ‘NGO Submission for the Universal Periodic Review of the People’s Republic of China’ (March 2013) para 16; It is however important to note that the scope of the application of the death penalty in China is still very high.
478 See Figure 2.
481 Ibid. Another example of the positive impact of regionalism in the UPR, with regard to Africa states, was evident in the review of Chad. During Chad’s UPR II, Togo and Czech Republic recommended that Chad ‘Ratify the Optional Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment.’ Even though both recommendations were of the same action category of specific recommendations (R5), Chad refused to accept the same recommendation from Czech Republic because it added ‘without delay’. See UN Human Rights Council, Report of the Working Group on the Universal Periodic Review – Chad, UN Doc A/HRC/25/14 (3 January 2014) para 110.18 and 110.120.
recommendation from Cape Verde (on violence against women, female genital mutilation and forced marriages), but rejected a similar recommendation from Italy, even though both recommendations addressed the same issues and fell in the same action category.\textsuperscript{482} This provides evidence of the positive outcome of identification as a micro process of acculturation by causing recommendations made by states within a regional block, which otherwise may not have been accepted, to be accepted by members of that regional block. However the extent to which the UPR could transform the culture on gay rights within African states through acculturation still remains to be seen, but the cognitive pressures associated with acculturation are an important part of the process.

Cognitive pressures associated with the acculturation micro process of identification can push the language of human rights into some moral commitments within particular cultures even in terms that challenge one or more aspects of that culture. Benjamin Gregg employed a cognitive approach rather than a normative one to show how human rights norms can be advanced as rights internal to any given community’s culture by means of cognitive re-framing.\textsuperscript{483} He argued that ‘an idea once external can become internal through system-level learning.’\textsuperscript{484} While examining the issue of female genital mutilation in Africa, he noted that a cognitive rule can be deployed that revises local normative rules that justify female genital mutilation, but that such a cognitive rule has to be ‘indigenized.’\textsuperscript{485} For example reframing female genital mutilation as a technical, medical issue rather than a normative human rights concern can advance the human rights issue as internal to the African culture.\textsuperscript{486} Such an approach can be equally beneficial to other cultural aspects affecting the engagement of Nigeria with the UPR.


\textsuperscript{483} Gregg, ‘Deploying Cognitive Sociology to Advance Human Rights’ above n 325, 289

\textsuperscript{484} Ibid.

\textsuperscript{485} Ibid 304.

\textsuperscript{486} Human Rights Norms against Child Prostitution in Asia were advanced internally by means of cognitive re-framing. See ibid 289.
As the acculturation process progresses, it will be difficult for a state to sustain purely rhetorical commitments because of external ‘audience’ effects. External audience effects are generated by national and transnational human rights advocacy networks when they engage governments in a dialogue about norm implementation and hold them accountable for their human rights rhetoric. The publicity of a government’s UPR commitments creates expectations among informed citizens and NGOs/CSOs, making it difficult for the government to contradict or deviate from the accepted commitment/recommendations. 

Dia in his study\(^{487}\) noted how the Communist regimes’ commitments under the Helsinki Accords were frequently referenced in popular struggles for freedom of association and freedom of expression.\(^{488}\) Citizens over time may pressure their government to live up to their human rights rhetoric and commitments. This is referred to by O’Brien and Li as ‘rightful resistance’.\(^{489}\) They suggest that this grows from the space created when the state’s international commitment is disconnected from local practice.\(^{490}\) According to O’Brien and Li, ‘so long as a gap exists between rights promised and rights delivered, there is always room for rightful resistance to emerge.’\(^{491}\)

In the case of Nigeria, there is a space for civil society to hold the government accountable for its UPR commitments. A strategic and well-coordinated campaign by NGOs can contribute to meaningful human rights improvement within a state. In Chapter 5, I examine in greater detail how NGOs can effectively engage with the UPR and influence the state’s engagement with the mechanism. With particular focus on NGOs in Kenya, I examine in Chapter 5 how the formation of a broad and representative NGO coalition and the

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\(^{488}\) Ibid 120.

\(^{489}\) Kevin J O’Brien and Li Lianjiang, *Rightful Resistance in Rural China* (Cambridge University Press, 2006) 15-24; Note however that the number of offences subject to the death penalty is still very high in China.

\(^{490}\) Relating to the situation where public conformity is disconnected from local practice see Kevin J O’Brien and Li Lianjiang, *Rightful Resistance in Rural China* (Cambridge University Press, 2006) 64.

\(^{491}\) Ibid.
undertaking of media and advocacy campaigns by the coalition can positively impact a state’s UPR process.

Continuous engagement of Nigeria with the UPR process has the potential to over time narrow the implementation gap. As earlier indicated, some of the UPR I recommendations to Nigeria that were not implemented during the specified time were subsequently implemented. The adoption of a UPR implementation action plan would accelerate and provide greater certainty on the implementation process. In addition, continuous engagement with the UPR process may over time influence states even on issues which it rejected in its previous review. As governments within nations change, so do their views on human rights issues so as to identify with the wider community with which they interact. This was the case with Côte d’Ivoire. During UPR I, the government of President Laurent Gbagbo rejected recommendations from the UK, Brazil and Czech Republic to sign and ratify OP-CAT. During UPR II, the government of President Alassane Ouattara accepted the same recommendations from states such as Ghana, Tunisia, Czech Republic, Uruguay and Burkina Faso. With the new Nigerian government that was elected in 2015, it remains to be determined whether specific recommendations on the death penalty and the rights of sexual minorities may subsequently receive a positive response from the new government. Acculturation in this context is seen as a continuous process which may over time produce a positive outcome.

4.5. THE ‘SPIRAL’ EFFECT OF THE FIGHT AGAINST BOKO HARAM ON NIGERIA’S UPR ENGAGEMENT

Just as terrorism has a grave impact on human rights, so too anti-terrorism laws and policies can have serious implications for human rights and individual

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When conflicts within or between states pose a threat to the nation or citizens, governments easily justify repressive measures and human rights considerations may thereby be weakened. The role of conflict and security threats in Nigeria in hindering norm compliance is an important aspect to consider when examining its engagement with the UPR. There is always a tendency for governments to trade off human rights considerations in the name of counter-terrorism measures or national security. Human rights violations mostly committed by governments under the pretext of counter-terrorism measures include torture, extra-judicial executions and secret and arbitrary detention. During UPR I, Nigeria accepted a recommendation to take ‘all practical measures’ to end ‘extrajudicial executions’ and ‘step up its measures to halt torture.’ This section considers whether the escalation of the conflict between the government and Boko Haram terrorist group after UPR I had a regressive effect on Nigeria’s subsequent engagement with the UPR.

There is some obscurity surrounding the origin of Boko Haram. Attempts at explaining the origin and leadership of the group have generated some confusion. Boko Haram, literally translated to mean ‘western education/civilization is sin,’ is a sect whose early recruits were indoctrinated ‘to believe that their state of hopelessness was caused by government which imposed Western education on them and failed to manage the resources of the country to their benefits.’

While the existence of the sect has been traced as far back as 1995, it was only after Nigeria’s UPR I in 2009 that the conflict between the sect and the government escalated. Two particular incidents escalated the conflict between

the government and *Boko Haram* terrorist group. These were the bombing of the Nigerian Police Headquarters in Abuja on 16 June 2011 and the bombing of the United Nations House in Abuja on 26 August 2011. Prior to these incidents, *Boko Haram* was apparently not understood as a threat to peace and to the protection of human rights in Nigeria and the region. None of the 32 recommendations during Nigeria’s UPR I session on 9 February 2009 addressed the issue of terrorism. It only became a major concern during UPR II on 27 October 2013, receiving three recommendations from France, Portugal and the Republic of Korea.

A major counter terrorism response by the Nigerian government immediately followed the two major incidents above. The government enacted the *Terrorism (Prevention) Act 2011* (hereafter ‘TPA’). This was amended on February 21, 2013 by the *Terrorism (Prevention) (Amendment) Act 2013* (hereafter ‘TPA’ as Amended). While most of its provisions are human rights compliant, some are not. Some counter terrorism measures have been found to have grave impact on the enjoyment of human rights. For example section 32(1) of TPA (as Amended) which provides that the Federal High Court ‘shall have the sole jurisdiction to try an offence and impose the penalties specified in this Act’ is in conflict with the *Child Rights Act 2003*, pursuant to which a child is to be tried by a Family Court. This also goes against the UPR recommendations Nigeria accepted from Poland and Slovakia to ‘[e]nsure that neither the death penalty nor life sentence is imposed for offences committed by persons below 18 years of age.’

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501 The 41 sections of the TPA define and proscribe acts of terrorism including methods of intelligence gathering, prevention, investigation and prosecution of alleged terrorists and also mutual legal assistance.
503 *Terrorism (Prevention) Act 2011* (Nigeria), s 32 (1).
504 This is the law domesticated the Convention on the Rights of the Child.
505 Defined as a person below 18 years.
506 *HRC UPR II Report –Nigeria*, UN Doc A/HRC/25/6, paras 137.28 and 137.29.
Furthermore, subjecting the proscribed acts or omissions in the TPA \(^{507}\) (including ‘threats’) ‘to maximum of death penalty’, \(^{508}\) irrespective of the gravity of the offence, is open to abuse and undermines the principle of proportionality. Amnesty International notes this fact and other inconsistencies with the TPA to which it stated:

> Key provisions of the Act are incompatible with Nigeria’s human rights obligations. Many of the provisions of the Act use terms and definitions that are imprecise and overbroad in scope, violating the ‘legality’ requirement for criminal offences, and/or unlawfully restricting a range of rights – such as freedom of thought, conscience and religion, freedom of opinion and expression, freedom of association and freedom of assembly – by failing to adhere to the requirements of demonstrable proportionality... some provisions relating to investigation, detention, and trial are not consistent with various provisions of human rights law. \(^{509}\)

Another prominent issue during Nigeria’s UPR related to the government’s anti-terrorism campaign was torture and extra-judicial executions. Six states including Benin, Germany and Portugal recommended during UPR I that Nigeria investigate and put an end to the use of torture and extra-judicial executions by the police. \(^{510}\) These recommendations were accepted by the Nigerian government.

Despite the above UPR commitment to end extra-judicial executions, there has been an increase in extra-judicial executions. Government security forces have been implicated in numerous extra-judicial killings, torture, and other serious human rights abuses. \(^{511}\) The escalation of violence between *Boko Haram* and the government was prompted by an act of extra-judicial execution. \(^{512}\) It was


\(^{510}\) Ibid paras 14, 22 and 23.


the death of Yussuf, a Boko Haram leader in police custody that triggered Boko Haram to perpetuate the two major bombings in 2011 as acts of retaliation.\footnote{132} During UPR II on Nigeria, HRAN reported an increase in the number of extra-judicial executions, torture and ill treatment committed by the Joint Task Force set up by the government in the name of fighting terrorism.\footnote{513}

Amnesty International also reported an increase in the number of extra-judicial executions by the government. It reported that over 950 people died in detention facilities ran by the Joint Task Force within the first six months of 2013.\footnote{514} Similarly, just one month after Nigeria’s UPR I, Human Rights Watch documented 28 alleged extra-judicial executions committed by the government police between 28 July and 1 August 2009\footnote{515} and 27 extra-judicial executions carried out by the military in Maiduguri between July 2009 and May 2012.\footnote{516} The Nigerian National Human Rights Commission in its UPR II submission noted that there is no body set up to monitor and investigate extra-judicial executions in Nigeria and that the National Committee against Torture has no investigative powers.\footnote{517} During UPR II, Portugal recommended that the Nigerian government should tackle the problem of extra-judicial executions by mainstreaming human rights into counter terrorism laws and policies.\footnote{518} This can contribute to draw a clear line between law enforcement and terrorism. Besides, torture and extra-judicial executions are non-derogable rights recognised by international human rights law and Nigeria (as of February 2017) did not officially derogate from the ICCPR in its counter terrorism campaign.\footnote{519} Nigeria accepted all five recommendations during UPR II to end, prevent and investigate extra-judicial executions and torture by security forces,\footnote{520}
and to guarantee respect for human rights in its fight against terrorism. The extent to which this is implemented can only be determined by the end of UPR II implementation timeframe in 2018.

Acculturation falls within the broader socialisation theory on the ways in which human rights norms become socialised into domestic settings of states. Prominent among these theories which I examined in Chapter 3 was the five-stage spiral model developed by Risse, Ropp and Sikkink. A criticism of this theory was its failure to consider the regressive effect of serious conflicts and security threats on human rights norm implementation. This section with focus on Boko Haram terrorism has demonstrated that conflicts and security threats can have a regressive effect on state human rights compliance. The fight against Boko Haram terrorism in Nigeria has resulted in an increase by government police and militia in the perpetuation of torture and extra-judicial executions, despite its UPR commitments and other human rights obligations.

4.6. CONCLUSION

This Chapter, with focus on Nigeria, has demonstrated that cooperation and dialogue can help cause human rights changes within states in a subtle but significant way. Exclusive reliance on confrontational mechanisms could undermine the potential for cooperative mechanisms to contribute to human rights changes within states. This reflected the point expressed by Elvira Domínguez Redondo that:

‘[T]hose in charge of human rights mechanisms, scholars and practitioners tend to neglect the potential value of cooperative approaches to human rights implementation and focus instead on the confrontational approaches.’

Nigeria’s engagement with the UPR, in terms of its commitment to the national consultation process and the quality of its UPR delegation, indicated an effective engagement from the Nigerian government. This contrasted significantly with its engagement with the treaty bodies and the African

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522 Redondo, above n 108, 683.
Commission. While these bodies are non-coercive and non-adversarial in their methods of operation, they can be less cooperative, inclusive and collaborative than the UPR because of their high technical expertise and procedures. Also, the limited state involvement and control over their outcomes/findings make them less state-friendly than the UPR. The inclusive nature of Nigeria’s UPR national consultation process and the quality of its UPR delegation were important indicators for an effective engagement with the UPR.

The ‘soft’ approach adopted by Nigeria as a reviewer strengthens the cooperative and non-confrontational nature of the UPR. The fact that such an approach generally produces more general (R4) than specific (R5) recommendations does not necessarily undermine the value and relevance of such recommendations. While Nigeria’s engagement across the various regional groups and with various categories of recommendations is an important aspect of its active engagement with the UPR, this is undermined by the double standard exhibited in such engagement. This was evident in the different approach adopted in reviewing African states compared to WEOG, and making particular recommendations to peers which Nigeria itself refused to accept.

Nigeria’s acceptance of most of the UPR I and II recommendations (about 90% and 84% respectively), indicated its receptiveness to peer recommendations. This was significant compared to a state like Botswana which did not accept about 62% of its UPR recommendations. Two important aspects that were evident in the extent of Nigeria’s receptiveness to recommendations were cultural relativism and regionalism. Cultural relativism limited Nigeria’s active engagement as it was not willing to accept recommendations on sexual orientation on the basis of culture. Regionalism on the other hand attracted a stronger engagement from Nigeria evidenced by its acceptance of all UPR I recommendations from African states and rejecting less than 1% of their recommendations during UPR II when compared to other groups of states. Some have perceived regionalism to be detrimental to the UPR mechanism. This is true to the extent that it may prevent cooperation across regional groups and affect the universality of the UPR. However, this may not entirely be
detrimental because it facilitates acculturation by causing recommendations made by the regional block, which otherwise may not have been accepted, to be accepted by members of that regional block.

The fourth step in evaluating the effectiveness of Nigeria’s engagement with the UPR process was to examine the extent of the government’s implementation of UPR recommendations. This provided further insights into the potential value of the UPR process by the extent to which it contributed to influence human rights changes within Nigeria. About 43% of the recommendations which were either fully or partially implemented by the Nigerian government indicated an important contribution of the UPR in improving the human rights situation on the ground. However, there was a significant implementation gap which poses a major challenge as was addressed on issues such as justice and detention, women’s rights and torture. But, as I argue, acculturation can narrow this gap over time through the internal and external audience effects generated by effective NGO engagement. This was seen in instances where certain steps were taken by the state to implement UPR recommendations beyond the implementation timeframe.

In particular, issues that are culturally sensitive in African such as the recommendations on sexual orientation can be addressed by internal cognitive pressures through Greggs’ cognitive re-framing approach. Approaches that employ coercion or recommend immediate normative solutions may experience negative resistance which may cause further regression. For example, calls for immediate decriminalisation or threats, such as the threat by the British government to withhold UK aid from governments that do not reform legislation banning homosexuality, was met with specific legislation further criminalising same sex unions in countries including Nigeria and Uganda.523 This further indicates the limits and dangers of coercive or confrontational approaches in addressing human rights issues which are perceived to be sensitive within certain cultures.

523 Same Sex Marriage Prohibition Act 2013 (Nigeria); Uganda Anti-Homosexuality Act, 2014 (Uganda).
Equally important from the analysis in this Chapter was that conflicts and security threats such as terrorism can have a regressive effect on the implementation of UPR recommendations and other human rights commitments. Despite Nigeria’s UPR commitment with respect to ending torture and extra-judicial execution, the escalation of the conflict between Boko Haram and the government resulted in further human rights violation.

In addition, it is evident from Nigeria’s UPR engagement that while membership in the HRC may have its benefits, it does not necessarily influence a state’s engagement with the UPR mechanism as the level of Nigeria’s engagement with the UPR improved on many aspects during UPR II even though it was not a member of the HRC at the time. A vital point highlighted in this Chapter is the important role of NGOs to effectively engage the state and help narrow the compliance gap. As noted, the NGOs in Nigeria did not have a strong mobilisation for the UPR and lacked a broad and representative coalition. The next Chapter examines in detail the impact of effective NGO engagement with the UPR with a focus on Kenya. Chapter Five will strengthen the central thesis argument on the potential value of cooperative mechanisms of human rights implementation and reinforce the themes of regionalism and cultural relativism in the UPR as developed in this Chapter. It will significantly add to this Chapter by examining the difference which effective NGO engagement can bring to a state’s UPR engagement, the correlation between NGO and state recommendations and the amplification and synergy between the UPR and other mechanisms.
CHAPTER FIVE:
KENYA AND THE UNIVERSAL PERIODIC REVIEW

5. INTRODUCTION

This Chapter critically examines the effectiveness of Kenya’s engagement with the UPR within the framework of the four-step approach to evaluating the effectiveness of state engagement earlier developed. This Chapter will contribute to making a determination on the extent to which the UPR, as a cooperative and inclusive approach to human rights implementation, can contribute to influencing positive human rights changes within African states. It considers the themes of regionalism and cultural relativism impacting on the engagement of African states with the UPR. More importantly, this Chapter examines the significance of effective NGO engagement in the UPR process and the potential for NGOs to influence state recommendations by considering whether there was a positive correlation between state and NGO recommendations during the review of Kenya. In addition, this Chapter considers the relationship between the UPR and the UN human rights treaty bodies and argues that the UPR has the potential to reinforce and amplify the recommendations from national, regional and other UN human rights mechanisms and by so doing potentially create a synergy with these mechanisms. This Chapter also considers the implementation gap in relation to Kenya’s UPR recommendations and again argues for the potential for the implementation gap to be narrowed over time by the process of acculturation.

5.1. BRIEF BACKGROUND TO KENYA’S UPR

In the mid-1980s, Kenya was the subject of intensive global human rights campaigns. Its record during this time was replete with gross human rights violations. Following an unsuccessful coup in August 1982, the government of President Daniel arap Moi of the ruling Kenyan African Union Congress (KANU) increased its direct control over parliament, the judiciary and

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CSOs.\textsuperscript{525} To crack down on political opposition, the ensuing years witnessed civil liberties curtailed, elections rigged, political detention without trial and an increase in systemic torture.\textsuperscript{526} The role of civil society and transnational advocacy networks in causing human rights and institutional changes in Kenya in the 1990s was invaluable\textsuperscript{527} as it is today.

The dawn of a new millennium raised excitement and hopes especially when the KANU regime was replaced by the National Rainbow Party in 2003. Between 2003 and 2007, some improvements were made to Kenya’s human rights record.\textsuperscript{528} However, the 2007-2008 post-election violence was a major setback. Egregious human rights violations were committed in a magnitude which is yet to be fully understood or resolved.\textsuperscript{529} According to the report of the Commission of Inquiry into the Post-Election Violence, 1,133 people were killed\textsuperscript{530} in the violence and 663, 921 people were internally displaced.\textsuperscript{531} This formed part of the basis for the International Criminal Court’s (ICC) intervention in Kenya by the ICC prosecutor issuing arrest warrants on six Kenyan senior politicians and government officials which, apart from creating resentment in the minds of many African leaders, has increased their dislike for confrontational mechanisms of human rights enforcement.\textsuperscript{532} Within this

\textsuperscript{527} Ibid.
\textsuperscript{530} Commission of Inquiry into the Post-Election Violence (CIPEV), Report of the Commission of Inquiry into the Post-Election Violence (October 16, 2008) 383 (hereafter ‘Waki Report’).
context, the introduction of the HRC’s UPR mechanism came at a time when Kenya ought to address the 2007-2008 post-election violence issues, redeem its human rights record and find non-confrontational methods to engage with the international human rights system.

Kenya underwent its 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’s UPR I 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.533 This was critical in engaging the Kenyan government in the pre-review, review and follow-up stages of the UPR.

Section II of this Chapter engages with the first two steps of my four-step approach to assessing the effectiveness of state engagement with the UPR by evaluating the commitment of the Kenyan government to the UPR national consultation process and the quality of its UPR delegation. In addition, I highlight the impact of the UPR process on Kenya’s compliance with its UN human rights treaty body reporting obligations.

Section III examines the commitment of Kenya as a reviewer and as a state under review (the third step in my evaluation). I underscore Kenya’s approach to cooperation, the relevance and specificity of recommendations made by Kenya to its peers, and the receptiveness of the Kenyan government to various categories of recommendations made by other states to Kenya.

Section IV examines the role of domestic NGOs in the review of Kenya to determine their impact on Kenya’s UPR process. I argue that NGOs have found

many ways to bypass the limitations on their direct participation and to strategically engage with the UPR process. This section examines the formation and composition of the Kenya Stakeholder Coalition (KSC) for the UPR, its media and advocacy campaigns and their impact on Kenya’s UPR process. I also consider whether the NGO domestic operational environment in Kenya and other factors may have nonetheless hampered their effective engagement with the UPR process.

Section V analyses whether there is a relationship between state and NGO UPR recommendations by analysing the recommendations made by states and NGOs.

Section VI engages with the implementation aspect of the four-step approach by examining the extent to which Kenya implemented its UPR recommendations and considers whether the new Constitution (2010) had an impact on the implementation of some of Kenya’s UPR recommendations. Finally, section VII examines the relationship between the UPR and the UN human rights treaty bodies.

5.2. COMMITMENT TO THE PRE-REVIEW PROCESS AND THE QUALITY OF KENYA’S UPR DELEGATION

5.2.1. Kenya’s UPR National Consultation Process

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

\[534 \text{Resolution 5/1, UN Doc A/HRC/RES/5/1, para 15(a).} \]
\[535 \text{HRC UPR I State Report - Nigeria, UN Doc A/HRC/WG.6/NGA/1, para 2; HRC UPR II State Report – Nigeria, UN Doc A/HRC/WG.6/NGA/1, para 4.} \]
\[536 \text{HRC UPR II State Report – Nigeria, UN Doc A/HRC/WG.6/NGA/1, para 4.} \]

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Other states like Switzerland published its state report on their website inviting all of its citizens to make comments. Some states, like South Africa, did not meet this requirement of broad consultation because they never carried out any form of consultation with civil society during their UPR I.\(^{538}\)

The preparation of the state report of Kenya during UPR I and II was coordinated by the Advisory Committee on International Human Rights Obligations (ACIHRO) that was set up by the government in 2005.\(^{539}\) It is composed of 12 government officials, three CSOs and two members of the Kenyan National Commission on Human Rights (KNCHR).\(^{540}\) It is mandated, among other things, to advise the government on its international human rights law obligations and to coordinate the timely preparation and submission of state reports to the various human rights monitoring bodies.\(^{541}\) ACIHRO is chaired by the Attorney General of Kenya who is the head of the state law office and the principal legal advisor to the government.\(^{542}\)

Both UPR reports were formulated through a broad consultation which involved the government, KNCHR and civil society stakeholders.\(^{543}\) In addition to an initial consultative meeting during UPR II in November 2013, ACIHRO held another preparatory meeting in the same month in which the Office of the High Commissioner for Human Rights was an additional participant.\(^{544}\) Kenya’s NGO consultation was facilitated by the Kenyan Stakeholder Coalition for the UPR (KSC) which provided stakeholders like the

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\(^{540}\) Ibid.

\(^{541}\) The Kenya Gazette, above n 539, 14 [a] [c] and [f].

\(^{542}\) *The Constitution of Kenya*, art 156 (4).


Gay and Lesbian Coalition of Kenya the opportunity to be represented in the coalition. The KSC comprised 97 NGOs representing 9 broad human rights issues. By engaging with the KSC, the government engaged with the various human rights issues they represented. A draft state report prepared by a subcommittee of the ACIHRO was endorsed by all stakeholders in a forum organised by the ACIHRO in October 2014. This is an important aspect of the state’s consultation process because it provides NGOs the opportunity to suggest inputs to the national report so that it is comprehensive and reflective of the actual human rights situation in the country. Taking into account NGO comments on the draft report also assists the report to reflect efforts made by the state to improve the human rights situation in the country and that recommendations to address prevailing human rights issues are relevant and substantial.

However, many of the stakeholders’ contributions were not included in the final report of the state. These included issues on the death penalty and sexual orientation. Nevertheless, the pre-review consultation meetings were of mutual benefit to the state and the NGO stakeholders. It provided the NGO stakeholders with information that would enable them prioritise issues in their UPR campaign and the kind of recommendations to lobby states to make to the Kenyan UPR delegation. Also, the fact that Kenya and many African states have engaged various stakeholders in the preparation of their reports can help create human rights awareness among state institutions, right holders and various domestic stakeholders. Over time, this can help shape the logic of

545 An important point to note here is that prior to the 2015 High Court judgement in the case *Eric Gitari V Non-Governmental Organisation Coordination Board and 4 Others [2015]* eKLR, Gay and Lesbian peoples’ right to form an Association bearing the name gay and lesbian was not recognised in Kenya. See Section 5.6 for details on how the new constitution of Kenya impacted on this development.

546 These included Minority and Indigenous Rights Cluster; Sexual Minorities Cluster (including Gay and Lesbian Coalition of Kenya which was at this moment unregistered); Child Rights Cluster; Old Persons Cluster; Women Cluster; ESCR Cluster; Youth Cluster; Disability Cluster; and Civil and Political Rights Cluster.

547 Ibid.

appropriateness and create a ‘symbiotic relationship’ between international and national human rights norms.

While ACIHRO has engaged with stakeholders and taken the UPR process seriously, its engagement with the UN human rights treaty body reporting is still to fully witness this level of commitment. Despite its establishment in 2005, Kenya before its UPR I had several overdue treaty body reports. For example, it had not submitted any report to the Committee on the Elimination of all Forms of Racial Discrimination. The initial report was due in October 2002, second report in October 2004 and the third and fourth reports after each subsequent two years. Kenya’s reporting to the treaty bodies has been described as ‘inconsistent and a manifestation of lack of political will.’ Its initial report to the Committee against Torture which was due in 1998 was only submitted in 2007. Its second report to the UN Human Rights Committee which was due in 1986 was only submitted in 2004.

The UPR process has had some impact on Kenya’s compliance with its UN treaty body reporting obligations. After its UPR I in 2010, the government began to meet many of its outstanding reporting obligations. While there was no specific UPR I recommendation to Kenya to this effect, Kenya had made a pledge in 2009 to continue to submit national reports to the treaty bodies when it sought membership in the HRC. It submitted its first, second, third and

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549 Based on the logic of appropriateness state actions are driven by rules of appropriate or exemplary behaviour, organised into institutions. Rules are followed because they are seen to be natural, rightful, expected, and legitimate. See James G March and Johan P. Olsen, ‘The Logic of Appropriateness’ (ARENA Working Papers No WP 04/09, Centre for European Studies University of Oslo, 2004).


554 See also Kenya’s 5th and 6th reports to the Committee on the Elimination of All Forms of Discrimination against Women. They were due in 2001 but only submitted in 2006. See Ibid.

fourth reports to the Committee on the Elimination of all Forms of Racial Discrimination in 2011\textsuperscript{556} and other outstanding reports.\textsuperscript{557} However, Kenya (as of February 2017) still has two overdue treaty body reports with one more than 10 years overdue.\textsuperscript{558} Therefore Kenya has engaged more rigorously with the UPR consultation and reporting process than with the UN treaty bodies.

From the above analysis of Kenya’s pre-review consultation process, it can be concluded that the Kenyan government undertook broad consultation for its UPR process, but such broad consultation was made largely possible by the instrumentality of the NGO stakeholders who formed coalitions representing a broad range of human rights issues. While the government was willing to engage with many human rights issues during the consultation process, such engagement was not extended to the issues of sexual orientation and the death penalty. Nevertheless, Kenya has more actively engaged with the preparation of its UPR reports than with the treaty body reports despite the fact that the same domestic committee (ACIHRO) is responsible for the preparation of both UPR and UN treaty body reports. This supports the argument in this thesis that African states have more actively engaged with the UPR than with other human rights mechanisms. Moreover, as indicated above, the UPR has had some impact on the state’s treaty body reporting obligation as Kenya began to submit many of its outstanding treaty body reports after its UPR I in 2010.

5.2.2. The Quality of Kenya’s UPR Delegation

An effective engagement with the UPR process will not simply require that states send a large number of delegates for its review but rather high level delegates. This will mean delegates with the competence to respond to questions during the interactive dialogue stage. The Constitution of a state’s UPR delegation and the authority that heads such a delegation will reflect the state’s perspective on the UPR process. As argued in Chapter 4, a delegation headed by the state ministries of justice or human rights will engage more

\textsuperscript{556} Mbote and Akech, above n 551.
\textsuperscript{557} CEDAW and CCPR for example.
\textsuperscript{558} See OHCHR, ‘Status of Late and Non-reporting by state Parties’ <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/LateReporting.aspx>.
actively with the technical aspects of the human rights issues raised during the review than a delegation headed by the foreign ministries. This can help mitigate the level of politicization. Some few states have also taken a positive approach to demonstrate gender parity and regional balance in their UPR delegation. This is in line with resolution 5/1 which requires states to ‘fully integrate a gender perspective’ in the review. For example Sudan’s UPR I delegation included representatives from the north and south regions of Sudan. Kenya’s delegation demonstrated gender parity as indicated below.

Kenya sent a delegation of 14 members during UPR I and 13 during UPR II. The number of delegates states send for the review depends on factors such as the size of the state, its financial capabilities and whether or not it has a permanent mission in Geneva. While large and economically powerful African states like Nigeria can send a delegation of 26 persons, other smaller states like Gabon can only send a delegation comprised of 6 persons. Kenya is one of the African states that have benefitted from the Voluntary Fund for Participation in the UPR Mechanism.

An examination of the composition of the Kenyan delegation indicated the government’s willingness to be committed to the process rather than to simply consider it as a foreign affairs issue. The delegation for UPR I was headed by the state Minister of Justice, National Cohesion and Constitutional Affairs and UPR II by the Attorney General of the Republic. More so, more than half of both delegations were comprised of legal and judicial personnel rather than diplomats. In addition, there was gender parity in both UPR delegations. Seven

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of the delegates during UPR I were female and 8 during UPR II.\textsuperscript{565} This is an interesting development because women are generally underrepresented in government appointments and national institutions in many African states. In Kenya for example, only 10\% of women were represented in parliament in 2009 placing Kenya at 112\textsuperscript{th} position in the ranking of female participation in parliaments on a global scale.\textsuperscript{566} In both UPR delegations, there was a representative from the National Gender and Equality Commission.\textsuperscript{567}

Kenya, therefore, had a comprehensive representation during both cycles of its UPR. The competence of its delegation and the gender balance of its composition could be seen as an indication of the government’s commitment to the UPR mechanism. However, such demonstration of gender parity in the composition of Kenya’s UPR delegation should not be mistaken for the government’s commitment to secure equal representation of women in government. The government has not met the threshold of 30\% of women in parliament as required by the new Constitution.\textsuperscript{568} This attracted many recommendations from both states and NGOs during UPR II.\textsuperscript{569} Nevertheless, the exercise of gender parity in its UPR delegation may be seen as a positive step and an indication of the government’s effective engagement with the UPR mechanism. Despite Nigeria’s large UPR delegation (26 and 34 delegates during UPR I and II, respectively), its delegation included only 7 women.\textsuperscript{570}

\textsuperscript{565} Ibid.
\textsuperscript{566} By 2013, Kenya had made progress and risen up the ranking scale to the 74\textsuperscript{th} position; Nigeria in 2015 ranked at 132\textsuperscript{nd} position with only 6.5\% of female participation in Parliament. See Inter-Parliamentary Union, ‘Women in National Parliament’ (August 2015) <http://www.ipu.org/wmn-e/classif/2015.htm>.
\textsuperscript{567} Ibid.
\textsuperscript{568} The Constitution of Kenya, Art. 27 (8).
\textsuperscript{570} Another example is Senegal whose UPR I delegation was composed of 15 men and 5 women.
The quality of Kenya’s participation on this aspect therefore outshines that of Nigeria.

5.3. KENYA AS A REVIEWER AND AS A STATE UNDER REVIEW

5.3.1. Kenya as a Reviewer

An examination of Kenya’s engagement as a reviewer indicates that Kenya did not effectively engage as a reviewer in either cycle of the UPR. During UPR I (when it was not a HRC member), Kenya did not engage with the review of any state. Many states, in particular smaller states, do not participate or make recommendations to every state that comes up for review. States with limited or no permanent mission in Geneva will be very selective of the review sessions to attend. While this is not the case with Kenya and cannot explain their absence during UPR I as a reviewer, internal factors such as elections and ICC prosecution could arguably have limited their participation in the review of other states during UPR II.

During UPR II (when Kenya was a HRC member), Kenya’s engagement as a reviewer improved, but the state participated selectively in the review of other states. Kenya participated in 13 of the 14 UPR II sessions and reviewed 47 states out of the total of 193 states which were reviewed during UPR II. Twenty-two of the 47 states reviewed by Kenya were African states and 14 were Asian states. Kenya participated in the review of 10 states from the WEOG, GRULAC and EEG groups combined. Kenya therefore tends to be more attracted and comfortable with the review of its regional peers. This reinforces the theme of regionalism running through the engagement of African states with the UPR. During UPR II Kenya made 89 recommendations out of a total of 3,467 recommendations made by African states. This represents just about 1% of the recommendations made by African states and about 0.2% of the recommendations made by all states. Figure 5.1 below breaks down the recommendations made by Kenya across five regional blocs.

571 These are Angola, Burundi, Botswana, Comoros, Djibouti, Eritrea, Ethiopia, Nigeria, Ghana, Mauritius, Republic of Congo, and Zambia.
572 These are China, Uzbekistan, Cambodia, Yemen, United Arab Emirate and Sri Lanka
to determine the extent of its participation as a reviewer and the quality of its recommendations.

As indicated in figure 5.1 above, Kenya made more recommendations to African states (41% of the overall 89 recommendations by Kenya) than to any other group of states. This is closely followed by Asian states (32% of the overall 89 recommendations). A plausible explanation for this is that both regions have adopted a softer approach to the UPR and both largely share a common position on issues like the death penalty. Such commonality can be a factor that attracts mutual participation in their respective reviews. While Kenya engaged within and outside its regional group as a reviewer, it was selective in its engagement as a reviewer and engaged very little with the review of states from WEOG. With the exception of Latvia, Kenya did not engage in the review of states from EEG. This can arguably be seen as strategic engagement given the limited resources at its disposal for the review. The principle of universality has distinguished the UPR mechanism from other UN human rights monitoring mechanisms on the basis that all UN member

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573 See McMahon, above n 65, 3.
574 Resolution 5/1, UN Doc A/HRC/RES/5/1, para 3(a).
states are subject to its review. However, the review cannot be seen as truly universal when states become selective in reviewing their peers and do not attend the review sessions of some regional groups of states. While the UPR mechanism does not prevent any state from participating in the review of its peers, the limited time allocated to each state and for the interactive dialogue session may discourage the participation of some states in the review of their peers.  

States were very receptive to the recommendations made by Kenya. About 79% of the recommendations made by Kenya were accepted by its peers. However, the majority of the recommendations (68%) were non-specific recommendations. The majority of the recommendations touched on general issues (R4) or required the state under review to ‘consider’ undertaking a particular action (R3). As such, the recommendations were not critical enough to trigger specific action on the part of the state under review.

A combined 32% of the total 89 recommendations made by Kenya during UPR II required a specific action (R5) from the states under review. The majority of the total 89 recommendations (40%) required a general action (R4) such as the recommendation for Eritrea to ‘enhance its cooperation with the mechanisms of the Human Rights Council and OHCHR.’ Such general recommendations can be frustrating to both the state under review and other UPR stakeholders. This is because they are vague in terms of the means of implementation and measuring outcomes. Also, it has been observed that general recommendations (R4) tend to be more attractive to states because they are more easily ‘implemented’ as a result of the fact that their implementation is open to interpretation. Abebe has even argued that African states largely make general recommendations (R4) which are at times too general to be implemented. However, African states have in some cases not hesitated to

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578 Abebe, above n 58, 16; The pacific approach adopted by most African states to the UPR largely prompts them to make general recommendations.
make specific recommendations (R5), even to their African peers. About 16% of the total 89 UPR II recommendations made by Kenya to its African peers required specific action (R5). As indicated in figure 5.1, Kenya made more specific recommendations to its African peers than to any other group of states. Kenya for example recommended during UPR II that Angola ‘[c]omplete, without delay, the ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.’\(^{579}\) It also recommended that Mozambique ‘[r]atify the International Covenant on Economic, Social and Cultural Rights.’\(^{580}\) Both recommendations were accepted. In addition, the fact that the recommendations states make may be general does not necessarily imply that they are not valuable.

It has also been suggested that African states mostly make recommendations which require minimal action (R1).\(^{581}\) Such recommendations call upon the state under review to seek technical and financial assistance in the implementation of human rights. Twenty percent of the recommendations made by Nigeria to African states during UPR I fell in this category. All the recommendations made by Nigeria to Chad during UPR I required Chad to seek technical and financial assistance in the implementation of human rights.\(^{582}\) Interestingly, Kenya made no recommendation under this category


\(^{582}\) Human Rights Council, \textit{Report of the Working Group on the Universal Periodic Review – Chad}, 12\(^{th}\) sess, Agenda Item 6, UN Doc A/HRC/12/5 (5 October 2009) para 74; The African group has the majority of states that have applied and benefitted under the Voluntary Fund for participation in the UPR and the UPR Voluntary Fund for Financial and Technical Assistance. See Out of the 67 states that have applied to this fund, 27 are from Africa including Kenya. See Office of the High Commissioner for Human Rights (OHCHR), \textit{Requests for financial assistance under the Voluntary Fund for Participation in the UPR Mechanism}, above n 563; 21 African states have requested assistance from this fund compared to 13 states from Americas, 11 states from Asia and Pacific, 12 states from Europe and Central Asia and two states from Middle East. See OHCHR, \textit{UPR Voluntary Fund for Technical and Financial Assistance} <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRVoluntaryFundFinancialAndTechnicalAssistance.aspx>.  

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as indicated in figure 5.1. This would suggest that there is no particular preference for R1 recommendations among African states.

Kenya has not actively engaged as a reviewer compared to Nigeria. Nigeria as indicated in the earlier Chapter participated in 12 sessions during UPR I and made a total of 108 recommendations to 60 states. During UPR II, Nigeria participated in 11 of the 14 sessions and made a total of 102 recommendations to 64 states across the five different regional groups with recommendations across the 5 action categories. In the case of Kenya, it did not participate in the review of any state during UPR I but during UPR II there was limited improvement in the nature of its engagement as a reviewer. Also, both Nigeria and Kenya have displayed a double standard in their engagement. Kenya, just like Nigeria, refused to accept a similar recommendation it made to its peer. Kenya recommended that the United Arab Emirates should consider ratifying ICRMW among other instruments but rejected similar recommendations to itself from Sierra Leone, Madagascar and the Philippines. Nevertheless, the nature of Kenya’s engagement as a reviewer was reflective of the theme of regionalism as it made more recommendations to African states and participated more in the review of states within the African regional group during UPR II than states in the EEG or WEOG regional groups. The disparity between Kenya’s engagement with the UPR when it was a member of the HRC (UPR II) and when it was not (UPR I), underscores the potential for membership in the HRC to have some influence on state engagement with the UPR. Kenya engaged more as a reviewer during UPR II when it was a HRC member compared to its non-engagement during UPR I when it was not a HRC member, although there may be other reason contributing to this result.

583 In Chapter Four (section 4.3.1.1), I noted that Nigeria recommended during UPR I that Argentina ‘Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights already signed by Argentina, aiming at the abolition of the death penalty’. Argentina accepted this recommendation. When the same recommendation was made by Brazil and Montenegro to Nigeria during UPR II, Nigeria did not accept the recommendation. See HRC UPR I Report – Nigeria, UN Doc A/HRC/11/1, para 137.5.
5.3.2. Kenya as a State under Review

Kenya was reviewed by the HRC in May 2010 and January 2013 for UPR I and II respectively. During UPR I, 50 states made recommendations to Kenya, 14 of which were African states. A total of 150 recommendations were made and Kenya accepted 128.\textsuperscript{586} It rejected seven of the recommendations and postponed its response to 15 of the recommendations.\textsuperscript{587} However, during the 15th Session of the HRC, the Kenyan delegation accepted two recommendations on the rights of Indigenous people that were previously rejected.\textsuperscript{588} Furthermore, the government responded to recommendations to abolish the death penalty by stating that ‘any attempt to abolish it would not enjoy parliamentary approval at the present time.’\textsuperscript{589} In addition, the government ‘rejected in full’ the recommendations on the decriminalisation of same-sex unions.\textsuperscript{590} This reinforces the cultural relativist approach of African states highlighted in the previous Chapter.\textsuperscript{591} The three issues raised most frequently by states during Kenya’s UPR I related to judicial reform, truth and reconciliation; cooperation with international mechanisms; and women, children and persons with disabilities.\textsuperscript{592}

During UPR II, there was an increase in the number of recommendations made to Kenya as well as an increase in the number of recommending states. Ninety-one states made 253 recommendations to Kenya. Kenya accepted 192 and rejected 61 of the recommendations.\textsuperscript{593} African states engaged with the review of Kenya at a similar rate to their engagement with Nigeria. During UPR I, 13 African states made recommendations to Nigeria and 14 to Kenya. During

\begin{footnotes}
\item[586] \textit{HRC UPR I – Kenya}, UN Doc A/HRC/15/8, paras 101.1–103.7.
\item[587] Ibid paras 102.1-102.15.
\item[589] Ibid para 417.
\item[590] Ibid para 420.
\item[591] Nigeria rejected all the recommendations on same sex marriage during UPR I and subsequently strengthened its position through the enactment of the Same Sex Marriage Prohibition Act in 2010, officially criminalising same sex relations.
\item[592] See section 5.5 for details on how these categories were arrived at, the various thematic issues raised by states in their recommendations and the relationship between state and NGO recommendations.
\end{footnotes}
UPR II, 26 African states made recommendations to Nigeria and 27 to Kenya. The majority of recommendations to Kenya during UPR II related to issues such as women and children’s rights; ratification of international human rights instruments; socio-economic rights; the rights of civil society and human rights defenders; and the death penalty. Recommendations on issues relating to cooperation with international mechanisms and the rights of women, children and persons with disabilities represented about 72% of the total rejected recommendations. Figures 5.2 and 5.3 below provide an overview of Kenya’s responses to UPR I and II recommendations. They provide a general overview and compare Kenya’s responses to the recommendations made by its regional peers and those made by other groups of states.

Figures 5.2 and 5.3 indicate that Kenya actively engaged with the recommendations from both its regional group and all other groups of states. While Kenya was more inclined to accept recommendations from its regional peers during UPR I (Figure 5.2), it also accepted most of the recommendations from states outside its regional group. None of the recommendations during its UPR I (Figure 5.2) was rejected outright except for the one which required the state to decriminalise same-sex relations and provide protection and equal
treatment to LGBT persons.\textsuperscript{594} This reinforces the theme of cultural relativism evident in the engagement of African states and that was highlighted in the earlier Chapter on Nigeria’s engagement with the UPR. States within the region are not willing to consider any negotiations on their position on this issue.

During UPR II (Figure 5.3), there was a significant increase in the percentage of rejected recommendations (from 13% to 24%). The increase in the number of rejected recommendations can be explained by the rise in the number of recommendations calling for the ratification of international instruments, abolition of the death penalty and the decriminalisation of same sex relationships. For example, during UPR I, 22 recommendations required Kenya to take an action on certain international treaties, the majority of which were accepted by the state. During UPR II, 35 recommendations were made on this issue, the majority of which were rejected by the state and most of which required the state to ratify optional protocols to various human rights treaties. This indicates that the Kenyan delegation was not willing to allow for greater scrutiny of its human rights record as these optional protocols either establish a communication procedure or an inquiry procedure or both.\textsuperscript{595}

The right for states to reject recommendations has been a major criticism of the UPR.\textsuperscript{596} However, the fact that states reject recommendations does not necessary imply it creates no effect. The social and cognitive pressures generated by the process of acculturation can over time influence a state to alter its position and act on the rejected recommendations. The UPR Info study on mid-term implementation of UPR I recommendations also revealed that 15% of the rejected recommendations had nevertheless triggered an action.\textsuperscript{597}

\textsuperscript{594} HRC UPR I – Kenya, UN Doc A/HRC/15/8, para 101.8.

\textsuperscript{595} The communication procedure permits individuals to petition the state about human rights violations before a competent treaty body. The inquiry procedure allows for an inquiry into systematic and serious human rights abuses in states that are parties to the relevant optional protocol.

\textsuperscript{596} Heather Collister, above n 112, 116-119.

Kenya’s overall high acceptance level during UPR I (about 87%) and UPR II (76%) and its high intra-regional acceptance level may demonstrate the state’s general receptiveness to UPR recommendations. This supports two earlier general findings made on UPR I. First, African states accepted more recommendations from their regional group than did any other state from their respective regional groups. I argue that this aspect of identification is an important micro element which can facilitate the process of acculturation by causing recommendations made by states within a regional block, which otherwise may not have been accepted, to be accepted by members of that regional block. Secondly, African states accepted a higher percentage of recommendations during UPR I than any other group of states. However, such a superficial analysis may cloud other potential aspects of a state’s receptiveness to the UPR recommendations. A clearer picture of this level of receptiveness can be seen when the acceptance level is broken down into the various categories of recommendations. Figure 5.4 below examines this aspect to determine whether Kenya was receptive to the various categories of recommendations made by its peers during its reviews. The rank under which a recommendation falls equally plays a crucial role in the state’s implementation. This is because states generally are keener to accept recommendations that are general (R4) because it gives the implementing state greater autonomy to define how such a recommendation is to be implemented and also a comfortable margin of appreciation as to the meaning of implementation. However, the more general a recommendation, the harder it is to measure implementation.

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598 African states accepted 94% of the recommendations from African states, Asian states accepted 92% from Asian states and WEOG states 62% from WEOG states. See McMahon, above n 65, 19.
599 Ibid.
UPR I (Figure 5.4) shows that the state’s acceptance level reasonably spread across the various categories of recommendations from those requiring a minimal action (R1) to those requiring a specific action (R3). As earlier indicated, all its UPR I recommendations were accepted except for that which required the state to take concrete steps to provide for protection and equal treatment of LGBT persons, classified as a general recommendation (R4). Kenya generally engaged with the various action categories of recommendations during UPR I, indicating its receptiveness to the recommendations. However, figures 5.4 and 5.5 also indicate that the percentage of specific recommendations (R5) that were rejected by Kenya increased from 9% to 21% across UPR I and II. More than half of the total specific recommendations made to Kenya were rejected and this constituted 19% of the overall UPR recommendations to Kenya. This aspect of the state’s receptiveness could be clouded by the overall high percentage of accepted recommendations and indicates a significant resistance to the acceptance of specific recommendations.

5.3.2.1. Specificity of Recommendations and a ‘Softer Approach’

An interesting development in the review of Kenya is that it was engaged by its regional peers in some sensitive issues within the region like the death penalty, and in some specific recommendations (R5) such as to ‘[a]adopt the
bill on persons deprived of liberty’. Kenya tends to be more inclined to accept a sensitive recommendation if it requires a continuing action (R2) or to consider an action (R3) rather than one requiring a specific action (R5). In other words, the state would easily accept recommendations which required ‘softer’ actions than those calling for ‘tougher’ actions. For example during UPR II, it accepted R2 recommendations (to continue action) from Angola and Rwanda to ‘[c]ontinue its efforts towards the abolition of the death penalty’ but rejected R5 recommendations (specific action) from France and Poland to ‘[a]bolish the death penalty.’ Similarly during UPR II, it accepted a ‘softer’ recommendation from Albania to ‘[r]aise public awareness on the abolition of the death penalty…’ but rejected a ‘tougher’ recommendation from Australia to ‘[f]ormalize its moratorium on the death penalty.’

While Abebe observed during UPR I that African states largely made general recommendations, UPR II has witnessed greater specificity in the recommendations from African states. About 31% of recommendations made by African states during UPR II to Kenya required a specific action. Some have stepped out of the regional dynamics to make specific recommendations on issues like the death penalty. Gabon during Kenya’s UPR II recommended that Kenya ‘[c]omplete the process of abolition of the death penalty.’ Madagascar recommended that Kenya ‘[a]ccede to all human rights instruments that it is not yet a party’. While Kenya rejected this recommendation, it accepted a ‘softer’ one from Lesotho and Nicaragua to consider or pursue efforts to adopt international instruments which it is not yet a party to. This further reflects the inclination of Kenya to accept only ‘softer’ recommendations. All rank 2 recommendations (to continue action) were accepted by Kenya during UPR II. This is because the majority of the

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602 Ibid paras 143.39 and 143.44.
603 Ibid 142.61.
604 Ibid 143.38.
605 Ibid paras 142.1 and 142.2.
recommendations required the state to continue the implementation of certain actions which were triggered by the transitional justice processes within the state and the new Constitution. Some of these actions included police and judicial reforms, socio-economic rights and cooperation with international mechanisms such as the ICC and had been recommended by states during UPR I. The Kenyan delegation therefore had no difficulty accepting recommendations which required it to continue implementation on these issues. A similar ‘soft’ approach to the UPR was demonstrated in the engagement of Nigeria with the UPR and generally reflects the approach of African states in the review of their regional peers.

However, while the above ‘soft’ approach tends to be attractive to African states, a more critical perspective is that they sometimes produce general recommendations which are vague and consequently it is very difficult to assess their implementation outcome. For example Azerbaijan recommended that Kenya should ‘[f]urther promote good governance.’ The KNCHR when commenting on the implementation of this recommendation noted that it was difficult to assess.

To an extent, Kenya engaged effectively with different categories of recommendations as a state under review and accepted a high percentage of recommendations. Nevertheless, it can be argued that Kenya has not always been consistent with its position between UPR I and II as there is a potential finding of double standards in its engagement. During UPR I it accepted a recommendation from Burkina Faso to ratify ICRMW. During UPR II, it refused to accept the same recommendation from Sierra Leone, while at the same time recommending that the United Arab Emirates should consider

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609 HRC UPR II Report – Kenya, UN Doc A/HRC/29/10, paras 142.118 and 142.120.
610 Ibid para 142.98.
611 Ibid para 142.112.
612 See section 5.6 for other examples and the implementation outcome.
613 See Appendix II, para XV.
ratifying ICRMW among other instruments. Charlesworth and Larking have recently observed the tendency of the UPR to degenerate to this aspect of ritualism where a state criticises another state for rights failures but itself does not provide adequate protection for the right in question. The issue of rights ritualism in the engagement of Africa states with the UPR is further developed in Chapter 6 in relation to the engagement of South Africa with the UPR.

In conclusion, this section underscores that Kenya’s UPR engagement as a reviewer and as a state under review was superficial, compared to Nigeria. Kenya did not review any state during UPR I. Its engagement during UPR II as indicated above was selective, and it reviewed less states compared to smaller and poorer states like Gabon, Zimbabwe and Togo. Nevertheless, Kenya’s engagement reinforced the themes of regionalism and cultural relativism in the engagement of African states with the UPR. This was indicated by the fact that it made and accepted more recommendations from African states than from any other group of states. Kenya’s engagement equally re-echoed the ‘softer’ approach of African states to the UPR. This was established by the fact that Kenya rejected all 10 specific recommendations (R5) to abolish the death penalty but accepted a ‘softer’ recommendation to ‘[r]aise public awareness on the abolition of the death penalty’.

Another important issue that was analysed is the quality of recommendations that Kenya accepted. While Kenya accepted a high percentage of recommendations (See Figure 5.2 and 5.3), the recommendations accepted during UPR II were more general (R4) than specific (R5). This indicated the unwillingness of the state to engage with specific recommendations which accounted for 85% of the overall 61 rejected recommendations and 19% of the overall 150 recommendations to Kenya. General recommendations (R4), as indicated above, have been criticised because they tend to be vague and pose a difficulty in assessing implementation. The inclination of African states and in particular Kenya, to make and accept such recommendations was also

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617 Charlesworth and Larking, above n 49, 15.

demonstrated. However, such criticism is not unique to the UPR mechanism as the recommendations and concluding observations of treaty bodies have been criticised for lack of ‘clarity, degree of detail, level of accuracy and lack of specificity.’  

Rejecting a high percentage of specific recommendations (R5) may diminish the level of Kenya’s receptiveness and engagement at the review stage. However, recommendations which are phrased in general terms (R4) may at times subsequently translate to specific action (R5) at the implementation stage. For example the general recommendation (R4) by The Netherlands that Kenya ‘[p]rovide adequate protection for witnesses of human rights violations’ was implemented through a specific action, the enactment of the *Witness Protection Amendment Act, 2010* which established a Witness Protection Agency.

### 5.4. THE ROLE OF THE KNCHR AND DOMESTIC NGOs IN KENYA’S UPR PROCESS

As examined in Chapter 2, the inclusion of NGOs as participants in the UPR process was a compromise which limited the extent of their participation in the UPR process. Their formal participation is generally limited to the pre-review national consultation process. While they can attend the adoption of state outcome reports at the plenary session of the HRC, they cannot make statements or pose questions during the interactive dialogue session. In Chapter 2, I highlighted the significant role played by the African group in the HRC in limiting NGO participation in the UPR. I noted the criticisms by African scholars such as Abebe and Bulto as well as other UPR scholars like McMahon, to the effect that the limitation of NGO participation in the UPR weakens the review process. According to Schokman and Lynch, there are three obstacles to effective NGO engagement with the UPR process. These are the political nature of the process, limited formal opportunities for NGOs,

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621 See Appendix II, para XVI. Implementation of Kenya’s UPR I recommendations is examined in detail in section 5.6 of this Chapter.

622 See Abebe, above n 58, 29; Bulto, above n 70, 250; McMahon, above n 65, 26.

623 Schokman and Lynch, above n 155, 132-144.
and the lack of knowledge about the UPR. However, Schokman and Lynch in their analysis did not consider the domestic operational environment and constraints. In addition to the limitations to direct NGO participation in the UPR process, domestic NGOs within many African states are further constrained by the domestic NGO operational environment which tends to be hostile or distrustful of NGO activities. Many African states have either restricted the establishment or activities of NGOs or limit, by legislation, their ability to secure foreign financial aid. It is therefore not surprising that the African Group in the HRC actively sought to limit NGO involvement in the UPR.

Despite the limitations to NGO participation in the UPR process, Schokman and Lynch have provided pragmatic suggestions on how NGOs can effectively engage in the UPR process. These include the formation of NGO coalitions, effective media engagement and a focused advocacy strategy. While these three suggestions by Schokman and Lynch are practical ways for effective NGO engagement, they are yet to be tested on specific state engagement. This section builds on these practical suggestions and empirically tests them in the case of Kenya to determine their impact on Kenya’s UPR process. I argue that NGOs have found many ways to bypass the limitations to their direct participation and to strategically engage with the UPR process. This section examines the formation and composition of the Kenya Stakeholder Coalition (KSC) for the UPR, its media and advocacy campaigns, and the impact on Kenya’s UPR process. I also consider whether the NGO domestic operational

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624 Ibid.
625 In Angola, domestic legislation prohibits NGOs from taking part in ‘all activities of state organs; electoral processes.’ See Law of Association 1991 (Angola), 14/91 of 11 May 1991, Art. 8; In Eritrea, UN and bilateral agencies have been restricted by the Eritrean government from directly funding domestic NGOs. See Administration Proclamation No. 145/2005 (Eritrea); In 2009, Nigeria characterised the allegations in some International NGOs reports for the UPR as ‘preposterous’, ‘patently false’ and ‘unhelpful to the UPR process’. See HRC UPR I Report – Nigeria, UN Doc A/HRC/11/26, para 8; In March 2016, Sudan obstructed the participation of the representatives of four civil society organisations in the UPR of Sudan by confiscating their passports. See The Worldwide Human Rights Movement (FIDH), ‘Sudan blocks civil society participation in the UN-led human rights review’ (2016).
626 Schokman and Lynch, above n 155, 132-144.
environment in Kenya and other factors may have hampered their effective engagement with the UPR process.

5.4.1. The Formation and Composition of the KSC

The Kenyan National Commission on Human Rights (KNCHR) was very instrumental in the formation of the KSC.\(^{627}\) The KNCHR introduced the UPR process to NGOs in Kenya in a four-day conference in October 2008. It convened another meeting on 10 March 2009, attended by 22 people from 17 CSOs.\(^{628}\) It was during this second meeting that the Kenya Stakeholders’ Coalition (KSC) for the UPR was established. Schokman and Lynch have identified three key benefits in forming NGO coalitions. These are: the provision of expert input on the scope and nature of recommendations; the creation of validity and credibility; and ensuring a long term focus on implementation.\(^{629}\) First, a strong domestic NGO coalition can help provide expert input and guidance in identifying and prioritising the major relevant human rights issues. This is because of their on-the-ground experience and their understanding of the national legal, political, social and economic context.\(^{630}\) Secondly, given the distrust and hostility by African governments towards NGOs as noted above, the formation of NGO coalitions can empower NGOs and enhance their credibility and capacity to influence state engagement at various phases of the UPR. NGO coalitions can have more influence on the UPR process than individual NGOs especially by influencing state UPR recommendations through their advocacy strategies. As Schokman and Lynch observe, ‘representing a large NGO coalition opens the door to many Geneva-based missions, which means that greater effort can be made to ensure that the


\(^{629}\) Ben Schokman and Phil Lynch, above n 155, 133-135.

\(^{630}\) Ibid 133.
recommendations ultimately made to the state are as relevant and practical as possible.\footnote{Ibid 134-135.}

Notwithstanding, for any UPR NGO coalition to effectively engage in the UPR process, it is important that such a coalition is stable and broadly representative. If the membership of the coalition does not broadly represent all relevant NGOs, then some particular issues may be overlooked. Equally, if the membership is not stable, then arguably certain issues may not be appropriately represented at certain times. The membership of the KSC after its formation grew to more than 97 NGOs, broadly representing 9 clusters.\footnote{These are minority and indigenous rights; sexual minorities rights; child rights; the rights of the elderly; women’s rights; ESCR; youth rights; disability rights; and civil and political rights. See Kenya Stakeholder’s Coalition on Universal Periodic Review (KSC-UPR), ‘Coalition Joint Submission’ (13 June 2014) annexure 2 <http://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/KSC_UPR_KEN_S08_2010_KenyaStakeholdersCoalitionforUPR_Annex22.pdf>; Ibid 18-19.}

However, a weakness of this coalition is that its membership has not been stable and has fluctuated at different stages of the review when some coalition members leave the coalition. According to the KNCHR, some NGOs that initially were members of the KSC stopped attending meetings of the coalition.\footnote{Kenya National Commission on Human Rights, above n 628, 19.} It is unclear whether they left due to financial constraints or disagreements about the agenda of the KSC, but this in some ways has limited the effectiveness of the coalition.

After its formation, the KSC agreed on a common approach to the UPR. While it was debated whether the KSC should prepare a single or multiple report, the coalition ultimately submitted a joint UPR stakeholders’ report for Kenya under the nine human rights thematic clusters mentioned above.\footnote{Kenya Stakeholder’s Coalition on Universal Periodic Review (KSC-UPR), above n 632.} The single report had more credibility than the disjointed content issues which multiple reports could raise.\footnote{Ibid 19.} This report was comprehensive and included findings and recommendations from at least 97 Kenyan NGOs working on different human rights issues. However, there is a limitation on the length of such reports. The word limit for reports prepared by NGOs is 10,700, while the

\begin{footnotesize}
\footnotetext{Ibid 134-135.}
\footnotetext{These are minority and indigenous rights; sexual minorities rights; child rights; the rights of the elderly; women’s rights; ESCR; youth rights; disability rights; and civil and political rights. See Kenya Stakeholder’s Coalition on Universal Periodic Review (KSC-UPR), ‘Coalition Joint Submission’ (13 June 2014) annexure 2 <http://lib.ohchr.org/HRBodies/UPR/Documents/Session8/KE/KSC_UPR_KEN_S08_2010_KenyaStakeholdersCoalitionforUPR_Annex22.pdf>; Ibid 18-19.}
\footnotetext{Kenya National Commission on Human Rights, above n 628, 19.}
\footnotetext{Kenya Stakeholder’s Coalition on Universal Periodic Review (KSC-UPR), above n 632.}
\footnotetext{Ibid 19.}
\end{footnotesize}
OHCHR summary of stakeholders’ information is limited to 8,500 words. Therefore, NGO reports cannot detail every human rights issue in Kenya due to the limitation set out. Moreover, the summary of NGO reports prepared by the OHCHR potentially diminishes and dilutes the substance of NGO reports. This makes it vital for NGOs to highlight and prioritise the most critical issues. A NGO coalition is essential in the prioritisation process and needs to be broadly representative.

Despite these weaknesses identified, the KSC represents an example of a strong African NGO coalition for the UPR. This can be contrasted with the NGOs in other African states in which there were no NGO coalitions for the UPR or where there was one, but it lacked a broad and representative mandate. For example in South Africa, whilst there were a few joint submissions, there were no NGO coalitions during UPR I and II. In Nigeria, the CSO Coalition for the UPR in 2013 was neither broad nor representative as its membership was composed of only 13 NGOs and their report failed to address key issues such as socio-economic rights and the death penalty. Therefore a broad, stable and representative NGO coalition can enhance NGO engagement in the UPR process.

5.4.2. The Advocacy Campaign

After the KSC was established, the KNCHR carried out a capacity-building training workshop to empower the KSC members with the skills they would require to effectively participate in the UPR process. A workshop organised by the KNCHR on 19-20 May 2009 equipped the KSC members with a detailed understanding of the principles, technical and practical aspects of the UPR for them to effectively engage in Kenya’s review. As highlighted above,

636 The summary of stakeholders’ information prepared by the OHCHR is one of the three documents used to review each state in the UPR process. NGOs would therefore like to see their concerns reflected in the summary prepared by the OHCHR. See Julie Billaud, ‘Keepers of the Truth: ‘transparent’ documents for the Universal Periodic Review’ in Charlesworth and Larking (eds), above n 49, 76-7.
638 Kenya Stakeholder’s Coalition on Universal Periodic Review (KSC-UPR), above n 632, 15.
Schokman and Lynch have identified the lack of knowledge about the UPR as a major obstacle to effective NGO engagement. The KNCHR therefore played a key role in providing NGOs with the knowledge and technical skills, and to build their capacity to effectively engage with the UPR process. After the KNCHR workshop, the KSC engaged in three important campaigns on Kenya’s UPR. These were an awareness-raising campaign, an advocacy campaign and a media campaign. The purpose of the awareness raising campaign was to sensitise the public and domestic human rights organisations about the new UPR mechanism. It was designed to raise awareness in the grass roots communities and to ensure that the end-report of the KSC is a comprehensive picture of the human rights situation in the country.  

The advocacy campaign was designed to engage the government, international NGOs and foreign diplomats in Kenya on Kenya’s UPR process. The KSC established an Advocacy Charter for this purpose. The Charter highlighted the key human rights concerns in Kenya for the purpose of Kenya’s UPR review. It was intended to influence the government’s approach to the UPR. The KSC presented its list of 15 issues to the government who committed to address 13 of them excluding the death penalty and sexual orientation. This selection further reinforced the cultural relativist approach adopted by Kenya in its UPR engagement. The aim of the Advocacy Charter developed by the KSC was to get foreign diplomats to make similar recommendations to Kenya and assist regional and international NGOs to leverage their networks to influence diplomats during Kenya’s review.

The pre-review side events for NGOs which are organised by UPR Info before each UPR session in Geneva, provides further opportunity for NGO advocacy. There are many factors, including high financial costs and lack of familiarity with procedure, which may prevent domestic NGOs from participating in the

639 Ibid 22.
review process in Geneva. However, in the case of Pacific Island states, Natalie Baird argues that ‘it is possible to envisage a system whereby an international NGO offers a service to national NGOs to appear at side events on its behalf, undertake one-on-one lobbying of individual missions and make a statement at the HRC plenary session’. According to Baird, the pre-review side events can facilitate collaboration and networking between national and international NGOs which can help provide legitimacy to international NGOs as well as increase the capacity of domestic NGOs for effective lobbying and advocacy. The inclusion of international NGOs in the membership of national NGO coalitions for the UPR can promote this collaboration and networking between national and international NGOs. The advocacy campaign by the KSC potentially contributed to influence the recommendations made by states to Kenya during its reviews. I examine this aspect in section 5.5 of this Chapter by determining whether there is a relationship between state and NGO UPR recommendations.

The advocacy campaign by the KSC contributed to proactively engage the Kenyan government in its UPR process. While HRC Resolution 5/1 requires that states prepare their state report for the UPR ‘through a broad consultation with all relevant stakeholders at the national level’, an advocacy plan by an NGO coalition can enable them to proactively engage a reluctant government. An advocacy campaign which focuses on the national UPR consultation process, lobbies state UPR delegates to make key recommendations in Geneva and has a follow-up strategy, can contribute to the effectiveness of NGO engagement with the UPR process. Nevertheless, while effective NGO engagement in this regard can contribute to the effectiveness of the UPR process, it is important to be wary of NGOs that are in reality ‘government

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644 Ibid 34-35.
645 HRC Decision 6/102.
mouth pieces’ or those that prioritise the agenda of their donors which may not necessarily be the priority of the people they claim to serve.\(^{646}\)

### 5.4.3. The Media Campaign

The interactive dialogue phase of the UPR in Geneva is webcast. This provides an excellent opportunity for sensitisation about the UPR and awareness-raising of a state’s human rights record. A 2015 study by Sarah Joseph revealed that media coverage of the UPR is generally insignificant.\(^{647}\) She argues that where coverage exists, it only highlights ‘a “contest” between antagonistic states rather than focusing on its potential to help provide for better human rights outcomes.’\(^{648}\) However, an important finding in her study is that the few instances of UPR media coverage in developing states were sophisticated and tended to be supportive of the UPR process.\(^{649}\) This provides an opportunity for NGOs to use the media as a vehicle for sensitization and to mobilise wider public engagement with the UPR process.

During Kenya’s UPR review, the KSC undertook a media campaign that mobilised international media to attend Kenya’s review in Geneva, engaged the public with Kenya’s UPR process and disseminated information on Kenya’s UPR.\(^{650}\) In particular, Media 21\(^{651}\) assisted the KSC in getting international coverage by mobilizing Kenyan journalists and the international media to attend the stakeholders press briefings in Geneva.\(^{652}\) Media 21 mobilised the international media to attend KSC’s press briefings in Geneva and arranged for a meeting between the KSC team and Kenyan journalists attending a UPR training activity in Geneva.\(^{653}\) In addition, the KSC held a

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\(^{646}\) See Makau Mutua, *Human Rights NGOs in East Africa* (University of Pennsylvania Press, 2008) 47.


\(^{648}\) Ibid 148.

\(^{649}\) Ibid 163-166.

\(^{650}\) Kenya Stakeholder’s Coalition on Universal Periodic Review (KSC-UPR), above n 632, 26-27.

\(^{651}\) Media 21 is a leading provider of audio visual technology registered in Trinidad and Tobago. See Media 21 <http://www.media21ltd.com/>.

\(^{652}\) Ibid.

\(^{653}\) Ibid 26.
national press briefing on 13 April 2010, attended by 7 media organisations. Although this did not result in a significant media coverage of Kenya’s UPR process, it was a step towards engaging the media in the UPR process. However, to promote and mobilise wider national public engagement with the UPR, the KSC and other NGOs within Africa can effectively engage with the domestic media. The KSC did not achieve any significant domestic coverage of Kenya’s UPR process despite a few attempts to engage the domestic media through press briefing and talk-shows. The KSC could engage in a more elaborate media campaign so as to promote and mobilise wider public engagement which can help counter state ritualism in the UPR. However, it may be difficult to overcome the general lack of interest by the media in the UPR process.

Resolution 5/1 requires states to engage stakeholders in the preparation of their UPR national reports. Notwithstanding, the KNCHR and the KSC took a proactive approach in engaging the state at different stages of the review. The approach adopted by the KSC to Kenya’s review process has been referenced in many international forums as an inspiring example of good practice in the UPR mechanism because of the dynamic ways in which it sought to engage the state in its review process. However, the KSC could have secured the participation of grassroots organisations in Kenya whose involvement thus far has been limited by budgetary constraints. The fact that KSC’s meetings and workshops were mostly held in the capital city limited the participation of grassroots organisations. The KSC could have secured their participation in subsequent review cycles by holding these meetings and training workshops across the country.

654 Ibid 26-27.
5.4.4. NGO Operational Environment in Kenya

While NGOs have found ways to bypass the limitations to their direct participation in the UPR as examined above, the domestic NGO operational environment, financial constraints, and the lack of transparency and accountability are factors which can hamper their effective engagement with the UPR process. I focus my analysis on the first two issues since the problem of lack of transparency and accountability among many NGOs in Africa has been adequately addressed by a number of scholars.657

The Kenyan government has made attempts to improve the legal environment for NGOs. However, according to Frank Holmquist, it was not until 1992 when multi-party democracy compelled the state to permit independent citizen activity.658 The specific legislation which directly regulated NGOs in Kenya was the NGOs Coordination Act 1990.659 The Act established a NGO Coordination Board which previously governed NGOs and their operations.660

Between 1997 and 2005, there was a proliferation of NGOs in Kenya. In 1997


659 Non-Governmental Organizations Co-Ordination Act 2012 (Kenya); The Act only went operational in 1992 and it is still the Law until the Public Benefits Organisation Act 2013 goes operational.

660 Ibid s 3.
there were 836 NGOs in Kenya, most of which were located in the capital, Nairobi. By 2005, there were 4,099 NGOs in Kenya. In 2013, this number had doubled to 8,260 and contributed a total of KES 80 billion (about USD 1 billion) to the national economy. NGOs therefore play a vital role in Kenya.

However, the *NGO Coordination Act 1990* was criticised by many as gravely flawed. Patricia Kameri-Mbote, Founding Director of the International Environmental Law Research Centre, has criticised the wide discretion and sweeping powers the Act grants the NGO Coordination Board and the Minister in sections 12, 14, 19 and 32 of the Act. These wide discretionary powers granted to the NGO Coordination Board were exercised in 2014 when the government deregistered 510 NGOs in an anti-terror crackdown, including 15 NGOs accused of having links with terrorism. The UPR tries to promote cooperation and understanding between civil society and governments through the requirement of broad consultation in the preparation of national reports. However, the barriers erected by an atmosphere of suspicion, especially in the face of terrorism, have not been dismantled. There was also a definitional problem in the 1990 Act as the definition of ‘NGO’ in the Act was limited and failed to encompass other CSOs that are for public benefit such as trusts.

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663 Odundo Carolyne Achieng, Determinants Of Non-Governmental Organizations’ Accountability to the Community in Kisumu East District, Kenya (MA Thesis, The University of Nairobi, 2014) 5; for details of the problems the NGO Coordination Act 1990 posed to NGOs see Mbote, above n 37.

664 Ibid 17.


additional flaw of the Act was the absence of a complaint and dispute resolution mechanism for CSOs.

Attempts were made to improve the civil society space in Kenya through the enactment of the *Public Benefit Organisations Act 2013* by parliament, which replaced the *1990 NGO Coordination Act*. The PBO Act resolved the definitional problem and established a complaint and redress mechanism for NGOs. It also established an Independent Registration and Regulatory Agency which would eliminate the wide discretion and sweeping powers exercised by the NGO Coordination Board and the Minister under the 1990 Law.

However, after parliament enacted the PBO Act into law in 2013, the Kenyan government made many attempts to amend the law before making it operational. The first attempt to amend the PBO Act was through the Statute Law (Miscellaneous Amendments) Bill, 2013. It sought, among many other things, to limit the amount of external funding NGOs can receive to 15% and to prevent NGOs from receiving funding directly from foreign donors. This was defeated in Parliament during its second reading and withdrawn from the Bill. The second attempt by the government in 2014 intended to give the PBO Regulatory Agency wide discretionary powers, cut down the number of NGO representatives on the PBO Regulatory Agency Board and give the government greater powers in appointing members to the Board. The last attempt was at the end of 2014 with 54 proposed amendments to the PBO Act. These amendments modified, but largely maintained, the issues in the previous attempts. After more than 1,000 days since the PBO Act was signed into law

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668 There are no special rules in Kenya governing the receipt of foreign funds by NGOs and under section 65 of the PBOs Act, NGOs may engage in lawful economic activities provided income is sued solely to the NGOs registered purposes.
669 *Statute Law (Miscellaneous Amendments) Bill 2013* (Kenya), Kenya Gazette Supplement No. 146 (Bills No. 32) s 27A para 1 and 2.
672 The provisions the government sought to remove included that which required it to provide financial assistance to NGOs and to compel every state organ to ensure that its policies are carried out in a manner that supports a favourable environment for NGOs. See ibid.
the government has delayed its entry into operation. On the 31 October 2016, the High Court of Kenya ordered the government to operationalise the law within 14 days, describing the delay as an abuse of ‘discretion’ and ‘unconstitutional’. However, the government has reportedly refused to comply with the court order.

While the government has been unsuccessful in containing civil society through its proposed amendments, it has been very successful in intimidation, harassment and ill-treatment of civil society representations. My finding in section IV of this Chapter indicates that there was an increase in the number of UPR recommendations by states and NGOs for the Kenyan government to repeal any laws that would constrain NGOs or restrict their access to foreign funding. During Kenya’s UPR II, Australia and The Netherlands expressed concerns about the intimidation and ill-treatment of civil society representatives and the restrictive legislation that constrains them. The US, Canada and Ireland recommended that Kenya implement the PBO Act, repeal any laws that may constrain CSOs and create a safe environment for CSOs which is free from hindrance and insecurity. Germany’s recommendation to Kenya during UPR II targeted one of the proposed amendments to the PBO by recommending that Kenya repeals restrictions on NGO access to foreign funding. Kenya accepted all these recommendations. The impact of the new

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676 HRC UPR II Report – Kenya, UN Doc A/HRC/29/10, paras 62 and 142.140;

677 Ibid paras 142.128, 142.133 and 142.137.

678 Ibid para 143.53; See a similar recommendation by Canada and Netherlands, ibid paras 142.133 and 142.140 respectively.
Kenyan Constitution (2010) in further protecting NGOs is highlighted in section 5.6.

5.4.5. Financial Constraints.

Limited financial resources constitute another major problem for NGOs in Kenya, most of who depend largely on foreign donations to sustain their activities. This large dependence on foreign donors poses a problem as to whether they are accountable to their foreign donors or to the people they serve, and whose agenda they represent. Makau Mutua criticises the dependence of Kenya’s CSOs on foreign donors for their sustainability and agrees with Mahmood Mamdami’s argument that it results in retrogression of civil society.\footnote{Makau Mutua, Human Rights NGOs in East Africa, above n 646, 46.} This is because the agenda of the domestic NGOs arguably is owned by the donors.\footnote{Ibid.} As such, NGOs in Kenya sometimes design programmes which suit donor agendas but which may have little connection with domestic priorities. As noted above, the government of Kenya attempted to limit NGO access to foreign funding at 15% of their budget and to prevent them from directly receiving such funds. However, this could potentially cripple the important work of many NGOs and affect their ability to participate effectively in the UPR process. Due to limited financial resources it is difficult for many NGOs, especially from developing countries, to participate during the plenary sessions of the UPR. For example, despite Nigeria’s large state representation during UPR I, none of the domestic NGOs was able to attend and make oral submissions during its plenary session. Similarly, despite the strategic and fruitful engagement of the KSC during the first review of Kenya, financial constraints hampered the participation of many KSC members in the review process in Geneva.\footnote{Another reason is that most of the members of the KSC had not been accredited by the Economic and Social Council (ECOSOC). Only accredited NGOs can participate in the Geneva–based sessions. See Kenya National Commission on Human Rights, ‘Accounting for Human Rights Protection under the UPR: The Difference Kenya’s Stakeholders Made’ (2011) 59.} Apart from the KNCHR, none of the 97 members of the KSC made oral submissions during Kenya’s UPR I plenary session of the
HRC. More so, while the participation of states in the UPR mechanism is supported by the Voluntary Fund for Participation in the UPR Mechanism, NGO participation is not supported by this fund.

Overall, this section has demonstrated the important role NGOs can play in the UPR and how the KSC strategically engaged in the review of Kenya through its awareness raising, advocacy and media campaigns. This was a positive approach to engaging the state, especially at a time when other domestic NGOs in Africa are still struggling to understand and learn the dynamics of the UPR mechanism and the role they can play. Nevertheless, the KSC needs to ensure stability in its membership, reach out to grassroots organisations and intensify its local media campaigns. Engaging the state in its advocacy campaign demonstrated two things. First, the state has been consistent in its culturally relative approach to the UPR in its engagement with both NGOs and states. It was not willing to accept recommendations on issues of sexual orientation from its peers during the review and when addressing the 15 issues raised in the Advocacy Charter of the KSC. Second, the advocacy campaign demonstrated the potential for NGOs to influence state recommendations to Kenya through the advocacy charter. However, this section argued that the ability of the KSC and other domestic NGOs to effectively engage in the UPR is threatened by the NGO operational environment. Many of the proposed amendments to the PBO Act could further constrain the NGO environment and impact on their ability to effectively engage in the UPR process such as the attempt to restrict access to foreign donations. While the government was unsuccessful in achieving the proposed amendments, it has made the environment for NGOs less secure through threats, intimidation and harassment. These, as indicated above, have been reflected in Kenya’s UPR which has shown a rise in state recommendations targeting these NGO issues.

\footnote{Apart from the KNCHR, a total of 8 NGOs (all international) made oral submissions during Kenya’s UPR I plenary session. These included Action Canada for Population and Development, Conectas Direitos Humanos, FIDH, Franciscans International, RADDHO and World Organization against Torture.}
5.5. RELATIONSHIP BETWEEN RECOMMENDATIONS BY THE KSC AND RECOMMENDATIONS BY STATE PARTIES TO KENYA

The question has been asked whether civil society recommendations really matter.\textsuperscript{683} This question is justified given that NGOs are not peers, and the UPR does not require states to respond directly to NGO recommendations but recommendations from peers. Resolution 5/1 which lays down the modalities for the UPR permits NGOs to attend the interactive dialogue session in the UPR Working Group in Geneva but they cannot make any statements or pose questions to states.\textsuperscript{684} However, they are allowed to participate in the adoption of the outcome of the review during the plenary session of the HRC and can make statements then.\textsuperscript{685} Even though states are not obliged to respond directly to NGO statements, many do so in their concluding remarks. But how important are NGO recommendations in the UPR process? As I argue in this Chapter, effective NGO engagement with the UPR can influence state recommendations. Moreover, NGOs help to keep the UPR reporting process honest by providing relevant information for a state’s review\textsuperscript{686} and can be credible voices on the human rights situation on the ground.\textsuperscript{687} By effectively participating in the UPR process, NGOs can contribute to ensuring that state recommendations are relevant and target the major human rights concerns within states.

This section examines whether there is a correlation between state and NGO recommendations to Kenya during UPR I and II. The existence of a strong correlation between both classes of recommendations could indicate that NGO participation in the process is productive and also that state recommendations are relevant and address similar recommendations as NGOs on improving the

\textsuperscript{683} During UPR I McMahon found that recommendations by CSOs matter because they largely influenced the recommendations of states. See Edward McMahon et al, ‘The Universal Periodic Review: Do Civil Society Organisation-Suggested Recommendations Matter?’ above n 46.
\textsuperscript{684} Resolution 5/1, UN Doc A/HRC/RES/5/1, para 18(c).
\textsuperscript{685} Ibid para 31.
\textsuperscript{687} Schokman and Lynch, above n 155, 146.
human rights situation on the ground. In addition, this could contribute in making a determination on whether Kenya indirectly avoided or engaged with NGO recommendations when it engaged with the recommendations of other states.

In my analysis in Tables 5.1 and 5.2 below, I grouped the various human rights issues raised by NGOs during Kenya’s UPR I and II into 19 categories to facilitate analysis and presentation of data. To arrive at these broad clusters/categories, the analysis considered how frequently each category was mentioned, the logic and structure of national reports, the categorisation adopted by the OHCHR in the summary of stakeholders’ submissions and those of other studies. Most domestic NGOs in Kenya made written submissions for the UPR as a coalition. For example, apart from the KSC which comprised at least 97 NGOs, there were 4 other joint submissions during Kenya’s UPR I. In the analysis that follows, a reference to a particular human rights issue by the KSC is counted as ‘1’, rather than ‘97’. Nineteen UPR I and 24 UPR II stakeholders’ reports were analysed. The reports of both domestic and international NGOs are included in this analysis.

With the above in mind, a panoramic view of all the human rights issues raised by NGO submissions indicates an active NGO engagement with the review of

688 For example the death penalty, internally displaced persons and sexual orientation were each separately categorised because they were mentioned several times by state recommendations and stakeholders’ reports.
691 It is important to note that while counting issues raised by the KSC as ‘1’ rather than ‘97’ may diminish the weight of issues supported by more than one member of the coalition, counting the issues raised as ‘97’ may skew the analysis as each recommendation made by the coalition was only reflective of the position taken by one of the 9 clusters that worked on particular issues. In addition, counting the issues as ‘1’ would prevent duplication from individual NGOs in the KSC who submitted separate reports on behalf of their individual organisations.
692 This number includes the report of the Kenyan National Human Rights Commission.
Kenya. It also indicates a strong emphasis by NGO stakeholders on socio-economic rights, justice, truth and reconciliation and the rights of women, children, disabled and minorities, as indicated on the correlation tables below.
### Table 5.1

<table>
<thead>
<tr>
<th>Topic</th>
<th>NGO Recommendations</th>
<th>% of NGO Recommendations</th>
<th>State Recommendations</th>
<th>% of State Recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internally Displaced Persons</td>
<td>2.7%</td>
<td>0.7%</td>
<td>14.8%</td>
<td>19%</td>
</tr>
<tr>
<td>Institutional Protection and Domestic Legislation</td>
<td>2.7%</td>
<td>4%</td>
<td>6%</td>
<td>11.6%</td>
</tr>
<tr>
<td>Education</td>
<td>6.7%</td>
<td>0.7%</td>
<td>5.8%</td>
<td>14.7%</td>
</tr>
<tr>
<td>Poverty and Corruption</td>
<td>5.3%</td>
<td>0.7%</td>
<td>8%</td>
<td>18%</td>
</tr>
<tr>
<td>ESCR (General)</td>
<td>1.3%</td>
<td>0.7%</td>
<td>3.9%</td>
<td>18%</td>
</tr>
<tr>
<td>Civil and Political Rights (General)</td>
<td>0.7%</td>
<td>0.7%</td>
<td>3.9%</td>
<td>11.6%</td>
</tr>
<tr>
<td>National Commission on Human Rights</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Refugees and Asylum Seekers</td>
<td>2%</td>
<td>0.7%</td>
<td>2.7%</td>
<td>14%</td>
</tr>
<tr>
<td>Women and Children's Rights</td>
<td>14.7%</td>
<td>3.9%</td>
<td>14%</td>
<td>18%</td>
</tr>
<tr>
<td>Violations by State Agents and Extra-Judicial Execution</td>
<td>5.3%</td>
<td>0.7%</td>
<td>3.9%</td>
<td>11.6%</td>
</tr>
<tr>
<td>Minority, Indigenous People, Vulnerable Groups</td>
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<td>0.7%</td>
<td>2.7%</td>
<td>14%</td>
</tr>
<tr>
<td>Judicial Reform, Justice, Truth and Reconciliation</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Human Rights and Counter Terrorism</td>
<td>2.7%</td>
<td>0.7%</td>
<td>2.6%</td>
<td>14%</td>
</tr>
<tr>
<td>National Action Plan</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Sexual Orientation and Gender Identity</td>
<td>2.6%</td>
<td>0.7%</td>
<td>2.7%</td>
<td>14%</td>
</tr>
<tr>
<td>Death Penalty</td>
<td>5.3%</td>
<td>0.7%</td>
<td>3.9%</td>
<td>11.6%</td>
</tr>
<tr>
<td>Civil Society and Human Rights Defenders</td>
<td>14%</td>
<td>3.9%</td>
<td>14%</td>
<td>18%</td>
</tr>
<tr>
<td>Cooperation with International Mechanisms and Technical Assistance</td>
<td>8%</td>
<td>0.7%</td>
<td>2%</td>
<td>14%</td>
</tr>
<tr>
<td>International Instruments</td>
<td>5.3%</td>
<td>0.7%</td>
<td>2%</td>
<td>14%</td>
</tr>
</tbody>
</table>

### Table 5.2

<table>
<thead>
<tr>
<th>Topic</th>
<th>NGO Recommendations</th>
<th>% of NGO Recommendations</th>
<th>State Recommendations</th>
<th>% of State Recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internally Displaced Persons</td>
<td>1.8%</td>
<td>5.5%</td>
<td>6%</td>
<td>11.8%</td>
</tr>
<tr>
<td>Institutional Protection and Domestic Legislation</td>
<td>0.8%</td>
<td>1.8%</td>
<td>6.6%</td>
<td>13.6%</td>
</tr>
<tr>
<td>Education</td>
<td>1.8%</td>
<td>0.6%</td>
<td>9.9%</td>
<td>16.9%</td>
</tr>
<tr>
<td>Poverty and Corruption</td>
<td>3.6%</td>
<td>4.4%</td>
<td>6.3%</td>
<td>12.7%</td>
</tr>
<tr>
<td>ESCR (General)</td>
<td>4.4%</td>
<td>4.4%</td>
<td>6.3%</td>
<td>12.7%</td>
</tr>
<tr>
<td>Civil and Political Rights (General)</td>
<td>1.2%</td>
<td>1.6%</td>
<td>4.2%</td>
<td>9.3%</td>
</tr>
<tr>
<td>National Commission on Human Rights</td>
<td>0%</td>
<td>1.6%</td>
<td>4.2%</td>
<td>9.3%</td>
</tr>
<tr>
<td>Refugees and Asylum Seekers</td>
<td>0%</td>
<td>1.6%</td>
<td>4.2%</td>
<td>9.3%</td>
</tr>
<tr>
<td>Women and Children's Rights</td>
<td>1.8%</td>
<td>4.0%</td>
<td>3.6%</td>
<td>6%</td>
</tr>
<tr>
<td>Violations by State Agents and Extra-Judicial Execution</td>
<td>4.0%</td>
<td>4.0%</td>
<td>3.6%</td>
<td>6%</td>
</tr>
<tr>
<td>Minority, Indigenous People, Vulnerable Groups</td>
<td>5.1%</td>
<td>4.0%</td>
<td>3.6%</td>
<td>6%</td>
</tr>
<tr>
<td>Judicial Reform, Justice, Truth and Reconciliation</td>
<td>6.3%</td>
<td>5.1%</td>
<td>4.0%</td>
<td>3.6%</td>
</tr>
<tr>
<td>Human Rights and Counter Terrorism</td>
<td>16.9%</td>
<td>16.9%</td>
<td>16.9%</td>
<td>21.7%</td>
</tr>
<tr>
<td>National Action Plan</td>
<td>0.9%</td>
<td>0.9%</td>
<td>0.9%</td>
<td>0.9%</td>
</tr>
<tr>
<td>Sexual Orientation and Gender Identity</td>
<td>3.6%</td>
<td>4.0%</td>
<td>3.6%</td>
<td>4.0%</td>
</tr>
<tr>
<td>Death Penalty</td>
<td>5.9%</td>
<td>4.0%</td>
<td>4.0%</td>
<td>4.0%</td>
</tr>
<tr>
<td>Civil Society and Human Rights Defenders</td>
<td>9.3%</td>
<td>5.1%</td>
<td>4.0%</td>
<td>4.0%</td>
</tr>
<tr>
<td>Cooperation with International Mechanisms and Technical Assistance</td>
<td>13.8%</td>
<td>4.7%</td>
<td>4.2%</td>
<td>4.2%</td>
</tr>
<tr>
<td>International Instruments</td>
<td>2.4%</td>
<td>4.2%</td>
<td>4.2%</td>
<td>4.2%</td>
</tr>
</tbody>
</table>
The comparative tables above (Tables 5.1 and 5.2) indicate that ESC rights figured prominently among NGO recommendations during Kenya’s UPR I. This is most likely explained by the fact that socio-economic grievances were important underlying causes of the 2007-2008 post-election violence in Kenya. Scholars and commentators agree on this especially as widespread poverty, corruption and radical inequality, particularly on land policies, were precarious issues predating the 2007 elections. NGOs therefore focused more on socio-economic rights, which, just like justice, truth and reconciliation, made significant gains into the new Kenyan Constitution and the transitional justice process in general after its UPR I. The little attention given to ESC rights by states reflected the priorities of various regional groups during Kenya’s review. The European regional groups (EEG and WEOG) and GRULAC made the majority of the recommendations to Kenya. Their priorities were police and judicial reform, death penalty, women and children’s rights and the ratification of international instruments. African and Asian states who made fewer recommendations prioritised socio-economic recovery, development, poverty and health. The low level of attention to ESC rights therefore only reflects the priorities of the European and GRULAC groups who made the majority of the recommendations to Kenya.

During UPR II, ESC rights and truth, justice and reconciliation recommendations still remained a major issue. However, among NGO recommendations, recommendations on women and children’s rights were

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prominent as well as an increasing focus on civil and political rights. This was largely as a result of the commitment to address the post-election violence issues in Kenya. The new Constitution of Kenya, which was part of the post-conflict resolution process, incorporated a Bill of Rights. This resulted in more demands for civil and political rights resulting in the rise of such recommendations from both states and NGOs (from about 1% to 4% and from about 2% to 12% respectively). Examples of state recommendations reflecting these demands include recommendations to amend ‘the security bill in the spirit of the new Constitution’; ‘promote and fulfil all the rights and fundamental freedoms as stipulated in the bill of rights’; ‘[a]dopt the bill on persons deprived of liberty’ and ‘[e]nact without delay the 2013 Access to Information Bill and Data Protection Bill.’ Similar recommendations from NGOs included recommendations to enact ‘the Access to Information Bill, 2012 and the Data Protection Bill 2012’ and ‘[g]uarantee the rights to freedom of expression as enshrined by the Constitution.’

Overall, NGO recommendations appeared to largely correlate with state recommendations on many human rights issues raised, but there were also some differences. While ESC rights and the rights of minorities/indigenous/vulnerable groups were of great concern to NGOs, they received far less attention from states. This suggests that NGO recommendations did not impact much on the substance of state recommendations in these areas. Progress was apparently made during UPR II where the percentage of state recommendations on ESC rights doubled (from about 5% to 10%). Conversely, human rights issues such as extra-judicial

696 HRC UPR II Report – Kenya, UN Doc A/HRC/29/10, paras 142.5, 142.18 and 142.82.
699 This contrasts with an earlier finding on Ukraine where states made more recommendations on ESC rights than NGOs see; Takhmina Karimova, UPR in the CIS Countries: Regional Trends (Analytical Report, United Nations Development Programme in Ukraine, 2013) 28-30.
execution, cooperation with international mechanisms/technical assistance and the death penalty received more than three times more attention by states compared to NGOs during UPR I. NGOs made no specific recommendations on extra-judicial executions and only two recommendations on cooperation with international mechanisms. However, during UPR II there was a relative balance between state and NGO recommendations on these issues. Human rights and counter-terrorism was a non-issue to both states and NGOs during Kenya’s UPR I as no recommendation was made in this regard. However, 4% of state recommendations in UPR II addressed this issue. This arguably is as a result of the terrorism crackdown efforts by the Kenyan government which were highlighted in section three above.

Analysis of UPR II recommendations from states and NGOs also points towards a strong relationship: both made more recommendations on the women/children/disability than on any other issue. Other areas where NGO recommendations matched state recommendations included recommendations on violations by state agents/extra-judicial executions, institutional protection/domestic legislation, cooperation with international mechanisms and civil society/human rights defenders. NGOs focused more on justice, truth and reconciliation than states did. Conversely, adherence to international instruments was an issue of greater interest to states but an issue of relatively less interest to NGOs.

In addition, an examination of the statistical correlation coefficient between state and NGO UPR recommendations reinforced the strong relationship between both groups of recommendations. The linear correlation coefficient (r) measures the strength and direction of a linear relationship between two variables. My correlation analysis of the relationship between state and NGO

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UPR recommendations finds a moderate positive relationship of 0.5 for UPR I and a strong positive relationship of 0.6 for UPR II.\textsuperscript{701}

It is also important to comment on the death penalty and sexual orientation/gender identity which attracted the most recommendations subsequently rejected by many African states. During UPR I and II, NGOs and states made recommendations on sexual orientation/gender identity with an observable increase across both cycles of the UPR, but NGOs made more recommendations on this issue than states. The percentage of NGO recommendations increased from 2.6\% to 3.6\% across UPR I and II respectively while the percentage of state recommendations on the issue of sexual orientation increased insignificantly from 0.7\% to 0.8\% respectively.

On the death penalty, there was a significant difference on the issue between NGOs and states. While it was a ‘non-issue’\textsuperscript{702} for NGOs during UPR I and II, there was a significant rise in the percentage of state recommendations on the death penalty across UPR I and II (from about 1\% to 6\% respectively). The scant attention given to the issue of the death penalty by Kenyan NGOs is arguably a result of existing public support for the death penalty and it reinforces the government’s position during UPR II that ‘any attempt to abolish it would not enjoy parliamentary approval at the present time.’\textsuperscript{703}

A major finding of this section is the significant extent to which states’ UPR recommendations do in fact correlate with NGO recommendations.\textsuperscript{704} While this finding does not assert a direct causal link between NGO and state recommendations, it is credible to infer that NGO recommendations do have an impact on state recommendations. As indicated in the comparative tables above, state recommendations correlate with NGO recommendations to a

\textsuperscript{701} See Appendix IV.
\textsuperscript{702} This language has repeatedly been used by the Kenya President when addressing the issue of gay rights in Kenya. For a recent press conference between the Presidents of US and Kenya on Gay rights in Kenya see ‘Obama and Kenyan President Spar over Gay Rights in Joint Speech’ < https://www.youtube.com/watch?v=jZPa2CxiGRQ>. Also important to note is the discrepancy between the issues raised by the KSC in the Advocacy Charter which included the death penalty and the issues raised in the KSC’s UPR Submission which did not include the death penalty.
\textsuperscript{703} Report of the HRC on its 15\textsuperscript{th} Session, UN Doc A/HRC/15/60, para 417.
\textsuperscript{704} This finding corresponds with the finding of Karimova on Ukraine. See Takhmina Karimova, above n 699, 28-30. See also Edward McMahon et al, ‘The Universal Periodic Review: Do Civil Society Organisation-Suggested Recommendations Matter?’ above n 46.
significant extent. This is reinforced by a positive correlation finding of 0.5 and 0.6 during UPR I and II respectively. It indicates that NGOs do have some influence on the recommendations states make to their peers and that by engaging with the recommendations of its peers, the state may be indirectly engaging with NGO recommendations. This would give a voice to NGOs that they do not formally enjoy in the UPR process. State recommendations, as seen in the case of Kenya, largely reflect the perspectives and inputs from NGOs. The dynamic ways in which the Kenyan NGOs engaged the state and its peers played a significant role in influencing the recommendations of states to Kenya. This highlights the potential for NGOs to have their voices heard in the UPR, enrich the UPR process and strengthen its ability to improve human rights situation on the ground.

5.6. KENYA’S IMPLEMENTATION OF UPR RECOMMENDATIONS

This section engages with the fourth step of my approach to evaluating the effectiveness of state engagement with the UPR process. This step analyses the aggregate percentage of recommendations that were fully, partially and not implemented by Kenya. As I explained in Chapter 3, implementation in this research considers whether a state took specific actions to fulfil each of the recommendations accepted during the UPR. The analysis relies on the IRI index developed by UPR Info. The finding on a particular recommendation is arrived at from the average of state and stakeholders’ responses on the implementation outcome of each recommendation. The analysis is limited to the UPR I implementation period for Kenya because the UPR II implementation period was still taking place during the period of this research and therefore it is difficult to assess the implementation outcome for UPR II.

At the end of Kenya’s UPR I cycle, 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%

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705 See Appendix I.
706 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.
were fully implemented (FI), 43% were partially implemented (PI), and 37% were not implemented (NI). In terms of the FI recommendations, they cut across the different categories of recommendations examined in section 5.3 of this Chapter. Kenya fully implemented the specific recommendation (R5) to ‘[e]stablish an independent, credible and authoritative Police Oversight Authority, with sufficient powers and resources’ and also the specific recommendation (R5) to ‘[a]dopt legislation and a coherent national policy criminalizing female genital mutilation.’ The state, KNCHR and the NGO referred to as Article 19, all agreed that these recommendations were fully implemented. The above 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. Another recommendation which was fully implemented was that which called upon the state to ‘[c]onsider expediting the adoption process of the Kenyan National Policy and Action Plan for human rights’ (R3). According to the KNCHR, this was implemented as ‘[t]he state drew up an action plan on the UPR with the assistance of the Kenya National Commission on Human Rights and Civil Society organizations.

However, some recommendations such as the recommendation (R4) to ‘[f]urther promote good governance’ were quite difficult to assess implementation because of their vagueness. A little action on the part of the state could result in a full or partial implementation. The KNCHR stated that the recommendation to ‘[f]urther promote good governance’ was ‘difficult to

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707 About 4% of the recommendations were not assessed because stakeholders did not provide any commentary on implementation. See Appendix II for details.
708 See Appendix II, para XXIV.
709 See Appendix II, para XIX.
710 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.
711 See Appendix II, para XIX. For other recommendations fully implemented by Kenya see Appendix II, paras IX, X, XI, XVI and XXIV.
712 See Prohibition of Female Genital Mutilation 2011, Law No. 32 of 2011 (Kenya).
713 See Appendix II, para XXIX.
715 See Appendix II, para XXX.
assess’ implementation.\textsuperscript{716} Notwithstanding, the fact that Kenya fully implemented even some of the specific recommendations underscores the government’s commitment and the effectiveness of stakeholder advocacy at the follow-up stage of the review. Arguably, the transitional justice processes that were taking place in Kenya facilitated the full and partial implementation of many of Kenya’s UPR I recommendations. The enactment of a new Constitution in 2010 provided the basis for the full realisation of many of the state’s UPR commitments.\textsuperscript{717}

The recommendations which were partially implemented by Kenya targeted critical issues and some of their implementation is still on-going. Institutional failure has been identified by several authors as a major factor which made Kenya predisposed to violence following the 2007 presidential elections.\textsuperscript{718} The judiciary was weak, lacked independence and police brutality and a culture of impunity went unabated. The majority of the recommendations partially implemented by Kenya (43\%) were on police and judicial reform, a process which in some aspects is still unfinished.\textsuperscript{719} 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 including poverty and socio-economic recovery, violence to women and children, and internally displaced persons.\textsuperscript{720} Since Kenya received very few recommendations requiring the government to seek technical assistance (about 4\% of the total 150 UPR I recommendations), the majority of its fully and partially implemented recommendations cut across R3, R4 and R5 recommendations. This is important as the quality of recommendations has a great impact on the capacity of the UPR to promote meaning and measurable change. While general recommendations (R4) if implemented can promote

\textsuperscript{716} Ibid.
\textsuperscript{717} See for example the recommendations by Zimbabwe, Niger, UK and Republic of Korea for Kenya to support the enactment of a new constitution, \textit{HRC UPR I – Kenya}, UN Doc A/HRC/15/8, para 101.6–101.9.
\textsuperscript{719} An example is the vetting of police officers see \textit{HRC UPR II State Report – Kenya}, UN Doc A/HRC/WG.6/21/KEN/1, para 77.
\textsuperscript{720} See Appendix II, paras V, VI and XX.
meaningful change, it may be difficult to measure the changes as highlighted in one of the recommendations above. The implementation of specific recommendations (R5) is an important aspect of a state’s effective engagement as such recommendations can promote meaningful and measurable changes to the human rights situation on the ground by requiring specific actions in response to specific issues.

About 37% of the recommendations accepted by Kenya during UPR I were not implemented. None of the 12 recommendations which required Kenya to sign or ratify international human rights treaties were 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. The Treaty Making and Ratification Act 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. The constitutional reform process as such may have impeded the realisation of these recommendations within the implementation period. Early studies on the UPR indicated that R1 recommendations, compared to the other categories, received a high implementation rate. On the contrary, according to various stakeholders, Kenya did not implement any of the nine recommendations which required the state to seek technical assistance and support in implementing its human rights obligations.

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

721 See Appendix II, para I.
722 Treaty Making and Ratification Act 2012, Law No. 45 of 2012 (Kenya)
724 Six of these recommendations were made by African states including Egypt, Algeria, Zimbabwe, Niger, Chad and Nigeria. See HRC UPR I – Kenya, UN Doc A/HRC/15/8, paras 101.120, 101.121, 101.122, 101.123, 101.124 and 101.128.
compliance-centred paradigm which leans more on coercive mechanisms. This section demonstrates that non-confrontational mechanisms, like the UPR that are based on cooperation, cannot be labelled as weak and inefficient. They cannot be synonymous to inefficiency or lack of impact. They can, and do 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 within a four-year period.

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 (37%). As argued in this thesis, the gap can potentially be narrowed over time through the process of acculturation. 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, is an indication of the government’s particular commitment to implementing the UPR II recommendations. The plan outlines individual UPR recommendations, the specific priority action areas, and the indicators to measure progress in realising their implementation. This underscores the potential value for achieving human rights implementation within the cooperative framework of the UPR.

5.6.1. The Impact of the New Constitution of Kenya in the Implementation of UPR Recommendations

As indicated at the outset of this Chapter, Kenya undertook its UPR I within the context of addressing the legacies of the post 2007-2008 election violence. The enactment of a new Constitution in 2010 was a major development immediately after Kenya’s UPR I. The struggle towards a new Constitution

726 Ibid.
started as early as 1963 with numerous constitutional amendments. The role of civil society in the struggle was significant and contributed to ensure that the new Constitution enshrines a wide range of human rights. While the UPR did not directly impact on the provisions of the Constitution, it contributed to speed up the process of adoption of the Constitution, and some of the UPR recommendations were reflected in the new Constitution. As an example, it was recommended that the Kenyan government ‘[u]nitate behind a new Constitution through a fair referendum, and fully implement the result’ and equally ‘[e]nsure that the new Constitution of the country takes greater account of the dimension of human rights protection and promotion, as well as of democracy.’ The new Constitution contributed to the realisation of many of the rights that were the subject of UPR I recommendations to Kenya. This subsection examines the extent to which the new Constitution impacted on socio-economic rights and strengthened NGOs in Kenya. It focuses on these two issues because the former represented the greatest concern for NGOs during UPR I (see Table 5.1) and the latter can contribute to effective NGO engagement.

5.6.1.1. The Kenyan Constitution 2010 and the Implementation of Socio-Economic Rights from the UPR

The realisation of socio-economic rights in Kenya has been enhanced through the new constitutional machinery which incorporates a Bill of Rights. Article 43 of the new Constitution enshrines socio-economic rights which are enforceable through the courts under Article 23 of the Constitution. The socio-economic rights dealt with under Article 43 include: health, housing and sanitation, food, social security and education. Examples of the UPR I

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729 The time between the adoption of Kenya’s UPR I report at the HRC (May 2010) and the adoption of the constitution (August 2010) was just about 3 months.
731 The Constitution of Kenya, art 43 (1).
recommendations to Kenya targeting these issues include: develop education policies that ensure quality education, particularly for the poor, marginalised and vulnerable segments of its population; ensure the equitable distribution of water and food to the entire population, especially during times of drought; and continue to develop programmes and measures aimed at ensuring quality and free education and health services for its population.\textsuperscript{732} The government made little effort to fully implement many of these UPR recommendations and to ensure the realisation of these constitutional rights. However, the Constitution gives the courts a primary role in the enforcement of these rights. In the 2013 case of \textit{Mutemi v Permanent Secretary, Ministry of Education},\textsuperscript{733} the High Court of Kenya emphasised its readiness to enforce the socio-economic rights enshrined in the Constitution and cautioned the government stating that:

\begin{quote}
Let this judgment therefore be a wakeup call to the Respondents that Article 43 of the Constitution does not sit there like a [defeated] football player who has lost a match. It is indeed alive and has started the run towards full realisation as opposed to a slow shuffle in the name of progressive realisation.\textsuperscript{734}
\end{quote}

The first case in which the courts enforced socio-economic rights under Article 43 of the 2010 Constitution of Kenya was \textit{Kariuki v Town Clerk}, relating to the right to housing.\textsuperscript{735} The case concerned the demolition of the homes of the applicants by the Nairobi City Council which threatened their eviction on grounds that the houses were built on road reserves.\textsuperscript{736} The High Court had to decide whether or not the respondents owed the applicants a duty to respect, protect and fulfil their socio-economic rights under the Constitution. The High Court relied on jurisprudence from the UN Committee on Economic Social and Cultural Rights, to determine that the respondents had violated the rights of the

\begin{footnotesize}
\textsuperscript{733} Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education and others, (2013) eKLR Petition No. 133 of 2013.
\textsuperscript{734} The High Court is a premier court in interpreting the Constitution in Kenya. Matters from the High Court can be appealed to the Court of Appeal and finally to the Supreme Court of Kenya. Ibid para 21.
\textsuperscript{735} Susan Waithera Kariuki and 4 others v Town Clerk, Nairobi City Council and 2 others (2011) HCC 66/2010.
\textsuperscript{736} Ibid 8-9.
\end{footnotesize}
applicants to housing under the Constitution.\textsuperscript{737} In addition to awarding damages and ordering restitution, the High Court ordered the respondents to expeditiously put in place the required legislative, policy and programmatic framework so as to sufficiently cater for the housing needs of everyone especially the most vulnerable and marginalised.\textsuperscript{738} This case set an important precedent on the enforcement of socio-economic rights under the Constitution and the Court’s willingness to give life to these constitutional rights.

In \textit{Consumer Confederation of Kenya (COFEK) v Attorney General,}\textsuperscript{739} the High Court acknowledged its competence to adjudicate on the right to adequate food under the Kenyan Constitution. The relevant government authorities failed to stabilise the rise in fuel prices which resulted in high cost of subsistence goods and services. As a result, the Petitioner claimed that their right to be free from hunger and the right to adequate food under Article 43 of the Constitution had been violated.\textsuperscript{740} While the High Court was willing to adjudicate and develop the content of this right, it was rendered helpless by the fact that the Petitioner failed to link the acts or omissions of the state respondents to the violation of the relevant socio-economic rights.\textsuperscript{741} One of the recommendations during Kenya’s UPR I on the right to food required the government to ‘[e]nsure the equitable distribution of water and food to the entire population, especially during times of drought.’\textsuperscript{742}

While the new Constitution has served as a door for the implementation of some UPR recommendations, it has equally served as a facade to cover up the government’s non-implementation of other UPR recommendations. For example, it was recommended during UPR I that the government ‘[f]urther strengthen relations with the indigenous communities with a view to promoting and protecting their rights and assisting them in their development initiatives’ and to ‘devote attention to the recommendations made by the Special

\begin{footnotes}
\item[737] Ibid 5.
\item[738] Ibid 16-17.
\item[739] \textit{Consumer Confederation of Kenya (COFEK) v Attorney General \\ & 4 others} (2011) High Court Petition No. 88 of 2011, 1-3.
\item[740] Ibid.
\item[741] Ibid 4-5.
\item[742] \textit{HRC UPR I – Kenya}, UN Doc A/HRC/15/8, para 101.93.
\end{footnotes}
Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, after her visit to the country.\textsuperscript{743} In responding to their implementation outcome, the government stated that ‘Kenya’s new Constitution provides several avenues for the protection and strengthening of indigenous peoples’ personal and collective rights’.\textsuperscript{744} However, the KSC noted that the Endorois decision of the African Commission,\textsuperscript{745} which found the government to have violated the land rights of indigenous peoples and recommended recognition, restitution and compensation of the Endorois people for ownership over their lands,\textsuperscript{746} had not been implemented.\textsuperscript{747} The KSC also submitted that the implementation of similar recommendations made to Kenya has been assumed and overlooked.\textsuperscript{748} Similarly, the UPR I recommendation on the right to food mentioned above was only partially implemented. While the government relied on the provisions of the new Constitution to justify its implementation,\textsuperscript{749} NGO stakeholders submitted that the government’s action ‘falls short of an express commitment to tackle food distribution during times of drought.’\textsuperscript{750}

5.6.1.2. The Kenyan Constitution 2010 and the protection of NGOs and CSOs

The new Kenyan Constitution has strengthened the protection of NGOs in Kenya who now have the potential to influence the government’s cultural relativist position on some human rights issues. Articles 196 and 118 (1) (b) of the Constitution which require public involvement in the legislative and other

\textsuperscript{743} Ibid paras 103.6 and 103.7.
\textsuperscript{744} Ibid para 25.
\textsuperscript{746} Ibid paras 71-298.
\textsuperscript{747} See Civil Society Coalition on Kenya’s 2\textsuperscript{nd} Universal Periodic Review (CSCK-UPR), above n 569, para 29.
\textsuperscript{749} HRC UPR II State Report – Kenya, UN Doc A/HRC/WG.6/21/KEN/1, para 57.
\textsuperscript{750} Franciscans International (FI), Edmund Rice International (ERI) and Foundation for Marist Solidarity International (FMSI), ‘UPR Mid-Term Assessment Kenya’ (2012) 1 < http://www.upr-info.org/followup/assessments/session21/kenya/Kenya-FI+ERI+FMSI.pdf >.
business of its county assemblies and in the national parliament, have increased the role NGOs play within the state. Examples of UPR recommendations in this area required the government to ‘[e]ngage in a participatory and inclusive process with civil society in the implementation of universal periodic review recommendations’ and to ‘[i]nvestigate harassment and attacks against journalists and human rights defenders in order to bring those liable to justice’;\(^\text{751}\) ‘[e]nsure that non-governmental organizations and human rights defenders can freely conduct their activities’ and ‘[c]reate and maintain, in law and in practice, a safe an enabling environment, in which human rights defenders and civil society can operate…’\(^\text{752}\)

The Kenyan courts have in a few recent cases enforced the provisions of the Constitution with the effect of strengthening NGOs/CSOs in Kenya with particular focus on the constitutional right to public participation and freedom of association. In \textit{Gakuru v Governor Kiambu County},\(^\text{753}\) the High Court had to determine whether the \textit{Kiambu Finance Act, 2013} was passed with sufficient public participation as required by the article 196 of the Constitution of Kenya, amongst other things.\(^\text{754}\) The Court found that although newspaper advertisements had been published and a number of persons had been consulted, the effort was insufficient to amount to public participation in the language of Article 196 (1) (b).\(^\text{755}\) Odunga J stated that:

\begin{quote}
In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit
\end{quote}

\(^{751}\) \textit{HRC UPR I – Kenya}, UN Doc A/HRC/15/8, paras 101.119 and 101.89.
\(^{753}\) Robert W Gakuru and Others v The Governor Kiambu County and 3 others (2014) eKLR Petition No. 532 of 2013 (Consolidated with) Petition Nos. 12, 35, 36, 42 and 74 of 2014.
\(^{754}\) Ibid para 40.
\(^{755}\) Ibid para 84, Judge Richard Mwongo subsequently relied on this judgment in the case of \textit{Andrew Ireri Njeru and 34 others v County Assembly Of Embu and 3 others} [2014] eKLR to find that there was no adequate public participation in respect of the removal of the Governor and that the Petitioners’ rights were violated. See \textit{Andrew Ireri Njeru and 34 others v County Assembly of Embu and 3 others} [2014] eKLR para 57.
of public participation is attained both quantitatively and qualitatively.\textsuperscript{756}

This echoes the importance of a broad and representative consultation with NGOs and civil society necessary for the state’s effective engagement at the consultation phase of the UPR when the state report is being drafted. Rather than relying on stakeholders to facilitate the broad and representative representation, the state needs to be more proactive at its consultation phase and engage the various public stakeholders in the preparation of its UPR report in a broad and representative way.

A more recent case invoking constitutional provisions was \textit{Gitari v Non-Governmental Organisations Co-ordination Board}.\textsuperscript{757} This was a landmark ruling and represents a step towards a change in the attitude of the state towards LGBT rights in Kenya. As reinforced earlier on in this Chapter, the theme of cultural relativism especially on gay rights runs through the engagement of African states with the UPR. They neither make nor accept recommendations advocating for these rights. Examples of such recommendations which Kenya rejected required that Kenya ‘[t]ake concrete steps to provide for the protection and equal treatment of lesbian, gay, bisexual and transgender persons’\textsuperscript{758} and ‘[d]ecriminalise consensual same sex conduct between adults.’\textsuperscript{759}

The \textit{Gitari} case related to the right to freedom of association under Article 36 of the Kenyan Constitution. The petitioner sought three times to register an Association with the names ‘Gay and Lesbian Human Rights Council’; ‘Gay and Lesbian Human Rights Observancy’ and ‘Gay and Lesbian Human Rights Organization.’\textsuperscript{760} His application to register the Association was rejected by the NGO Coordination Board on the basis that the names were inappropriate and contravened sections 162, 163 and 165 of the Penal Code which criminalises same sex relations.\textsuperscript{761} Regulation 8(3)(b) of the NGO Regulations empowers

\textsuperscript{756} Ibid para 75.
\textsuperscript{757} \textit{Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others} [2015] eKLR.
\textsuperscript{758} \textit{HRC UPR I – Kenya}, UN Doc A/HRC/15/8, para 103.5.
\textsuperscript{759} \textit{HRC UPR II Report – Kenya}, UN Doc A/HRC/29/10, para 143.48.
\textsuperscript{760} \textit{Gitari v Non- Governmental Organisations Co-ordination Board} [2015] eKLR para 10.
\textsuperscript{761} Article 165 criminalises homosexuality with 5 years’ imprisonment. See \textit{Penal Code 2012} (Kenya), Chapter 63, s 165.
the Director of the NGO Coordination Board to reject an application to register an Association if it has a name which is ‘in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable.’\textsuperscript{762} The High Court had to determine whether LGBT people had the right to form associations, and whether the decision of the Board to reject the petitioner’s application because of the names violated the petitioner’s constitutional rights under Articles 36 and 27 of the Constitution, relating to freedom of association, equality and non-discrimination. After examining international and comparative jurisprudence on these issues, the Court found that rejecting the petitioner’s application was unjustified and contravened the provisions of Articles 36 and 27 of the Constitution in ‘failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice.’\textsuperscript{763} The Court issued an order of mandamus for the registration of the Association with the intended names.\textsuperscript{764} While the Kenyan government rejected all the UPR recommendations on the above issue, this case marks a step towards a change of culture within Kenya.

In summary, this section underscores the potential of the UPR as a cooperative mechanism to help facilitate human rights changes in Kenya. It examined the degree to which the UPR process has been able to contribute in causing observable changes in the domestic human rights situation of Kenya, by assessing the state’s UPR implementation record. It pointed out that for the UPR to promote meaningful and measureable human rights changes, the state must equally engage with the various categories of recommendations, and in particular, the specific recommendations (R5). The Kenyan government, as examined above, implemented many of the UPR recommendations across the different categories. However, the adoption of the new Constitution was a factor that facilitated some of this implementation but equally impeded and disguised the non-implementation of some of the UPR I recommendations. While the High Court’s adjudication of socio-economic rights in the

\textsuperscript{762} Non-Governmental Organizations Co-Ordination Regulations, 1992 (Kenya), 8 (3) (b) (ii).
\textsuperscript{763} Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 others [2015] eKLR para 148(ii).
\textsuperscript{764} Ibid para 148(iv).
Constitution impacted on the implementation of related UPR recommendations, its approach has not been consistent. A consistent and strong interpretive approach that favours the enforcement of these rights is needed. Nevertheless, the constitutional requirement of public participation and the court’s landmark ruling in the case of *Gitari* further strengthens NGOs/CSOs. It pierces the veil of cultural relativism behind which the government conceals its attitude towards sexual minorities. This could be a potential stepping stone for a change in the government’s attitude towards related recommendations in subsequent reviews.

### 5.7. Amplification and Synergy Between the UPR and Other National and International Mechanisms

When the UPR was established a major concern was that it would undermine the work of other human rights mechanisms, especially the treaty bodies.\(^{765}\) It was therefore included as one of the essential base of the review that it shall complement and not duplicate the work of the treaty bodies.\(^{766}\) In Chapter 2 I examined three viewpoints on the relationship between the UN human rights treaty bodies and the UPR mechanism, and highlighted the disagreement between scholars and practitioners such as Nadia Bernaz, Rodley, Olivier de Frouville and Helen Quane. Nadia Bernaz took the first viewpoint to the effect that the UPR duplicates the work of the UN human rights treaty bodies because of an overlap in their respective functions.\(^{767}\) Rodley and de Frouville argued the second perspective, that the UPR weakens and overshadows treaty body recommendations, and facilitates the evasion by states of their obligation to implement recommendations by treaty bodies.\(^{768}\) Quane argued the third perspective that the UPR enhances state engagement with the UN treaty bodies.\(^{769}\) She demonstrated in the case of ASEAN states, that the UPR has contributed to greater and more constructive engagement between many ASEAN states and the UN human rights treaty bodies by facilitating the...

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\(^{765}\) In Chapter 2 I highlighted the sentiments of Australia and the African Group on this issue during the negotiations on the modalities for the UPR. See Gaer, above n 126, 122.

\(^{766}\) Resolution 5/1, UN Doc A/HRC/RES/5/1, para 3(f).

\(^{767}\) Bernaz, above n 63.

\(^{768}\) Rodley, above n 133, 327; Frouville, above n 12, 251; Collister, above n 112, 116-19.

\(^{769}\) Quane, above n 70.
submission of overdue treaty body reports and the ratification of specific human rights treaties. I made similar findings in the case of Nigeria and Kenya where the UPR has facilitated the submission of overdue treaty body reports.

In this section I take a different approach to the relationship between the UN human rights treaty bodies and the UPR. I argue that the UPR can potentially create a synergy with other national, regional and international human rights mechanisms. It can facilitate the amplification of issues highlighted in various human rights mechanisms and equally amplify the concerns of NGOs/CSOs. Rather than duplicate their function, the various human rights mechanisms can generally reinforce and complement each other.

In Kenya, the UPR has been a very important mechanism to support and strengthen the transition and development process. The UPR recommendations can play a role at the national level by promoting the inclusion of international human rights standards in constitutional or legislative drafting, and by strengthening mechanisms that will improve access to justice, especially for vulnerable and marginalised groups. This can be very valuable to transitional societies undergoing institutional reforms. In Kenya for example, the UPR occurred at a time of increased local calls for transitional justice, police and judicial reforms, constitutional change, demand for socio-economic rights, and to address the plight of internally displaced persons. Many of the recommendations during Kenya’s UPR I re-emphasised and reinforced transitional justice processes that were taking place within Kenya. For example in 2008, Kenya’s Commission of Inquiry on Post-Election Violence (CIPEV) made a number of recommendations regarding police reforms. In particular, CIPEV recommended the establishment of an Independent Policing Oversight Authority (IPOA). This and similar recommendations were re-emphasised in the 2009 report of the National Task Force on Police Reforms. These were

770 Ibid.
771 Set up by the Kenyan government to investigate the facts and circumstances surrounding the 2007/2008 post-election violence. See Waki Report, above n 530.
subsequently amplified by many states in their recommendations to Kenya. The UK recommended that Kenya ‘establish an independent, credible and authoritative Police Oversight Authority, with sufficient powers and resources.’\(^{773}\) This was subsequently implemented.\(^{774}\) Another state recommendation called Kenya to ‘fully implement the proposals made by the National Task Force on Police Reforms.’\(^{775}\) Also, CIPEV in 2008 had recommended that the Freedom of Information Bill be enacted forthwith.\(^{776}\) Norway reinforced this recommendation during UPR I by recommending that Kenya ‘Enact as a matter of urgency the Freedom of Information Bill.’\(^{777}\) While this was not implemented within the UPR I implementation timeframe, it was subsequently implemented on 31 August 2016 when the *Access to Information Act* was signed into Law.\(^{778}\) During UPR II, 9 states buttressed the recommendations of the Kenyan Truth and Reconciliation Commission’s report by each recommending that the state should implement the recommendations in the Commission’s report.\(^{779}\) Kenya accepted these recommendations.

Similarly, Kenya’s reviews were also used by states to reinforce recommendations made by other regional and international human rights mechanisms regarding the human rights situation in Kenya. During Kenya’s UPR I, Denmark recommended that the government implement the recommendations of both the UN Special Rapporteur on extra-judicial killing and that of the UN Special Rapporteur on the rights of Indigenous Peoples following the latter’s visit to Kenya in 2007.\(^{780}\) Kenya did not accept Denmark’s recommendation and has remained in denial of many of the findings in the report of the UN Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions.\(^{781}\) However, it accepted another

\(^{774}\) See Annex II, para XXIV.
\(^{775}\) This was partially implemented. See Annex II, para III.
\(^{776}\) See Waki Report, above n 530, 476.
\(^{778}\) See *Freedom of Information Act, 2016*, Law No. 31 of 2016 (Kenya).
\(^{779}\) *HRC UPR II Report – Kenya*, UN Doc A/HRC/29/10, paras 142.91, 142.96, 142.101, 142.102, 142.104, 142.107, 142.107, 142.108, 142.116 and 142.117.
\(^{780}\) *HRC UPR I – Kenya*, UN Doc A/HRC/15/8, paras 102.5 and 103.4.
recommendation to ‘Implement the recommendations and decisions of its own judicial institutions and of the African Commission on Human and Peoples’ Rights, particularly those relating to the rights of indigenous peoples’ but did not implement the recommendation.\textsuperscript{782}

With regard to the treaty bodies, the UPR has equally reinforced their recommendations. The UPR reinforced many of the previous recommendations to Kenya by the UN Committee on Economic Social and Cultural Rights. The Committee had recommended in 2008 that Kenya criminalise domestic violence and female genital mutilation, and allocate sufficient resources for the fight against poverty.\textsuperscript{784} The UPR strengthened and amplified the importance of these recommendations during Kenya’s UPR I in 2010. States made more than 20 recommendations addressing these issues, many of which were specific.\textsuperscript{785} For example it was recommended that Kenya ‘[i]mplement measures to prevent, punish and eradicate all forms of violence against women… and also completely eradicate the practice of female genital mutilation\textsuperscript{786} and to ‘[u]rgently adopt legislation criminalizing female genital mutilation\textsuperscript{787} Kenya accepted all these recommendations. According to the KNCHR and the KSC, the recommendations to adopt legislation that would criminalise and eradicate the practice of female genital mutilation were fully implemented as the government enacted the \textit{Prohibition of Female Genital Mutilation Act} in 2011 and an anti-FGM policy was developed.\textsuperscript{788}

\textsuperscript{782} Ibid [101.114].

\textsuperscript{783} See Civil Society Coalition on Kenya’s 2\textsuperscript{nd} Universal Periodic Review (CSCK-UPR), above n 569, [29].


\textsuperscript{786} Ibid para 101.51.

\textsuperscript{787} Ibid para 101.56.

This section demonstrates the ability of the UPR to reinforce and amplify the concerns of domestic, regional and international human rights mechanisms. 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 states to 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 and the post-2015 development agenda, 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, 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.

5.8. CONCLUSION

The central argument of this thesis, reinforced in this Chapter, is that the UPR as a human rights mechanism based on cooperation and dialogue can contribute to human rights implementation in subtle but significant ways not captured by coercive/confrontational approaches. This Chapter advances this argument by examining the effectiveness of Kenya’s engagement with the UPR mechanism within the framework of the four-step approach to evaluating state engagement with the UPR.

Section II examined the extent of Kenya’s pre-review national consultation process and the quality of Kenya’s UPR delegations. In terms of its

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commitment to the pre-review consultation process, the Kenyan government effectively undertook a broad and representative national consultation through the instrumentality of NGOs who formed coalitions representing a broad range of human rights concerns. However, the extent of the consultation process by the Kenyan government was limited by its refusal to engage with issues on the death penalty and sexual orientation. In contrast, Nigeria engaged with both issues during its consultation process with NGOs even though it was unwilling to make any commitments. In relation to the quality of Kenya’s UPR delegation, Kenya had a comprehensive representation during UPR I and II. The inclusion or more legal and judicial personnel than diplomats, and the demonstrable gender parity of Kenya’s UPR delegations, underscored the competency of the delegation and the government’s commitment to the UPR process. An examination of the engagement of both Kenya and Nigeria with the UPR has revealed that they have engaged more actively with the UPR process than with the UN treaty bodies. The fact that the UPR mechanism is grounded on the principles of cooperation, dialogue and peer review is a strong rationale as to why Kenya and many other African states are actively engaging with the UPR.

In terms of the quality of Kenya’s UPR participation as a reviewer, its engagement was superficial and selective compared to Nigeria. Nigeria reviewed 60 states during UPR I but Kenya reviewed none. During UPR II Kenya was very selective and reviewed fewer states compared to smaller and poorer states like Gabon, Zimbabwe and Togo. As a state under review, Kenya actively engaged by accepting a high percentage of recommendations made to it during UPR I and II (about 87% and 76% respectively). However, the level of receptiveness during UPR II is diminished by the fact that about half of the specific recommendations (RI) made to Kenya were rejected, such recommendations having greater potential to bring about meaningful and measurable human rights changes. However, it was argued that the fact that states reject recommendations does not necessarily imply they create no effect.

Analysis of Kenya’s UPR engagement re-echoed the ‘softer’ approach of African states to the UPR. Both Nigeria and Kenya have been willing to accept
some sensitive recommendations when they are phrased in a ‘soft’ or general manner. While it was noted that such recommendations can be vague and difficult to measure the implementation of, it was equally highlighted that they are not insignificant as some have been translated into specific actions at the implementation stage. The themes of regionalism and cultural relativism were reflected in the engagement of both Nigeria and Kenya with the UPR. They were both more inclined to accept recommendations from their regional peers than from any other state and neither of them made nor accepted recommendations on the decriminalisation of same-sex relations. Even though both Kenya and Nigeria have more actively engaged with the treaty bodies than with the UPR, they have sometimes exhibited a double standard in their engagement by making recommendations which they are not willing to accept themselves.

Section IV of this Chapter demonstrated the important role NGOs can play in the UPR and how NGOs have found ways to bypass the limitations to their direct participation in the UPR process. Through the formation of a broad and representative NGO coalitions, NGOs have strategically engaged in the UPR by undertaking awareness raising, advocacy and media campaigns. This Chapter highlighted the benefits of forming coalitions such as the prioritisation of human rights concerns, and the need for stability and broad representation in such coalitions. This Chapter examined the impact of the various KSC campaigns on Kenya’s UPR engagement and underscored the need for the KSC to ensure stability in its membership, reach out to grassroots organisations and intensify its media campaigns. Charlesworth and Larking have argued that the ability of the UPR to move beyond ritualism and act as an effective regulatory mechanism depends profoundly on effective NGO engagement. Effective NGO engagement can improve a state’s UPR engagement and potentially contribute to narrow the UPR implementation gap.

Section V of this Chapter then examined the relationship between state and NGO recommendations. This section found a significant correlation between

790 Charlesworth and Larking, ‘Introduction: the regulatory power of the Universal Periodic Review’ in Hilary Charlesworth and Emma Larking (eds), above n 49, 16.
the recommendations of states and NGOs during Kenya’s UPR. I argued that NGO recommendations can have an impact on state recommendations. Since NGOs can be credible voices on the human rights situation on the ground, their recommendations can enrich the UPR process and strengthen its ability to improve the human rights situation on the ground. By influencing state recommendations to their peers, NGOs can indirectly gain a voice in the UPR process and ensure that states make recommendations which are relevant and have the capacity to promote meaningful and measurable human rights change on the ground.

Notwithstanding the existence of a correlation between states’ and NGO recommendations, state engagement will not be meaningful if it does not contribute to some degree to improve the human rights situation on the ground by implementation. Section VI of this Chapter examined this in relation to Kenya by examining the extent to which Kenya implemented the accepted UPR I recommendations. I arrived at the finding in this section that more than 50% of the recommendations made to Kenya had either being fully or partially implemented. This section observed that the level of fully and partially implemented recommendations has contributed to improving the human rights situation on the ground. This reinforces the thesis argument that the UPR, which is based on cooperation and dialogue, can help cause human rights changes within states in subtle but significant ways, without the use of coercive techniques.

The Kenyan government engaged with the implementation of various categories of recommendation and the new Constitution was examined as a major factor that facilitated the implementation of many of the UPR recommendations. This was illustrated by cases on socio-economic rights and the rights to freedom of association. I underscored how the High Court of Kenya has actively engaged in the enforcement of socio-economic rights and pointed out how the constitutional requirement of public participation and the landmark ruling in the case of *Gitari* have strengthened the role played by civil society in Kenya. The decision in the case of *Gitari* opens the gate for the registration of LGBT associations in Kenya and could act as a potential
stepping stone to a change of the government’s attitude towards related recommendations in subsequent review cycles. The social and cognitive pressures generated by the process of acculturation can over time influence changes within states as was evident in some of the UPR I recommendations to Kenya that were not implemented within the implementation timeframe but were subsequently implemented by the state. Notwithstanding the problem of implementation, the positive attitude of African states towards cooperation could have long term positive implications for the nature of their implementation of UPR recommendations.

Finally, section VII of this Chapter engaged with the ongoing debate on the relationship between the UPR and other international human rights mechanisms. I argue that the UPR has the ability to strengthen and reinforce the human rights concerns raised by domestic, regional and other UN mechanisms. This Chapter demonstrated how the UPR has been used as a platform to strengthen and support the transitional justice process in Kenya and reinforce recommendations made by other human rights mechanisms to Kenya. Despite some variations in their engagement level, both Kenya and Nigeria have more actively engaged with the UPR than with the treaty bodies. Their engagement with the UPR has demonstrated that cooperative mechanisms can contribute to improving the human rights situation on the ground, but equally that states need to engage more actively with implementation.
CHAPTER SIX:
SOUTH AFRICA AND THE UNIVERSAL PERIODIC REVIEW (UPR)

6. INTRODUCTION

This Chapter continues to advance the focus of this thesis that seeks to provide a representative view of the engagement of Sub-Saharan African states with the UPR mechanism and South Africa is a key player in the Southern part of the region. South Africa is one of the longest serving members of the HRC. It has been a member from inception (June 2006 to June 2010) and a member from December 2014 to December 2016. The government of South Africa has been vocal in its support for the HRC and its UPR mechanism. In 2010, it described the HRC as the body with ‘first instance’ responsibility for the universal enforcement of human rights, and the UPR as the ‘hallmark of the Council’s work.’\(^\text{791}\) South Africa’s engagement with the UPR would therefore provide an opportunity to examine whether the government’s engagement with the UPR process reflects its strong support for the mechanism. Moreover, focusing on South Africa’s engagement with the UPR provides an additional view to the engagement of African states with the UPR by examining the potential for rights ritualism and highlighting a lack of effective NGO engagement with the UPR. This offers a contrast to the situation of Kenya examined in the previous Chapter.

6.1. BACKGROUND TO SOUTH AFRICA’S UPR

In 1994, South Africa underwent a democratic transition after 45 years of apartheid rule. Having experienced gross human rights violations under the apartheid regime, there were domestic and international expectations that in the future, South Africa would serve as a beacon of hope in the advancement

\(^{791}\) See Statement by Ambassador Baso Sangqu, above n 38; This is also evident in South Africa’s membership in the UN Security Council where in January 2007 for example, it voted against a draft Security Council Resolution on Burma and justified its vote on the basis that it preferred more democratic human rights institutions to address the human rights violations in Burma. See Edoard Jordaan, ‘South Africa and Abusive Regimes at the UN Human Rights Council’ (2014) 20 Global Governance 233, 242.
of human rights.\textsuperscript{792} There was reason to be optimistic. Commitment to
democracy and respect for human rights was the essence - if not the totality -
of President Mandela’s foreign policy.\textsuperscript{793} In 1996, South Africa enacted a
highly progressive Constitution that incorporated a Bill of Rights.\textsuperscript{794} The six
core international human rights treaties that existed at the time of drafting
greatly inspired the language and content of the Bill of Rights.\textsuperscript{795} In 2006,
South Africa became the first African country to legalise same-sex unions.\textsuperscript{796}
Furthermore, Article 9 (3) of the \textit{1996 Constitution of South Africa} prohibits
discrimination on grounds of sexual orientation.\textsuperscript{797} As mentioned earlier,
cultural relativism with regard to sexual orientation is an issue that limits the
engagement of African states with the UPR mechanism. This Chapter therefore
considers whether the South African government is committed to protecting
the rights of sexual minorities in its engagement with the UPR mechanism.

The optimism ushered by the immediate post-apartheid period in relation to
the advancement of human rights may have been premature. South Africa’s
post-apartheid human rights policy has been fraught with significant
inconsistencies. These include the ‘quiet diplomacy’ in response to repression
and abrogation of the rule of law in Zimbabwe;\textsuperscript{798} the denialist position of
President Thabo Mbeki on HIV/AIDS; South Africa’s controversial arms
procurement programme; domestic xenophobia; and threatened withdrawal
from the ICC.\textsuperscript{799} On domestic xenophobia in particular, NGOs have criticised

\textsuperscript{792} Tristan Anne Borer and Kurt Mills, ‘Explaining Post-apartheid South African Human
Rights Foreign Policy: Unsettled Identity and Unclear Interests’ (2011) 10 \textit{Journal of Human
Rights} 76.
\textsuperscript{793} Laurie Nathan, ‘Consistency and inconsistencies in South Africa’s Foreign Policy’ (2005)
81(2) \textit{International Affairs} 364.
\textsuperscript{794} \textit{Constitution of the Republic of South Africa Act 1996} (South Africa).
\textsuperscript{795} The Constitution has been described by Heyns and Viljoen as ‘Highly “International human
rights law friendly”’. See Christof Heyns and Frans Viljoen, above n 209, 542 and 552.
\textsuperscript{796} See \textit{Civil Union Act 2006} (South Africa).
\textsuperscript{797} \textit{Constitution of the Republic of South Africa Act 1996} (South Africa), Art. 9 (3).
\textsuperscript{798} A detailed analysis of this was carried out by Shoeman and Alden. See Maxi Schoeman and
Chris Alden, ‘The hegemon that wasn’t: South Africa’s foreign policy towards Zimbabwe’
\textsuperscript{799} See Laurie Nathan, ‘Consistency and Inconsistencies in South Africa’s Foreign Policy’
the South African government for failing to combat the 2008 xenophobic attacks and to prevent their recurrence in 2015.\textsuperscript{800} Furthermore, the institutions set up by the Constitution to monitor and scrutinise rights enforcement have been criticised, even by UPR stakeholders, for failing to make use of their powers and for lack of governmental support.\textsuperscript{801} Many commentators have lauded the South African Constitutional Court for its active engagement in the enforcement of socio-economic rights.\textsuperscript{802} Yet, despite the brilliance with which the Constitutional Court has articulated decisions on socio-economic rights, the government has been reluctant to implement them. A point of reference is the case of \textit{South Africa v Grootboom}.\textsuperscript{803} Despite successful litigation, the decision did very ‘little to change the social conditions of the complainants.’\textsuperscript{804} In addition, violence and discrimination based on sexual orientation is reportedly on the rise, despite the legal recognition of same-sex unions in 2006.\textsuperscript{805}


\textsuperscript{803} Government of the Republic of South Africa and Others v Grootboom and Others [2001] 1 SA 46 (Yacoob J) (Appellate Division).


Human rights scholars have viewed South Africa’s human rights commitment from three different broad perspectives. The first perspective assumes that South Africa is still strongly committed to the human rights cause. In 2009, Alison Brysk placed South Africa in the group of Sweden and Canada as a model international citizen that promotes human rights. The second perspective sees South Africa as no more or less committed to human rights than other democracies. From this perspective, South Africa is committed to human rights whenever it serves its national interest. This may explain why South Africa, despite its significant role in the creation of the ICC, would spearhead a movement to prevent the ICC from issuing an arrest warrant on Sudanese President Omar al-Bashir and subsequently fail to arrest him. Since its re-election to the HRC in 2014, South Africa has consistently abstained from all country-specific resolutions except those on Israel and the Occupied Territories. However, Nigeria and Kenya have exhibited similar voting patterns in the HRC. In 2011, Human Rights Watch criticised Nigeria for having the worst voting record among African states in the HRC because it either voted against or abstained on all country-specific resolutions.

The third perspective to South Africa’s human rights commitment takes a different stand. Eduard Jordaan, has argued that South Africa has scaled back in its human rights commitments, shielded regimes with odious human rights records and obstructed the international human rights cause. Jordaan’s argument is based on his 2014 analysis of South Africa’s actions in the HRC.

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806 See Alison Brysk, Global Good Samaritans: Human Rights as Foreign Policy (Oxford University Press, 2009) 171.
807 Ibid.
808 David Black, ‘South Africa, Multilateral Institutions and the Promotion of Human Rights’ in Philip Nel et al (eds), South Africa’s Multilateral Diplomacy and Global Change: The Limits of Reformism (Ashgate, 2001) 76.
809 President Omar al-Bashir is Sudan’s long-serving ruler who has been accused of war crimes by the prosecutor of the International Criminal Court. See Erika de Wet, ‘The Implications of President Al-Bashir’s Visit to South Africa for International and Domestic Law’ (2015) 13(4) Journal of International Criminal Justice 1-23.
810 South Africa has abstained from HRC resolutions targeting Syria, Iran, Belarus, Democratic People’s Republic of Korea, Eritrea but has voted in favour of resolutions targeting Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, the occupied Syrian Golan and the right of the Palestinian people to self-determination.
He criticised South Africa for opposing the singling out of specific countries through HRC country mandates and for voting against UN Security Council resolutions that targeted the human rights situation in specific countries.\footnote{Ibid 100-109; for voting patterns within the HRC and their political implications see Simon Hug, ‘Dealing with Human Rights in International Organisations’ (2016) 15(1) \textit{Journal of Human Rights} 21.} According to Jordaan, South Africa appeared to ‘believe that international pressure and “naming and shaming” are counterproductive… and at best, it is naïve.’\footnote{Ibid 100-103.} However, as earlier mentioned, Nigeria and Kenya, two key players in the African continent, took a similar position to South Africa in their opposition to country-specific resolutions in the HRC. This reinforces my argument against the ‘naming and shaming’ approach that I made in Chapter 3 of this thesis. I argued that the ‘naming and shaming’ approach is limited and that the benefits of an inclusive and cooperative approach to human rights implementation need to be considered. I underscored that the opposition of African states to ‘naming and shaming’ through country-specific resolutions is not just because they breed selectivity and double standards, but also partly as a result of their belief that it is a neo-colonial tool.

Like other African states, South Africa is inclined to support the UPR mechanism because of its inclusive, cooperative and collaborative approach to human rights implementation. However, the extent to which the South African government engages with the UPR, the factors undermining its engagement and the perspective which best describe this engagement are some of the issues that this Chapter seeks to address. This Chapter therefore examines the effectiveness of South Africa’s engagement with the UPR mechanism within the framework of the four-step approach to effectiveness developed in Chapter 3 of this thesis. I argue in this Chapter that while the inclusive and cooperative framework of the UPR galvanises strong support from South Africa for the mechanism, there is a potential for rights ritualism where there is a lack of effective NGO engagement with the UPR. In addition, this Chapter considers the themes of regionalism and cultural relativism developed in the previous Chapters and further argues that South Africa’s engagement with the UPR
largely reflects the second perspective wherein South Africa, like other states, is committed to human rights whenever it serves its national interest.

South Africa undertook its UPR I in 2008 (when it was a HRC member) and UPR II in 2012 (when it was not a HRC member). In the following sections of this Chapter I apply my four-step approach to determining the effectiveness of South Africa’s engagement with the UPR. I underscore the potential for rights ritualism by examining three important issues that featured prominently in the review of South Africa. These are corporal punishment, violence based on sexual orientation, and racism and xenophobia. I argue that while there is a potential for rights ritualism, effective NGO engagement can contribute to countering rights ritualism in the UPR.

6.2. COMMITMENT TO THE PRE-REVIEW PROCESS AND THE QUALITY OF SOUTH AFRICA’S UPR DELEGATION

6.2.1. South Africa’s UPR National Consultation Process

The UPR pre-review process is marked by a national consultation that culminates with the preparation and submission of the UPR state report, as well as reports by other UPR stakeholders. As I argue, an effective engagement at this stage of the review would require that states undertake a broad and representative consultation with all relevant stakeholders. The extent of consultation carried out by the states examined in this thesis has varied. While Nigeria during its first two reviews did not engage all relevant stakeholders, it engaged with all relevant human rights issues during its consultation meetings.\(^{815}\) The Kenyan government carried out a broad and representative consultation through the instrumentality of NGOs who formed coalitions and proactively engaged the state in the UPR process. This represents an example of an effective national consultation process that was broad and inclusive.

In the case of South Africa, my analysis indicates that the government did not effectively engage with the UPR national consultation process. During South

\(^{815}\) Including sensitive issues like the death penalty and same sex relations. However, the national consultation process was not representative because the state did not include gay rights organisations in the process.
Africa’s UPR I when it was a member of the HRC, it did not undertake any consultation in the preparation of its UPR state report. Some NGOs in their UPR I submissions stated that no consultation was undertaken and that it was unknown whether a state report was being prepared.\textsuperscript{816} In fact, South Africa is reported to be the only UN member state that did not submit a written report in advance of its UPR I.\textsuperscript{817} State reports for the UPR are generally due six weeks prior to the review.\textsuperscript{818} South Africa’s report that was due in January 2008 was only submitted on 15 April 2008, the same day South Africa was reviewed in Geneva. In addition, the late report submitted by the state during the interactive dialogue did not follow some other guidelines for the state report.\textsuperscript{819} The guidelines for the preparation of state reports require that states provide in their UPR reports a ‘description of the methodology and the broad consultation process’ followed in the preparation of their state reports.\textsuperscript{820} South Africa’s late UPR I report did not comply with this guideline, presumably because there was no such consultation.\textsuperscript{821} The South African Human Rights Commission (SAHRC) criticised the government for its lack of commitment to the reporting process.\textsuperscript{822}

The South African government made improvements during South Africa’s UPR II. It submitted the state report in time and complied with the structural


\textsuperscript{818} Resolution 5/1, UN Doc A/HRC/RES/5/1, para 17.

\textsuperscript{819} Chenwi, above n 817.

\textsuperscript{820} Human Rights Council, Follow-up to the Human Rights Council resolution 16/21 with regard to the Universal Periodic Review, 17\textsuperscript{th} sess, Agenda Item 1, UN Doc A/HRC/DEC/17/119 (19 July 2011).

\textsuperscript{821} See also criticisms by the CAT on the Initial Report of South Africa to CAT that was not in conformity with the guidelines. Committee against Torture, Conclusions and Recommendations of the Committee against Torture, South Africa, 37\textsuperscript{th} sess, UN doc CAT/C/ZAF/CO/1 (7 December 2006) para 3.

\textsuperscript{822} See Parliamentary Monitoring Group, above n 817.
guidelines of the UPR state report. This provides evidence of an on-going process of acculturation through the micro process of mimicry and identification. The need for South Africa to identify itself with the UPR practice of its regional and international peers generated social pressures to subsequently conform to the practice of timely submission of its UPR report. However, while the state UPR report provided information on the nature of the national consultation process, the process did not satisfy the requirement for a broad and representative UPR consultation. On this issue, the government stated that it undertook an ‘extensive national consultative process across government’ in the preparation of its state report.823 This implicitly suggests that there was no meaningful national consultation with NGO stakeholders as the consultation was solely across government institutions. Lawyers for Human Rights and the Consortium for Refugees and Migrants in South Africa, in their UPR II submission, criticised the failure of the South African government to consult NGO stakeholders in a timely and meaningful manner during UPR II.824

Comparatively, the African Peer Review Mechanism (APRM), a self-monitoring initiative established by the African Union to promote freedom and human rights amongst other values, has had a higher level of engagement from South Africa than the UPR.825 For example in the preparation of its 2014 country report to the APRM, the South African government organised consultations across various provinces with various stakeholders, including

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NGOs, faith-based organisations and the business sector.\textsuperscript{826} In addition this report was discussed and adopted in parliament.\textsuperscript{827} While the level of consultation in the preparation of the state report for the APRM has been criticised as insufficient,\textsuperscript{828} that mechanism has witnessed greater involvement of parliament, CSOs and individuals than the UPR.

However, the UPR is comparatively a more recent mechanism than the APRM and state engagement with the UPR has improved across both cycles of the review. Notwithstanding the greater level of consultation by South Africa with the APRM compared to the UPR, the general enthusiasm and level of engagement by Africa states with the UPR can be contrasted with their engagement with the APRM. According to McMahon, Busia and Asherio, despite the progress made by the APRM, it faces major challenges among African states because of the ‘lack of political will and capacity … and the number of acceded countries ‘sitting on the fence’ with no serious signals to kick-start the review process could dilute the initial enthusiasm and effectiveness of the mechanism overall’.\textsuperscript{829} Nineteen African states have not yet signed up to the review and of the 35 African states that have signed up to the APRM, more than half of them are yet to undertake their self-assessment process.\textsuperscript{830} The fact that all African states participated in both cycles of the UPR and engaged in the UPR reporting and interactive dialogue processes is an indication of a greater enthusiasm and level of engagement with the UPR.

Furthermore, the UPR may have had some impact on South Africa’s human rights treaty body reporting obligations across South Africa’s UPR I and II. At the time of South Africa’s UPR I in 2008, South Africa, as many UN member


states, had a backlog of overdue reports before the various human rights treaty bodies. After UPR II in 2012, the South African government has made a concerted effort to comply with its reporting obligations. On 26 November 2014, it submitted to the various UN human rights committees 12 of its 14 outstanding treaty body reports. These include the initial report to the Human Rights Committee (due in 2000); II-IV reports to the Committee on the Elimination of all forms of Discrimination against Women (due in 2009); IV-VIII reports to the Committee on the Elimination of Racial Discrimination (due in 2002); and the initial report to the Committee on the Rights of Persons with Disabilities. I made a similar observation in the previous Chapter in relation to the positive impact of Kenya’s UPR engagement on the state’s compliance with its treaty body reporting obligations. While it may be uncertain to draw a causal relationship between engagement with the UPR and compliance with treaty body reporting obligations, it is plausible that the former has an impact on the latter, given that about 828 of the total UPR I recommendations by all states (about 4% of the total recommendations) were on state engagement with the treaty bodies.

Notwithstanding the potential impact of the UPR process on the treaty body reporting obligations, it is important for the state to engage with domestic NGO stakeholders through the national consultation process. In addition, as I argued in the previous Chapter on Kenya, NGOs have found ways to bypass the limitations to their direct participation in the UPR process and effectively engage the state. Unlike Nigeria and Kenya, there was no NGO coalition in the case of South Africa during UPR I and II. The absence of such a coalition limited the ability of NGOs in South Africa to engage effectively with the

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831 In 2010, South Africa had 14 overdue reports to the UN human rights treaty bodies. See Lilian Chenwi, above n 817, 28-50.
832 South Africa (as of February 2017) only has three overdue reports. The Department of Justice and Constitutional Development in South Africa is also responsible for the preparation of various treaty body and UPR reports of South Africa. See OHCHR, ‘Status of Late and Non-reporting by state Parties’ <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/LateReporting.aspx>.
833 There were 621 UPR II recommendations on treaty bodies (about 2% of the total UPR recommendations to states). See UPR Info <https://www.upr-info.org/database/statistics/index.php?cycle=1>.
834 While there has been an increase in the number of joint submissions by NGOs in South Africa, an NGO Coalition for the UPR was not established at the conclusion of UPR II.
government in the review process. Through the formation of a broad and representative NGO coalition, NGOs in South Africa can potentially undertake media and advocacy campaigns on the UPR that would proactively engage the government. This would strengthen their capacity to impact and influence South Africa’s subsequent UPR process, considering the reluctance of the South African government to engage NGOs during the UPR national consultation process as highlighted above.

6.2.2. The Quality of South Africa’s UPR Delegation

There are no stated guidelines on the composition of a state’s UPR delegation.835 However, for a state to participate effectively in the interactive dialogue, the delegates should have the competence to respond to questions and have up-to-date information on the efforts taken by their state to comply with its human rights obligations. As noted in the previous Chapter, the composition of a state’s UPR delegation is indicative of the way in which the state perceives the UPR process. Sweeny and Saito mentioned that a UPR state delegation headed by the foreign ministries denote that the state views the review ‘as a foreign affairs exercise rather than a national process for the examination and improvement of human rights protection and promotion.’836 Further, while there are no requirements on the number of personnel to represent the state, there is a requirement for the integration of a gender perspective.837

An analysis of the composition of South Africa’s UPR I delegation clearly indicates that the government took the UPR process more as a foreign affairs matter rather than a process for the examination and improvement of human rights. The delegation was composed of seven delegates. The South African Ambassador and Permanent Representative to the UN Office at Geneva headed the delegation and all the delegates were from her Department of Home and

835 HRC Resolution 5/1 provides that ‘Each member State will decide on the composition of its delegation’. See Resolution 5/1, UN Doc A/HRC/RES/5/1, 18(a).
836 Gareth Sweeny and Yuri Saito, above n 392, 209.
837 Resolution 5/1, UN Doc A/HRC/RES/5/1, 3(k).
Foreign Affairs. 838 Judith Cohen, Head of Parliamentary and International Affairs Programme of the South African Human Rights Commission, criticised the government for sending an exclusively Geneva-based delegation for its review. 839 She expressed disappointment at the inability of the delegation to provide sufficient responses and up-to-date information to questions asked during the review. 840

During UPR II, the government made improvements to the quality of its UPR delegation and included representatives from the Justice and Human Rights Departments. 841 The delegation was composed of 20 personnel and headed by the Deputy Minister of Justice and Constitutional Development. 842 In addition, the South African government fully integrated gender balance in its UPR delegation, as was the case with the composition of the Kenyan UPR delegations. 843 During UPR I, South Africa’s delegation was headed by Ms. Glaudine Mtshali, Ambassador, Permanent Representative of South Africa to the United Nations Office at Geneva, and four of the seven delegates were female. During UPR II, seven of the 13 delegates were female. However, the future composition of the South African UPR delegation could be strengthened by including representatives from Parliament as was earlier seen in the composition of the Nigerian UPR delegation. 844 It is important to note that parliament has an important role to play in the UPR process. Parliament could ensure that government complies with its UPR reporting obligations. Moreover, including parliamentary representatives in the UPR delegation can facilitate collaboration between government and parliament, with regard to the

839 See Parliamentary Monitoring Group, above n 817.
840 Ibid.
842 Ibid.
843 Slovenia during UPR I recommended that South Africa should continuously integrate a gender perspective in its UPR process. See HRC UPR I Report – South Africa, UN Doc A/HRC/8/32, para 67(3).
844 This can equally be contrasted with its engagement with the APRM which has had Parliamentary involvement. See Economic Commission for Africa, ‘The Role of Parliament in the APRM’ (2011) 12-23 <http://www.uneca.org/sites/default/files/PublicationFiles/5-pamphlet_the_role-of-parliament-in-aprm.pdf>.
implementation of UPR recommendations that require parliamentary approval such as treaty ratification by the executive branch of government.

As I argue in this thesis, the UPR is an evolving mechanism and the engagement of African states improved across the two cycles of the review, as is the case with South Africa. The quality of the UPR I South Africa delegation may have indicated that the state was less committed to the process by viewing it simply as a foreign affairs exercise. However, the improvement that was evident in the UPR II delegation in the case of Nigeria, Kenya and South Africa by incorporating legal and judicial personnel as well as instituting a gender balance in their respective delegations signals an increasing commitment to the UPR mechanism. The lesser commitment of South Africa to this aspect of the review during UPR I when it was a HRC member compared to the improved commitment during UPR II when it was not a HRC member, suggests that membership in the HRC may not necessarily have a direct influence on state engagement with the UPR. Despite the early scepticism on the efficacy of the UPR mechanism, the increasing commitment to the ideals of the UPR of promoting the implementation of human rights through cooperation can contribute to improving the human rights situation on the ground.

6.3. SOUTH AFRICA AS A REVIEWER AND AS A STATE UNDER REVIEW

6.3.1. South Africa as a Reviewer

To engage effectively as a reviewer, it is important that states make quality recommendations in a non-selective manner. This would fall in line with the UPR principles of universality and non-selectivity. As examined in the previous Chapter, selectivity and lack of specificity in the making of recommendations undermined Kenya’s engagement as a reviewer during UPR II. During UPR I (when Kenya was not a member of the HRC), Kenya did not participate in the review of any states. Kenya only started engaging as a reviewer after July 2012 when it sought and subsequently became a member of the HRC. While membership in the HRC may have influenced Kenya’s engagement with the UPR mechanism during its UPR II, Kenya’s participation
as a reviewer during UPR II was selective as the state did not effectively engage with the various regional groups of states.

An examination of South Africa’s engagement as a reviewer reinforces the universality and non-selectivity of the UPR mechanism. During UPR I, South Africa participated in 11 of the 12 UPR sessions and reviewed states in all the all the five regional groups of states. It participated and made recommendations to 32 African states, 16 Asian states, 3 states from the EEG,845 11 states from GRULAC and 10 states from WEOG.846 It participated in a similar manner during UPR II.847 South Africa is among the top 6 African states that have made the highest number of recommendations during the first two cycles of the UPR.848

However, only the quality - not the quantity of recommendations - has the capacity to improve the human rights situation on the ground. As argued in the preceding Chapter, a good recommendation should be relevant and have the capacity to promote meaningful and measurable human rights changes on the ground. This falls in line with what Roland Chauville describes as SMART recommendations, those that are specific, measurable, achievable, relevant and time-bound.849 Figure 6.1 and 6.2 below provide further analysis of South Africa’s participation as a reviewer to determine the extent of its participation and the quality of its recommendations.

845 This included Russia, Slovakia and Azerbaijan.
846 This included Australia, France, Belgium, Germany, Denmark, Netherlands and New Zealand.
847 During UPR II South Africa made recommendations to 42 African states, 15 Asian states, 3 states from the EEG, 13 states from GRULAC and 11 states from WEOG.
As figure 6.1 and 6.2 above indicate, South Africa reviewed states across all the regional groups, with some variation. The fact that it participated and made more recommendations to states within the African Group indicates that its first loyalty is to the African Group. About 48% and 46% of the total South African recommendations made during UPR II and I respectively were made to African states.\textsuperscript{850} In terms of the specificity of the recommendations made (R5 recommendations), South Africa engaged the various groups of states with specific recommendations across the first two cycles of the UPR. The African Group in particular has experienced an increase in the percentage of specific recommendations made by South Africa (from 5% to 7%). This might be explained by the commitment undertaken after UPR I by the African Group (including South Africa) and 89 other states to make specific recommendations during UPR II.\textsuperscript{851} However, in proportion to the total number of recommendations made to each group of states, GRULAC and WEOG have had more specific recommendations (R5) compared to African states.

\textsuperscript{850} This is calculated from 166 recommendations made by South Africa during UPR I and 138 during UPR II.

Notwithstanding, the recommendations made by South Africa to other states (including African states) are more specific compared to those made by other African states like Nigeria and Kenya but there is a general improvement in the specificity of UPR recommendations across UPR I and II. For example, Nigeria’s percentage of specific recommendations (R5) to its African regional peers increased from 1% to 4% across UPR I and II, as well as its percentage of specific recommendations to WEOG increased from 2% to 3%. This is in line with the commitment entered into in 2013 jointly by the African Group (including South Africa) together with other states, to make UPR recommendations that are ‘precise, practical, constructive, forward-looking and implementable.’ The tendency for states to emulate good practice from their peers by improving on the quality of their UPR recommendations provides evidence of acculturation through the microprocess of mimicry. This also reinforces the potential for the UPR to evolve over time in relation to the nature of UPR recommendations and to address early criticism with regard to their general lack of specificity.

An examination of the substance or relevance of the recommendations made by South Africa tends to support the perspective that South Africa, like many other states, is committed to human rights whenever it serves its foreign policy interest. The ‘quiet diplomacy’ in the review of Zimbabwe undermines the objectivity of South Africa’s participation as a reviewer. During UPR I, South Africa made comments about the obstacles impeding the human rights efforts of the Zimbabwean government, but ignored the government’s repression and failed economic policies which impact on rights enjoyment. In addition, most of South Africa’s recommendations to African states were on socio-economic and development rights issues. However, no recommendation on these issues were made to Zimbabwe in spite of the fact that South Africa has

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852 As earlier mentioned, Kenya did not make any recommendations during UPR I. 16% of the total 89 UPR II recommendations made by Kenya required specific action (R5) from its African peers compared to only 1% of its recommendations to EEG and 1% to GRULAC states. However, it is important to note that Kenya was very selective in its participation as a reviewer and reviewed only one state from the EEG.


recently experienced an unprecedented influx of Zimbabweans, largely attributed to failed economic policies and a governance crisis.\textsuperscript{855} South Africa equally failed to be critical of Sudan despite its appalling human rights situation by making just one general recommendation with no particular focus.\textsuperscript{856} This recommendation lacking specificity required Sudan to ‘[g]ive priority to the promotion and protection of human rights in all policies developed by the government.’\textsuperscript{857}

Further analysis on South Africa’s participation as a reviewer raises questions on its commitment to human rights, especially to protecting the rights of sexual minorities. Amidst criticism from the African Group, South Africa tabled a draft resolution before the HRC titled ‘Human Rights, sexual orientation and gender identity’, which expressed concern at violence and discrimination against sexual minorities.\textsuperscript{858} However, South Africa’s participation as a reviewer during the UPR does not reflect its support for the rights of sexual minorities, at least within the African region. African states received the highest number of recommendations on the decriminalisation of same sex relations.\textsuperscript{859} Despite this fact, South Africa made no recommendation on the issue to an African state, ignoring the growing specific legislation criminalising same-sex relations within Africa. South Africa made recommendations on sexual orientation to many states including the United States, Demark and Cuba, except to states within Africa and Asia where criminalisation is predominant.\textsuperscript{860} While this undermines South Africa’s

\textsuperscript{855} Nicola de Jager and Catherine Musuva, ‘The influx of Zimbabweans into South Africa: a crisis of governance that spills over’ (http://www.tandfonline.com/doi/pdf/10.1080/09744053.2015.1089013).

\textsuperscript{856} This is in contrast to the recommendations made by most Western states specifically targeting issues such as treaty ratification, torture, enforced disappearance, justice, freedom of the press, public security and the death penalty. See UN Human Rights Council, Report of the Working Group on the Universal Periodic Review – Sudan, UN Doc A/HRC/18/16 (11 July 2011).

\textsuperscript{857} Ibid para 83.48.


\textsuperscript{859} This constituted 27\% of the total recommendations made during UPR I and II. See UPR Info, http://www.upr-info.org/database/statistics/index_issues.php?fFk_issue=47&cycle=.

commitment to protecting the rights of sexual minorities, it however, reinforces the theme of regionalism in the engagement of African states with the UPR mechanism by underscoring the inability for South Africa to break away from the general position of the African Group in its intra-African UPR engagement.

Nevertheless, the engagement of South Africa as a reviewer strengthens my argument in the earlier Chapter that the UPR has the ability to amplify human rights concerns and recommendations made by other human rights mechanisms. About 8% of the total 166 recommendations made by South Africa during UPR 1 required states to implement recommendations from the treaty bodies. For example, South Africa recommended that Mauritius ‘[i]mplement the recommendations of the Committee on the Rights of the Child’ 861 and recommended that Germany should ‘[i]mplement the recommendations of the CERD’ 862.

Overall, South Africa, unlike Kenya, effectively engaged as a reviewer in a non-selective manner across the various regional groups. It demonstrated the universality of the UPR while at the same time consolidating regionalism by reviewing more states in the African Group than any other group of states. However, while South Africa engaged various groups of states with specific recommendations, the substance of its recommendations to some African states avoided human rights issues that were of serious concern within those states. The little criticism of its regional peers like Zimbabwe and Sudan and avoidance of the issue of sexual orientation when reviewing its African peers raises questions about South Africa’s international commitment to protecting the rights of sexual minorities. It equally reinforces the perspective that South Africa, like many other states, is committed to human rights whenever it serves its national interests. Nonetheless, the increasing relevance and specificity of UPR recommendations, and the ability for the UPR to reinforce treaty body recommendations underscores the potential for the UPR mechanism to evolve

into an effective cooperative mechanism for monitoring human rights implementation.

6.3.2. South Africa as a State under Review

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

During UPR II, there was an improvement in South Africa’s responses to recommendations from its peers. Sixty-seven states made 151 recommendations to South Africa. South Africa directly responded to about 90% of the recommendations but still failed to declare its position on about 10% of the recommendations. From the 151 recommendations, South Africa declared 80% as ‘acceptable’, about 9% ‘not acceptable’ and less than 1% were ‘rejected’. The only recommendation explicitly rejected concerned

864 Report of the HRC on its 8th Session, UN Doc A/HRC/8/52, paras 562-592; Since South Africa did not clearly communicate acceptance of any of the UPR I recommendations, the data on figure 3 below is limited only to UPR II recommendations most of which received a clear response from South Africa.
865 See Resolution 16/21, para 6; It therefore becomes difficult to assess implementation when a state under review does not directly communicate its position on the recommendations made.
866 Ibid para 16.
allegations of sexual exploitation and abuse by South African peacekeepers.\textsuperscript{868} The South African delegation stated that ‘[i]n view of the political gravity of this exaggerated allegation, the South African government has decided to reject this allegation and take the matter up bilaterally with the Canadian government at a political level.’\textsuperscript{869} South Africa did not provide a clear response to about 10\% of the recommendations. These included recommendations such as to ‘[a]ccede to the Agreement on Privileges and Immunities of the ICC’ and to establish without delay an independent national monitoring mechanism on the Rights of Persons with Disabilities. Figure 6.3 below analyses the recommendations made to South Africa during UPR II and its responses to the various categories of recommendations.

![Figure 6.3: South Africa UPR II Percentage of Recommendations Accepted by Category](image)

Figure 6.3 indicates that South Africa engaged with the various categories of recommendations. The majority of the recommendations accepted by South

\textsuperscript{868} Canada made this recommendation. See ibid para 124.96.

\textsuperscript{869} Ibid.
Africa were general recommendations (about 37% of overall 151 recommendations). However, it accepted some specific recommendations (20% of overall 151 recommendations). Another observation is that South Africa rejected more specific (R5) recommendations (about 9% of the total recommendations) when compared to the percentage of recommendations rejected from the other categories.\footnote{This included the recommendations South Africa considered unacceptable and those it failed to provide a direct response to.} The majority of recommendations made by African states to South Africa during UPR II (74%) required a general (R4) or continuing (R2) action from South Africa. All of these recommendations were declared ‘acceptable’ by South Africa. In contrast, 92% of the recommendations that were declared ‘not acceptable’ by South Africa were made by Western states. This reinforces the theme of regionalism and highlights the diverging approach to cooperation in the UPR between African and Western states. As I argued in the case of Nigeria and Kenya, the tendency for African states to accept UPR recommendations from their regional peers can facilitate their acculturation through the microprocess of identification. In addition, the improvement in the response of South Africa across UPR I and II is an indication of evolving practice as states are increasingly providing clearer responses to their position on each UPR recommendation.

As noted in the previous Chapters, the rank under which a recommendation falls presents a clearer picture of a state’s level of receptiveness and plays a crucial role during implementation. General recommendations (R4) give the state under review greater autonomy to define the manner of implementation, but the more general a recommendation is, the harder it is to measure implementation. Unlike general recommendations, specific recommendations, when implemented, have the capacity to promote meaningful and measurable human rights changes on the ground.\footnote{As pointed out in the previous Chapter, a few general recommendations can translate into specific actions at the implementation stage.} However, as I highlighted in Chapter 5, states can implement general recommendations through specific actions. In addition, the fact a recommendation is non-specific or less actionable does not necessarily mean it is qualitatively inferior or inconsistent with the ideals of
the UPR. On the other hand, a specific recommendation (R5) may be more actionable but inconsistent with the ideals of the UPR by failing to ‘take into account the level of development and the specificities of countries’,\textsuperscript{872} consider the capacity needs of the country\textsuperscript{873} or aim to secure the ‘the improvement of the human rights situation on the ground.’\textsuperscript{874} African states have generally adopted a ‘soft’ approach to cooperation, which in many cases results in non-specific recommendations. As I argue, the fact that the recommendations states make are non-specific does not necessary imply they are not relevant. Table 6.1 below provides a list of the top 12 issues raised during South Africa’s UPR I and II.

\textbf{Table 6.1}

<table>
<thead>
<tr>
<th>Rank</th>
<th>UPR I</th>
<th></th>
<th></th>
<th>UPR II</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Issue</td>
<td>Total No. of Recom. (UPR I)</td>
<td>% of 22 Recom. (UPR I)</td>
<td>Rank</td>
<td>Issue</td>
<td>Total No. of Recom. (UPR II)</td>
</tr>
<tr>
<td>1</td>
<td>Violence against Women and Children</td>
<td>5</td>
<td>22.7%</td>
<td>1</td>
<td>Violence and Discrimination based on race, Gender and Sexual Orientation</td>
<td>45</td>
</tr>
<tr>
<td>2</td>
<td>HIV/AIDS</td>
<td>3</td>
<td>13.6%</td>
<td>2</td>
<td>Treaty Ratification</td>
<td>18</td>
</tr>
<tr>
<td>3</td>
<td>Sexual Orientation</td>
<td>3</td>
<td>13.6%</td>
<td>3</td>
<td>Health and HIV/AIDS</td>
<td>17</td>
</tr>
<tr>
<td>4</td>
<td>Racism and Xenophobia</td>
<td>2</td>
<td>9%</td>
<td>4</td>
<td>Freedom of Expression/Information</td>
<td>11</td>
</tr>
<tr>
<td>5</td>
<td>Treaty Ratification</td>
<td>2</td>
<td>9%</td>
<td>5</td>
<td>Education</td>
<td>9</td>
</tr>
<tr>
<td>6</td>
<td>Human Rights Education</td>
<td>2</td>
<td>9%</td>
<td>6</td>
<td>Socio-economic Rights</td>
<td>8</td>
</tr>
<tr>
<td>7</td>
<td>Torture</td>
<td>1</td>
<td>4.6%</td>
<td>7</td>
<td>Vulnerable Groups/Disability</td>
<td>8</td>
</tr>
<tr>
<td>8</td>
<td>Vulnerable Groups/Disability</td>
<td>1</td>
<td>4.6%</td>
<td>8</td>
<td>Torture and other CID Treatment</td>
<td>6</td>
</tr>
<tr>
<td>9</td>
<td>Poverty</td>
<td>1</td>
<td>4.6%</td>
<td>9</td>
<td>Rights of Migrant Workers</td>
<td>6</td>
</tr>
<tr>
<td>10</td>
<td>Socio-economic Rights</td>
<td>1</td>
<td>4.6%</td>
<td>10</td>
<td>Human Trafficking</td>
<td>5</td>
</tr>
</tbody>
</table>

\textsuperscript{872} See Resolution 5/1, UN Doc A/HRC/RES/5/1.
\textsuperscript{873} Ibid para 4(c).
\textsuperscript{874} Ibid para 4(a).
The majority of the recommendations to South Africa during UPR I focused on violence against women and children, HIV/AIDS treatment and discrimination based on race or sexual orientation.\textsuperscript{875} The three issues that appeared predominantly in the recommendations to South Africa during UPR II included violence and discrimination based on race, gender or sexual orientation (about 30\% of overall 151 recommendations),\textsuperscript{876} treaty ratification (about 12\%);\textsuperscript{877} and HIV/AIDS (about 11\%).\textsuperscript{878}

In response to UPR I recommendations from its peers, South Africa stated that ‘[m]ost of the recommendations proposed for South Africa require serious contextualization… and have already been implemented through national legislation and programmes.’\textsuperscript{879} For example, during UPR I, Slovenia made a specific recommendation that South Africa:

\begin{quote}
Commit not only to removing the defence of reasonable chastisement but also to criminalizing corporal punishment with the concomitant pledges towards raising awareness and providing the necessary resource to support parents in adopting positive and alternative forms of discipline.\textsuperscript{880}
\end{quote}

The government of South Africa responded by stating that the issue of corporal punishment at home is being dealt with by the South African \textit{Domestic Violence Act 1998}.\textsuperscript{881} It further stated that it has outlawed corporal punishment at school by legislation but there are only ‘isolated cases of non-compliance with legislation for which corrective measures are usually taken.’\textsuperscript{882} However,

\textsuperscript{875} Ibid.
\textsuperscript{876} There were 27 recommendations. Fifteen recommendations were on sexual orientation and 12 on racial discrimination.
\textsuperscript{877} Twenty recommendations were on treaty ratification.
\textsuperscript{878} Twelve recommendations were on HIV/AIDS treatment. The three issues mentioned above accounted for about 53\% of the overall 151 recommendations made to South Africa during UPR II.
\textsuperscript{879} \textit{Report of the HRC on its 8th Session}, UN Doc A/HRC/8/52, para 567.
\textsuperscript{880} \textit{HRC UPR I Report – South Africa}, UN Doc A/HRC/8/32, para 67(1); See a similar recommendation from Mexico during UPR II for South Africa to prohibit and punish corporal punishment at home and in schools. \textit{See HRC UPR II Report – South Africa – Addendum}, UN Doc A/HRC/21/16/Add.1, para 124.88.
\textsuperscript{881} \textit{Report of the HRC on its 8th Session}, UN Doc A/HRC/8/52, para 568.
\textsuperscript{882} Ibid. See a similar response by the government during UPR II - \textit{HRC UPR I Report – South Africa}, UN Doc A/HRC/8/32, para 124.88.
NGOs such as Children Now, Global Initiative to End Corporal Punishment of Children, and the South African Human Rights Commission have repeatedly made recommendations for the government to ban corporal punishment at home and to remove the defence of ‘reasonable chastisement.’\textsuperscript{883} The special attention given to the issue of corporal punishment by various stakeholders during South Africa’s UPR I underscores the relevance of the recommendations on corporal punishment. The relevance of these recommendations was reinforced by Mexico during UPR II when it recommended that the South African government should ‘[p]rohibit and punish corporal punishment both in the home, as well as in public institutions such as schools and prisons.’\textsuperscript{884} In section IV of this Chapter, I examine the extent to which the South African government implemented these recommendations on corporal punishment.

On other issues, such as violence based on sexual orientation, racism and xenophobia, the government of South Africa responded by referring to the constitutional protection in place and to its international endorsement of LGBT rights at the HRC.\textsuperscript{885} However, this undermines the commitment to increase domestic protection of the relevant human rights issues because the substance of many of the UPR recommendations raised concerns about the inadequacy and inefficacy of the existing protective measures. Examples of such UPR recommendations to South Africa include ‘reinforce measures to combat and prevent xenophobia…’\textsuperscript{886} and to enhance the prevention, investigation and


\textsuperscript{884} See \textit{HRC UPR II Report – South Africa – Addendum}, UN Doc A/HRC/21/16/Add.1, para 124.88.

\textsuperscript{885} \textit{Report of the HRC on its 8th Session}, UN Doc A/HRC/8/52, paras 571–574.

\textsuperscript{886} See \textit{HRC UPR II Report – South Africa – Addendum}, UN Doc A/HRC/21/16/Add.1, para 124.44.
prosecution of crimes of violence against individuals based on their gender or sexual orientation.\textsuperscript{887}

Nevertheless, it is observable, from an examination of South Africa as a state under review, that there has been an improvement in the engagement of South Africa with the UPR across UPR I and II. South Africa, like Kenya, has provided clarification and comments on the government’s position on each of the UPR II recommendations. It accepted a high percentage of the total UPR II recommendations (80\%), just like Nigeria (84\%) and Kenya (76\%). This provides evidence of an increasing level of engagement with the UPR mechanism. In addition, the parallel between some of the recommendations made by states and NGOs underscores the relevance of such recommendations to improving the human rights situation on the ground. It also reinforces my argument in Chapter 5 on the impact of NGO UPR recommendations on state UPR recommendations. However, the receptiveness of South Africa to its UPR I recommendations demonstrates the potential for rights ritualism. As I noted in Chapter 2, this concept in the context of the UPR relates to the participation of states in the UPR process but with reluctance about increasing the domestic protection of human rights.\textsuperscript{888} The reluctance of the South African government to accept recommendations that raised concerns about the inadequacy and inefficacy of the existing measures for human rights protection limits the extent of the state’s engagement at this stage of the review.

\section*{6.4. SOUTH AFRICA’S IMPLEMENTATION OF UPR RECOMMENDATIONS}

In the previous section, I highlighted the relevance of the UPR recommendations made during the review of South Africa by underlining issues such as corporal punishment, violence based on sexual orientation, racism and xenophobia. The implementation of these recommendations would contribute to improving the human rights situation on the ground. Implementation of UPR recommendations is therefore a central component in my model to evaluating the effectiveness of state engagement with the UPR

\textsuperscript{887} Ibid para 124.82.  
\textsuperscript{888} See Charlesworth and Larking, above n 49, 16.
mechanism. This section engages with the last component of the four-step approach to measuring the effectiveness of state engagement with the UPR by analysing the extent to which South Africa implemented its UPR recommendations. I limit the analysis to UPR I recommendations because UPR II only recently ended and information on implementation is not yet available.

The implementation timeframe for South Africa to implement its UPR I recommendations ran from April 2008 to May 2012 when it submitted its UPR II report. It is important to consider this timeframe when measuring implementation because the UPR is a dynamic and on-going process, and the human rights situation on the ground is constantly changing. As a result, the implementation of South Africa’s UPR I recommendations is only analysed within this timeframe. As previously noted, the analysis on implementation employs the Implementation Recommendation Index (IRI) that is based on an average of stakeholders’ responses on the implementation outcome of each recommendation.889 In addition, as I explained in Chapter 3, this thesis adopts three broad categories of implementation: Fully Implemented, Partially Implemented and Not Implemented.

At the conclusion of South Africa’s UPR I, the South African government had fully implemented about 14% of the 22 recommendations, 46% were partially implemented and 32% were not implemented. About 9% of the recommendations were not assessed because the stakeholders did not provide any responses on implementation. The recommendations not assessed were vague, making it very difficult to assess their implementation outcome. An example is the recommendation by Sudan that the South African government should ‘give special attention to the role of international cooperation for the enjoyment of economic, social and cultural rights.’890 The recommendations that UPR stakeholders considered as fully implemented only related to HIV/AIDS, while the partially implemented recommendations were mostly on

889 Commentary on South Africa’s UPR I implementation was provided by stakeholders such as the South African Human Rights Commission (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 Child Welfare South Africa (See full list in appendix III).

the issues of poverty and education, xenophobia and discrimination based on race and sexual orientation. I specifically examine below the implementation of three groups of issues that featured prominently in the review of South Africa and I consider the potential for rights ritualism. These three issues are corporal punishment, violence based on sexual orientation and gender identity, and racism and xenophobia. As I earlier highlighted, many of these issues were relevant and addressed the inadequacy or ineffectiveness of the measures put in place by the government to address these human rights concerns.

6.4.1. Corporal Punishment

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

However, various UPR stakeholders were in consensus in their response that the government did not implement this recommendation. For example, the South African National Human Rights Commission responded that the South African government has not taken steps to implement the recommendation and repeated the exact wording of the recommendation made by Slovenia on this issue for South Africa during UPR II. An NGO, Global Initiative to End Corporal Punishment of Children, stated that despite recommendations made to South Africa on this issue, ‘the legality of corporal punishment of children in South Africa has not changed since the review in 2008’ as corporal punishment continues to be lawful at home. The South African Schools Act

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and other relevant laws expressly prohibit corporal punishment in schools. Section 10 of the South African Schools Act provides that ‘[n]o person may administer corporal punishment at a school to a learner.’ The Constitutional Court of South Africa in the case of Christian Education SA v Minister of Education reinforced this. However, there is no explicit prohibition of corporal punishment at home. According to another NGO joint report by Save the Child et al, the South African government did not implement the 2008 UPR recommendation on corporal punishment as the government continued to condone corporal punishment being practised at home, in schools and other social settings.

In addition, 2014 findings by the Centre for Child Law at Pretoria University suggest that there is an ‘official ambivalence’ towards the ban on corporal punishment. The Centre found that approximately 2.2 million children were exposed to corporal punishment and that the phenomenon has been on a steady increase in certain provinces in South Africa. Similar recommendations made by the UN Committee on the Rights of the Child, the UN Committee against Torture and more recently by the African Committee of Experts on the Rights and Welfare of the Child have not been implemented. They expressed concern at the continuous use of corporal punishment in schools. Their recommendations were that the government ensure that legislation banning corporal punishment is strictly implemented in schools and take effective

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894 The appellants argued that the ban on corporal punishment violated the rights of the pupil’s parents to freedom of religion that permits the use corporal punishment on children. The court did not find any violation of freedom of religion and upheld the ban on corporal punishment in schools as lawful. See Christian Education South Africa v Minister of Education 2000 (4) SA 757.
897 Ibid 11.
measures to prohibit corporal punishment at home.\textsuperscript{899} The response of the government that simply points to existing legislation on corporal punishment underscores its reluctance about increasing the domestic protection of human rights. It fails to consider the inadequacy or ineffectiveness of the measures put in place to end corporal punishment at school and home.\textsuperscript{900} This demonstrates the potential for rights ritualism.

### 6.4.2. Violence based on Sexual Orientation

As indicated on Table 6.1, violence based on sexual orientation is one of the issues that featured prominently among state recommendations to South Africa during UPR I and II. Recommendations that states made to South Africa on sexual orientation include: undertaking credible investigation and prosecuting perpetrators; enhancing prevention and monitoring capacity; training police and judiciary; and launching awareness-raising campaigns.\textsuperscript{901} In some ways, South Africa is an exception to the general criminalisation and discriminatory treatment confronting the LGBT community in Africa. Article 9 (3) of the 1996 South African Constitution explicitly prohibits discrimination against anyone based on sexual orientation.\textsuperscript{902} At the international level, South Africa has achieved a milestone in advancing the rights of LGBT persons worldwide. In 2011, despite strong criticisms from its regional peers, South Africa tabled a draft resolution before the HRC that expressed concern at violence and discrimination against persons based on their sexual orientation.\textsuperscript{903} South Africa was the only African state that voted in favour of a subsequent resolution on sexual orientation in 2014.\textsuperscript{904} South Africa’s response to state recommendations on this issue during UPR I and its comments on

\textsuperscript{899} Ibid.

\textsuperscript{900} The existing enforcement mechanisms regulating the prohibition of corporal punishment in schools have been found to be inadequate and ineffective. See Global Initiative to End All Corporal Punishment of Children, ‘Corporal Punishment of Children in South Africa’ (2015) 1-6 <http://www.endcorporalpunishment.org/assets/pdfs/states-reports/SouthAfrica.pdf>; Centre for Child Law, above n 896.

\textsuperscript{901} See for example HRC UPR II Report – South Africa – Addendum, UN Doc A/HRC/21/16/Add.1, paras 124.50, 124.51 and 124.75-124.87.

\textsuperscript{902} Constitution of the Republic of South Africa Act 1996 (South Africa) ch 2, art 9 (3).

\textsuperscript{903} UN Human Rights Council, Human Rights, Sexual Orientation and Gender Identity, UN Doc A/HRC/RES/17/19 (14 July 2011).

\textsuperscript{904} UN Human Rights Council, Human Rights, Sexual Orientation and Gender Identity, UN Doc A/HRC/RES/27/32 (2 October 2014).
implementation simply made reference to the above domestic constitutional protection, government policy framework on combating hate crime and its international endorsement of the LGBT rights at the HRC.\textsuperscript{905}

However, South Africa’s role on the issue of sexual orientation lacks a consistent actual commitment domestically and internationally. According to various NGO reports, the domestic situation of LGBT individuals remained generally grim as they reportedly faced violence and intimidation because of their sexual orientation.\textsuperscript{906} In 2011, Human Rights Watch published a report that found a dichotomy between the constitutional ideals and public attitude towards such individuals.\textsuperscript{907} Furthermore, it found that despite the constitutional protection on the rights of the LGBT community, discrimination against them remained institutionalised in the communities, families and state institutions.\textsuperscript{908}

According to a joint report by the Centre for Applied Psychology of the University of South Africa and NGOs working on gay rights, state responses to violence based on sexual orientation have fallen short in many aspects.\textsuperscript{909} They argue that there is lack of official monitoring and reporting since there is no effective system to monitor and collect data on such crimes.\textsuperscript{910} The absence of such a system, they further argue, impedes policymakers from understanding the scope of the problem and developing adequate responses.\textsuperscript{911} Moreover, there is the growing phenomenon of ‘corrective’ or ‘curative’ rape


\textsuperscript{907} Ibid 1.

\textsuperscript{908} Ibid 14-15.

\textsuperscript{909} See The Centre for Applied Psychology of the University of South Africa et al, above n 906, 7-8.

\textsuperscript{910} Ibid; UPR II recommendation made by The Netherlands to South Africa addresses this issue. See HRC UPR II Report – South Africa – Addendum, UN Doc A/HRC/21/16/Add.1, para 124.81.

\textsuperscript{911} The Centre for Applied Psychology of the University of South Africa et al, above n 906.
in South Africa, in relation to which Lea Mwambene argues that the government has failed to fulfil its constitutional mandate. According to Mwambene, the government failed in its constitutional mandate by defining ‘corrective’ rape as a crime of rape instead of a hate crime, and for the failure of the courts to resolve the conflict between the right to culture and the rights to equality in the context of ‘corrective’ rape. Likewise, in 2011, the UN Committee on the Elimination of All Forms of Discrimination against Women expressed ‘serious concern about the practice of so called “corrective rape” of lesbians’ in South Africa.

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

913 Ibid.
916 Deon De Lange, ‘Call to suspend ANC MP for opening fire on gay rights’, Cape Times, (Cape Town), 8 May 2012, 4; This stated was made during a submission made to the Constitution review committee calling for changes to section 9 of the constitution that protects against discrimination based on sexual orientation.
at the time the statement was made, it may colour his level of commitment to protecting the rights of sexual minorities. Such statements and views by public officials undermine the commitment of the South African government to protect the rights of LGBT individuals.

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

South Africa’s role in the advancement of LGBT rights is an important one. As I argue in this thesis, the cooperative framework of the UPR can facilitate the realisation of LGBT rights within Africa through recommendations that seek to transform the social and political culture against sexual minorities rather than recommendations for immediate decriminalisation. Many African states can perceive the latter as confrontational and in disregard of strongly held African cultural values. However, the government of South Africa has not been consistent in its commitment internationally or publicly taken the lead in engaging its regional peers on this issue that tends to be culturally sensitive within the continent. At the domestic level, the government has not addressed the inadequacies of the existing protective measures for the protection of the


919 Ibid.

920 Ibid.
rights of sexual minorities. Enhancing prevention and monitoring capacity, and launching awareness-raising campaigns as recommended by UPR stakeholders, could help narrow the gap between the constitutional ideals and the attitude of the public towards the LGBT community.

6.4.3. Racism and Xenophobia

Addressing racism and xenophobia was a prominent issue in the review of South Africa with a dramatic increase from two recommendations during UPR I to 12 recommendations during UPR II. Most of these recommendations required the government to ‘reinforce measures to combat and prevent xenophobia’ and to ‘take all necessary steps to address the issue of xenophobia through legislation’ 921. Most of these recommendations focused on the ineffectiveness of existing measures to combat racism and reflected similar concerns raised by the human rights treaty bodies and other African regional mechanisms. For example in August 2006, the UN Committee on the Elimination of Racial Discrimination (CERD) was concerned about the frequency of hate crimes in South Africa and the ‘inefficacy of the measures in preventing such crimes’. 922 It recommended that the government ‘adopt legislative and other effective measures to prevent, combat and punish hate crimes.’ 923 In 2007, similar recommendations came from the African Peer Review Mechanism after observing that ‘xenophobia… is currently on the rise and should be nipped in the bud.’ 924 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. In addition, it reinforces my argument that the UPR can potentially create a synergy with other national, regional and international human rights mechanisms by amplifying and reinforcing their recommendations.

923 Ibid.
However, the recurrence of subsequent xenophobic incidents may be an indication that the South Africa government did not engage with the above recommendations to proactively prevent its recurrence. In May 2008, a spate of xenophobic violence in South Africa left more than 60 people dead, 342 shops looted and 213 burnt down, and about 100,000 people displaced.\textsuperscript{925} Mauritania and Switzerland questioned the South African delegation on this incident, which had been described as xenophobic, during the adoption of South Africa’s UPR I report in June 2008.\textsuperscript{926} The government in its response at the eighth session of the HRC was hesitant to recognise the incident as xenophobic. It stated that: ‘[t]he government of South Africa is on record as having publicly deplored the recent acts of violence against foreigners in the country by individuals and groups, ostensibly motivated by xenophobia.’\textsuperscript{927} More than two major instances of xenophobic attacks continued 2008 and 2011.\textsuperscript{928} In April 2015, there was recurrence of major xenophobic violence in Durban with at least five people killed, about 2,000 displaced and several foreign-owned shops looted.\textsuperscript{929} This recurrence of xenophobic incidents in South Africa underscores the ineffectiveness of the government’s measures to combat xenophobia.

Nevertheless, various stakeholders in their commentary on implementation recognised the specific challenge of racism and xenophobia in South Africa and some of the steps taken by the government to address the problem. The joint report by the Centre for Applied Psychology of the University of South Africa and other NGOs, among other things, commended the periodic public

\textsuperscript{925} Jonathan Crush et al, \textit{The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa} (Cape Town, 2008).
\textsuperscript{926} \textit{HRC UPR I Report – South Africa}, UN Doc A/HRC/8/32, paras 41 and 58.
\textsuperscript{927} \textit{Report of the HRC on its 8th Session}, UN Doc A/HRC/8/52, para 574.
denunciation of specific xenophobic incidents by President Jacob Zuma and the taking of steps to adopt specific legislation to address hate crime violence such as the drafting of the Prevention and Combating of Hate Crimes and Hate Speech Bill.\(^{930}\) In addition, the South African government in its comments on implementation referred to the substantive content of a draft National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP), which was being finalised.\(^{931}\) It also pointed to its leadership on resolutions against racism and xenophobia at the international level.\(^{932}\)

While South Africa has undertaken some measures to address the problem of racism and xenophobia, the ineffectiveness of these measures in preventing future recurrence in some parts of the country undermine the government’s effort. The narratives constructed by some South African government officials and influential traditional leaders on the xenophobic attacks help to undermine the efforts of the government. Shortly after the April 2015 xenophobic attacks in Durban, the Small Business Development Minister, Lindiwe Zulu, stated that the businesses of foreign Africans based in township areas could not expect to co-exist peacefully with local business owners unless they share their ‘trade secrets’.\(^{933}\) The reluctance of the government to condemn the rhetoric of King Goodwill Zwelithini, King of the Zulu people in South Africa undermines its commitment to addressing the problem of racism and xenophobia. King Zwelithini arguably played a role in inciting the 2015

\(^{930}\) See Prevention and Combating of Hate Crimes and Hate Speech Bill 2016 (South Africa).


\(^{932}\) Ibid; While there has been a remarkable level of consultation on the draft plan, it has taking too long to finalise given that South Africa hosted the 3rd World Conference against Racism in 2001 which adopted a resolution which urged ‘states to establish and implement without delay’ a national action plan against racism, xenophobia and related intolerance. See Department of Justice and Constitutional Development South Africa, ‘Address by the Deputy Minister of Justice and Constitutional Development, the Hon John Jeffery, MP, at a Consultative Workshop on the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, 15 May 2015’ (2015) http://www.justice.gov.za/m_speeches/2015/20150515_NAP.html.

xenophobic violence when he said at a public gathering that ‘African migrants should take their things and go.’\textsuperscript{934} The initial denial and ritual condemnation of such rhetoric and narratives undermines the government’s commitment to combat racism and xenophobia.

In summary, this section engaged with the issue of implementation as a component of the four-step approach to measuring the effectiveness of state engagement with the UPR mechanism. In the case of South Africa, about 46\% of the UPR I recommendations were either fully or partially implemented. This is similar to the case of Nigeria (about 44\%) but below Kenya (about 58\%). It reinforces the potential for the UPR to contribute to human rights change within states through an inclusive, cooperative and collaborative process. South Africa has made statements of strong support for the UPR mechanism and increased the level of its participation as a reviewer and as a state under review across UPR I and II. Its participation as a reviewer across regional lines demonstrates the universality and non-selectivity of the UPR mechanism and contributes to enhance the acculturation process. Moreover, the evidence of states implementing some of the UPR recommendations over time underscores the potential value of a cooperative mechanism to contribute to human rights change within states. On 18 January 2015, South Africa implemented the UPR I recommendation to ‘ratify the International Covenant on Economic, Social and Cultural Rights [ICESCR]’\textsuperscript{935} In addition, the government’s commitment to provide a mid-term UPR implementation 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 I mid-term implementation report. This provides evidence of emulation and mimicry associated with the process of acculturation which can produce positive results over time.

However, the responses by the government to some of its UPR recommendations and the government’s commentaries on implementation

\textsuperscript{934} Ibid.
indicate the potential for rights ritualism in the absence of effective NGO engagement. As highlighted above, the South African government did not undertake a national UPR consultation process with NGOs during UPR I and II. There were some indications of rights ritualism in relation to implementation. In its response to state recommendations during UPR I, the government of South Africa claimed that it had already implemented most of the recommendations made by its peers.936 This underscores the reluctance of the government about increasing human rights protection and as I examined in this section, many of the UPR recommendations raised concern on the inefficacy or inadequacy of the existing measures for human rights protection. Another aspect of rights ritualism is evidenced in South Africa’s support for HRC resolutions on sexual orientation but its unwillingness to recommend decriminalisation of same-sex relations or at least sensitisation, among its regional peers.

6.5. CONCLUSION

An examination of South Africa’s engagement with the UPR mechanism in this Chapter showed an increasing level of engagement with the UPR process. This Chapter reinforces some of the findings in the previous Chapters such as the potential for the UPR to contribute to influence change within states, regionalism, cultural relativism and complementarity. While noting the positive impact of the cooperative framework of the UPR, this Chapter critiqued some of the core challenges to the UPR process. I examined the phenomenon of rights ritualism in relation to the responses of the government of South Africa to UPR recommendations and its commentaries on implementation. Applying the four-step approach to evaluating the effectiveness of state engagement with the UPR provided a comprehensive analysis of South Africa’s engagement at various stages of the review.

In terms of its engagement at the pre-review process, there was a general lack of substantial commitment to a broad and inclusive UPR national consultation process. The South African government did not undertake any form of

consultation during UPR I, and the national consultation for UPR II was only limited across government. The absence of a NGO coalition for the UPR limited the ability of domestic NGOs to proactively engage the government in a national consultation process. A state that undertakes an inclusive UPR national consultation process that seeks the views of domestic stakeholders and reflects those views in the final report would provide its peers with a reliable and realistic basis for reviewing the state’s human rights situation and for making relevant recommendations. Nevertheless, the improvements in the quality of South Africa’s UPR delegation that incorporated legal and judicial personnel and reflected a gender balance signalled an increasing level of commitment to the UPR mechanism. It indicated a transformation of the government’s view of the UPR from a foreign affairs exercise to a process for the examination and improvement of human rights.

South Africa effectively engaged as a reviewer by reviewing states across all the five regional groups - demonstrating the universality and non-selectivity of the UPR mechanism. South Africa as a reviewer repeated recommendations from other UN mechanisms to its peers. This strengthens my argument that the UPR can potentially create a synergy with other human rights mechanisms by reinforcing their recommendations. However, South Africa adopted separate approaches to the review of African states compared to Western states. South Africa’s review of African states was one of positive reinforcement compared to a more critical approach towards Western states. The divergent approach was illustrated with examples of Zimbabwe and Sudan and by the proportion of specific recommendations made to WEOG and GRULAC compared to African states. While South Africa’s engagement reinforced the theme of regionalism, it equally consolidated the theme of cultural relativism in relation to sexual orientation by not making any recommendation on the issue to any of its African regional peers.

As a state under review, an improvement was observed in the engagement of South Africa across UPR I and II in terms of its responses to UPR recommendations. The high percentage of accepted recommendations (81%), similar to that of Kenya and Nigeria, indicated an increasing level of
engagement with the UPR. Moreover, the parallel between some of the state and NGO recommendations underscored the relevance of the recommendations made but also reinforced my finding in the previous Chapter on the impact of NGO recommendations on state recommendations. However, I examined the potential for rights ritualism in the response of the state to recommendations on issues such as corporal punishment, and violence based on sexual orientation.

With regard to implementation, about 59% of the UPR I recommendations which were either partially or fully implemented indicated the potential for the UPR to contribute in influencing human rights change within states. The potential for some of the recommendations to be implemented outside the implementation timeframe strengthened my argument that the process of acculturation can over time help narrow the implementation gap. This was illustrated by reference to South Africa’s ratification of the ICESCR which was implemented outside the UPR I implementation timeframe. However, the phenomenon of rights ritualism poses a challenge as was examined in relation to issues such as corporal punishment, violence based on sexual orientation, and racism and xenophobia.

Nonetheless, as I argued in Chapter 5, the ability of the UPR to move beyond ritualism and actually improve the human rights situation on the ground depends profoundly on effective NGO engagement. Unlike the case of South Africa, the NGOs in Kenya, despite some constraints, were proactive in engaging the Kenyan government in its UPR process. This was achieved through the formation of a NGO coalition, and various awareness raising, media and advocacy campaigns that contributed to influence state UPR recommendations to Kenya. It also followed up and monitored the implementation of the recommendations Kenya accepted – and produced its own mid-term assessment of the government’s implementation record. Moreover, coalitions can more effectively engage the state in the process of implementation than individual NGOs. Making effective use of these opportunities can help NGOs counter state ritualism in the UPR.
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 Nigeria, Kenya and South Africa, their engagement with the UPR has contributed to enhance their treaty body engagement in terms of meeting their reporting obligations. As I observed 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 UPR II in 2012. Finally, the increasing relevance and specificity of UPR recommendations, and the ability for the UPR to reinforce treaty body recommendations underscores the potential for the UPR mechanism to evolve into an effective cooperative mechanism for monitoring human rights implementation. Over time, this can help counter ritualism and enhance state engagement with the UPR process.
PART IV: CONCLUSION

CHAPTER SEVEN:

CONCLUSION

Over the years, economic sanctions, adjudicative, legalistic and other confrontational approaches have been used by the international community as principal mechanisms for human rights implementation. As Redondo has commented, those in charge of human rights mechanisms, as well as scholars and practitioners, have underestimated or neglected the potential value of cooperative approaches to human rights implementation, and tend to focus on the confrontational approaches.937 As highlighted in Part I of this thesis, African states have generally opposed such confrontational approaches but were actively pushing for the establishment of the UPR as a cooperative mechanism. This thesis has examined the engagement of three African states with the UPR to highlight the impact and potential of the UPR to contribute to human rights implementation in Africa within its inclusive, cooperative and collaborative framework.

The review of the literature in Chapter 2 mapped the differences between the sceptical and the evolutionary groups of scholars. Whereas the sceptical group has argued that the UPR is institutionally weak and needs to be overhauled, or replaced by a ‘stronger’ new institution, the evolutionary group contend that the UPR is an evolving mechanism and can be improved within the existing cooperative framework. Chapter 2 outlined the key features of the UPR and identified the aspects relevant to my analysis. While I situated my thesis within the evolutionary group, the review of the literature demonstrated three important gaps: first, little consideration has been given to the UPR consultation process; second, there is limited analysis on the impact of the UPR mechanism on human rights implementation in Africa; and finally there is relatively little theoretical engagement by scholars with the potential of the UPR to contribute to human rights changes within African states. In an attempt

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937 Redondo, above n 108, 683.
to address these gaps, this thesis has adopted a socio-legal research methodology. Chapter 3 examined the concepts of compliance, implementation and effectiveness and analysed various theoretical approaches to state compliance with international human rights law. I developed an original four-step empirical approach and incorporated a theoretical framework within which to evaluate African states’ engagement with the UPR and to analyse the factors impacting on that engagement. This thesis has undertaken an examination of the engagement with the UPR by three African states within this framework. The purpose was to provide a comprehensive analysis of the UPR engagement of the African states under examination and also to consider the best theoretical framework for evaluating state engagement with the UPR and its potential impact.

In this Conclusion, I evaluate my major research findings on the effectiveness of the UPR engagement of the three African states examined, draw together some of the themes that flow through their engagement and elaborate on how my findings demonstrate my overarching argument of the potential for the UPR to contribute to human rights implementation within African states. The findings equally demonstrate the potential for the UPR to evolve over time into an increasingly effective cooperative mechanism for monitoring human rights implementation. The following sections draw together my arguments and findings on three major issues: the appropriate theoretical and conceptual approach to evaluating state engagement with the UPR and its potential impact within Africa; the effectiveness of African states’ engagement with the UPR within the four-step approach; and the factors impacting on African states’ engagement.

7.1. Theoretical and Conceptual Approaches to Evaluating State Engagement with the UPR

Chapter 2 examined five main theoretical approaches to compliance and provided a justification for the theoretical framework used in this research. I argued that the coercive compliance-centred theory, the ‘naming and shaming’ approach, the transnational legal process theory and the five-stage ‘spiral
model’ do not provide a sufficiently comprehensive theoretical framework to understand the impact of the UPR mechanism. Chapter 2 argued the limitations of coercive/confrontational approaches to human rights monitoring, their impact on socio-economic rights and the potential backlash that may result from the ‘over-legalisation’ of human rights monitoring mechanisms. The deficiencies and failure of the ‘naming and shaming’ approach were also examined. I argued that the UPR mechanism, by relying on state dialogue and cooperation, embodies a sophisticated human rights approach whose impact cannot be appreciated by compliance theories that incorporate elements of coercion/confrontation. The transnational legal process theory only provides an empirical pathway to compliance and does not explain how to achieve social and political internalisation. While the spiral model recognises the significance of civil society/NGO engagement in human rights mechanisms, its focus is generally limited to the realisation of civil and political rights and it also incorporates elements of coercion in the second and third phases of the model. This makes it an unsuitable theoretical framework to test the impact of a mechanism based entirely on cooperation. As I argued in Chapter 2, acculturation provides the best theoretical framework to understand the impact of the UPR mechanism. This is because it is non-coercive, non-confrontational and can fully harness and maximise the social and cognitive pressures generated by the UPR mechanism. The inclusive, cooperative and collaborative framework of the UPR process provides effective conditions for acculturation. This can help promote a learning culture, rather than a culture of blame, which can achieve incremental improvement of the human rights situation on the ground.

Nevertheless, I noted the overlap between the various compliance theories and argued that these theories are not mutually exclusive. For example I highlighted how the theory of acculturation builds on Koh’s transnational legal process theory by identifying the micro processes of social influence that affect Koh’s process of ‘norm internalisation.’ I equally identified how both the theory of acculturation and the five stage spiral-model recognise the significance of civil society engagement in human rights mechanisms.
Chapter 3 examined the concepts of compliance, implementation and effectiveness to determine the appropriate conceptual framework for this research. I explained implementation as a function of compliance and defined implementation in the context of my research as actions taken by a state to fulfil the recommendations by its peers during the UPR process and improve the human rights situation on the ground. I narrowed the focus of the research to implementation because implementation is more measurable than compliance. I introduced a four-step approach to evaluating the ‘effectiveness’ of state engagement with the UPR mechanism which incorporated implementation. This four-step approach evaluates ‘effectiveness’ in terms of the level of a state’s commitment to the UPR pre-review consultation process, the quality of its UPR delegation, participation during the review sessions and the aggregate percentage of implemented UPR recommendations. The first and second steps of the four-step approach assess the state’s commitment to the UPR national consultation process, and the quality of its UPR delegation. The third step examines the state’s participation during the review sessions in Geneva as a reviewer and as a state under review to determine the specificity and quality of the recommendations made, received, and implemented. This enables a determination of whether a state’s engagement is active or passive and the potential for acculturation. The fourth step of my approach to assessing the effectiveness of state engagement measures the aggregate percentage of implemented UPR recommendations, to determine the extent to which the UPR contributes to the implementation of human rights within the state. The four-step approach contributes to existing scholarship by providing a holistic approach to assessing the effectiveness of state engagement with the UPR mechanism.

Chapter 3 therefore demonstrated the significance of the theory of acculturation to evaluating the potential impact of state engagement with the UPR and developed an original four-step approach to evaluating the effectiveness of state engagement with the UPR. This thesis has argued that the theoretical and conceptual approaches developed in Chapter 3 provide an appropriate framework to evaluating state engagement with the UPR and its
potential impact. Using this approach then enabled the comprehensive assessment of the engagement of the 3 African states with the UPR that was undertaken in Part III of this thesis.

7.2. The Pre-Review National Consultation Process.

The extent of a state’s commitment to the pre-review national consultation process was the first step in evaluating the effectiveness of state engagement with the UPR process. In accordance with HRC resolution 5/1, states are expected to undertake broad consultation with all stakeholders in the preparation of their national report. While states have adopted different approaches to consultation and there is no rule on what level of consultation will amount to a broad consultation, the quality, timeframe and inclusivity of the consultation process were important indicators in determining the commitment of a state to the consultation process.

I found in the case of Nigeria and Kenya that both governments undertook a broad and inclusive pre-review national consultation process and that the quality of the consultation process has improved across UPR I and II. In the pre-review consultation process of both states, the process included members from various branches of government, CSOs and the NHRI. Also, the fact that both governments engaged with all human rights issues during the consultation process, including the contentious issues of sexual orientation and the death penalty, was an indication of their conscientious engagement with the process, even though both governments made no commitment on the two contentious issues. However, the timeframe devoted for the consultation was insufficient to comprehensively engage with the other stakeholders and could be extended and expanded in subsequent reviews to include outreach activities across regional and local levels in both states. Moreover, many of the stakeholders’ contributions were not included in the final report of the state such as on the death penalty and sexual orientation in relation to Kenya.

In the case of South Africa, my findings indicated that while there was an improvement in the quality of its pre-review national consultation process
across UPR I and II, the government did not effectively engage with the consultation process. The South African government did not undertake any consultation in the preparation of its UPR I state report, and the report was submitted after the deadline and did not follow the guidelines. While there was improvement in UPR II, when South Africa undertook a pre-review consultation across the government, the consultation process was not open to seeking input from domestic CSOs and the SAHRC. The importance of this assessment of the pre-review national consultation process is that an inclusive consultation process that seeks the views of domestic stakeholders and reflects those views in the final report would provide a state’s peers with a reliable and realistic basis for reviewing the state’s human rights situation and for making relevant recommendations.

Nevertheless, I equally found in all three case studies a disparity between the states’ engagement with the UN human rights treaty bodies and UPR reporting obligations, and the potential impact of the UPR process on the states’ treaty body reporting obligations. For example while Nigeria submitted both its UPR reports on time, it remained the UN member state with the highest number of overdue reports (10 reports), with some more than 10 years overdue. In the case of Kenya, while its treaty body reporting had previously been inconsistent, the government began to meet many of its outstanding reporting obligations after its UPR I in 2010, and submitted several overdue reports.938 Similarly, South Africa submitted 12 of its 14 outstanding treaty body reports between UPR I and II. The ability for states to use the UPR pre-review consultation process to prepare treaty body reports and to accept UPR recommendations to meet treaty body reporting obligations, underscored the potential for the UPR to enhance African state engagement with the treaty bodies.

7.3. The Quality of a State’s UPR Delegation

Another important consideration in the four-step approach to examining the effectiveness of African state engagement with the UPR was the quality of the

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938 As of January 2017, Kenya had only 2 overdue reports.
states’ UPR delegations. While there are no stated guidelines on the composition of a state’s UPR delegation, the delegates should have the competence to respond to questions raised during the interactive dialogue session of the review. The competency of the UPR delegations of each of the three African states examined was determined by analysing the seniority of state representation, membership of the delegation (the breadth of responsibility of the members) and the gender balance of the respective delegations. The composition of a state’s UPR delegation was indicative of whether the state perceived the UPR process as simply a foreign affairs issue or as a process that would facilitate the examination and improvement of the human rights situation on the ground.

In all three states under examination, I found an improvement in the quality of their UPR delegations across UPR I and II which was indicative of an increasing commitment to the seriousness of the UPR process. Nigeria and Kenya both sent a high-level delegation for the UPR headed by either the Attorney General, Minister of Justice or in one instance the Minister of Foreign Affairs. The competency of the delegations of both states was strengthened by the inclusion of more legal and judicial personnel than diplomats, including representatives from parliament and academia. In the case of South Africa, I found that the government did not have effective representation for its UPR I because the delegation was composed exclusively of its diplomats in Geneva, and was criticised by the SAHRC for its inability to provide sufficient responses and up-to-date information to questions asked during the review. However, the South African government improved the quality of its delegation during UPR II by incorporating legal and judicial personnel in the composition of the delegation. The UPR delegations of all three African states examined demonstrated some gender parity in their composition, with Nigeria having a slightly lower gender balance in its UPR delegations. Therefore, the improvement in the competency of the various UPR delegations across UPR I and II, and in particular the inclusion of legal and judicial personnel in the later UPR delegations, signals an increasing commitment to the state-led UPR
process and its potential to evolve into an effective mechanism for monitoring human rights implementation within African states.

7.4. **The State as a Reviewer and as a State under Review**

The third step in my evaluation of the effectiveness of state engagement with the UPR mechanism examined the extent of a state’s participation as a reviewer and as a state under review. As a state under review, the analysis in this thesis considered the extent of the state’s participation in the review of states across the various regional groups and the specificity of the recommendations made. My findings indicated that both Nigeria and South Africa participated and made recommendations to states across the five regional groups of states. This demonstrated the universality and non-selectivity of the UPR mechanism. The specificity of the recommendations states made was also an indication of the quality of their recommendations. As I highlighted, specific recommendations (R5) have a greater capacity to promote meaningful and measurable human rights change than non-specific recommendations. However, I argued that the fact that a recommendation is non-specific or less actionable does not necessarily mean it is qualitatively inferior or inconsistent with the ideals of the UPR, and the fact that a recommendation is specific does not necessarily make it a good recommendation. Both Nigeria and South Africa made specific recommendations (R5) to states across the five regional groups of states, with increasing levels across UPR I and II, particularly in relation to their African peers. The findings indicated that the percentage of specific recommendations made by Nigeria to its African regional peers increased by about 10% across UPR I and II, and the recommendations by South Africa to African states increased by 2% across UPR I and II.

In the case of Kenya, it was revealed that Kenya did not participate as a reviewer during UPR I and was selective in its participation as a reviewer during UPR II with very limited participation in the review of states in the EEG and WEOG. This level of participation was contrasted with the participation of smaller and poorer African states like Gabon, Zimbabwe and Togo which were able to actively participate as reviewers across the various regional
groups and made more specific recommendations (R5) in both cycles of the UPR. Nevertheless, half of the 16 specific recommendations by Kenya were made to its African peers. This was indicative of the government’s willingness to engage its regional peers with specific (R5) recommendations. The increasing levels of specific recommendations across UPR I and II reinforced the potential for the UPR to evolve over time in relation to the nature of UPR recommendations and to dispel early criticisms with regard to their general lack of specificity.

The three states examined were generally receptive to UPR recommendations made by their peers during their various review sessions. With the exception of South Africa that did not clearly communicate its responses to its UPR I recommendations, of the African states examined, all accepted over 76% of the recommendations made by their peers during UPR I and II, with stronger intra-regional acceptance levels. My findings on the receptiveness of the three African states examined paralleled – was consistent with earlier findings by McMahon on UPR I. First, he found that African states accepted more recommendations from their regional group than did any other state from their respective regional groups. Secondly, African states accepted a higher percentage of recommendations during UPR I than any other group of states. The acceptance rate by African states was found to remain consistent during UPR II. This demonstrable consistent rate of acceptance suggests that African states have sought to be cooperative with the UPR mechanism. The stronger intra-African regional acceptance level, I argued, is as a result of the ‘soft’ approach African states have adopted in the review of their African regional peers, in contrast to the ‘tough’ approach by Western states. The ‘soft’ approach was influential in the acceptance of some recommendations which would otherwise be rejected. This was evidenced in the case of Kenya and Nigeria who both accepted softer recommendations to raise public awareness.

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939 African states accepted 94% of the recommendations from African states, Asian states accepted 92% from Asian states and WEOG states 62% from WEOG states. See McMahon, above n 65, 19.
940 Ibid.
or continue efforts towards the abolition of the death penalty but rejected tougher recommendations on immediate abolition.

7.4.1. Impact of Regionalism, Cultural Relativism and HRC Membership

Regional solidarity in terms of the receptiveness to UPR recommendations by African states was an indication of the positive impact of regionalism, especially in terms of increasing the likelihood of a recommendation on a controversial topic being accepted because they were made by states sharing the same soft approach and same regional affiliations. Regionalism was equally evidenced by the fact that all three states examined participated more in the review of their regional peers than in the review of any other group of states, and by the solidarity expressed in the review of their regional peers. However, I noted how regionalism may undercut the UPR principle of universality when states selectively participate only in the review of their regional peers as well as the potential for states to use regionalism to shield their regional peers with poor human rights record from scrutiny.

Cultural relativism, in relation to the issue of sexual orientation, also negatively impacted the UPR engagement of all three African states examined in their participation as reviewers and as states under review. While African states received the highest number of UPR recommendations on the issue of sexual orientation, Kenya and Nigeria rejected all the recommendations for the decriminalisation of same sex relations, stating that same sex unions were either culturally unacceptable or an affront to African values. With the exception of Madagascar, no African state made a recommendation to an African peer on sexual orientation. The failure of the UPR to effectively address the rights of sexual minorities is particularly evident in South Africa’s engagement with the UPR in which the government has been inconsistent in its domestic and international commitment to promoting the rights of sexual minorities.

Nevertheless, I argued that there could be an ‘African’ way to incrementally realise the rights of sexual minorities within the context of the UPR by focusing
on soft recommendations which seek to transform the social and political culture against sexual minorities. As I demonstrated, approaches that employ coercion or require immediate normative solutions have either experienced a backlash or have been inadequate. This was evidenced by the growing criminalisation of same-sex unions in African countries like Nigeria and Uganda inspite of a threat by the British government to withhold foreign aid from governments that do not reform legislation criminalising homosexuality. The inadequacy of an exclusively normative solution was demonstrated in the case of South Africa where, despite the existence of constitutional protection, there has been continuous violence and intimidation of sexual minorities and a dichotomy was found to exist between the constitutional ideals and public attitudes towards sexual minorities. I argued that within the context of the UPR, soft recommendations such as raising public awareness and sensitization on the need for decriminalisation can help transform the current public opposition to decriminalisation and subsequently pave the way for normative solutions that would enjoy public support. Also, applying Gregg’s cognitive re-framing approach, states could find ways to advance the rights of sexual minorities as rights internal to the African culture by means of cognitive re-framing. While African states such as Sao Tome and Principe, Ghana, and Cameroon have been receptive to UPR recommendations that require them to condemn, investigate acts of violences against LGBT people or to raise public awareness and sensitisation on LGBT rights, they were not receptive to recommendations for immediate decriminalisation, arguably because of the enormous public opposition to decriminalisation.942

In addition, I examined whether membership in the HRC influenced the states’ engagement with the UPR mechanism. I found that membership in the HRC does not necessarily influence a state’s engagement with the UPR mechanism. In the case of Nigeria, the fact that Nigeria was a member of the HRC (and

President of the HRC) at the time of its UPR I in 2009 may have incentivised its UPR engagement. However, its level of engagement consistently improved across UPR II when it was not a member of the HRC. The finding on Kenya in relation to its participation as a review indicated that Kenya only participated in the review of other states when it was a member of the HRC. While this may demonstrate the potential for HRC membership to influence state engagement with the UPR, the finding is not conclusive because the engagement of other African states such as South Africa improved during UPR II even though it was no longer a HRC member during UPR II.

Separate empirical studies by Dreher and Voigt, and Hafner-Burton, Mansfield and Pevehouse, support the hypothesis that membership in inter-governmental organisations enhances the credibility of a government’s commitment to human rights, especially in democratising states. However, it is difficult to construe such enhanced credibility as directly improving the human rights situation on the ground because the human rights foreign policy of states may be disconnected from domestic practice. Nevertheless, membership does have its privileges and states will often use their membership to further their human rights foreign policy and interests. Therefore membership in the HRC may not necessarily have a direct influence on state engagement with the UPR but it can be symptomatic of the way in which the state has engaged with the HRC.

7.4.2. Impact of NGOs/CSO

This thesis argued that NGOs/CSOs can impact on state engagement in the UPR. In Chapter 2, I noted the limitations to direct NGO participation in the


UPR process and highlighted the role of African states in limiting NGO involvement in the UPR process. I then examined in Chapter 5, the ways in which NGOs have bypassed the limits to their participation and effectively engaged in the UPR Process. As the third cycle of the UPR commences, there are opportunities for greater strategic NGO engagement with the UPR process which are yet to be utilised by many NGOs in Africa. In Chapter 5, I built on the three suggestions by Schokman and Lynch and empirically tested them in the case of Kenya. My findings demonstrated that the formation of a broad, stable and representative NGO coalition for the UPR enhanced NGO engagement in the review of Kenya through the coordinated and strategic advocacy and media campaigns undertaken by the KSC. I analysed the formation and composition of the KSC as a model and drew a contrast with the Nigeria CSO Coalition for the UPR which was neither broad nor representative, and the case of South Africa where there was neither an NGO coalition for UPR I and II nor a coordinated and strategic NGO plan to engage the South African government. I argued that the formation of NGO coalitions for the UPR can empower NGOs, enhance their credibility and capacity to influence states, and enable them to identify and prioritise the major human rights concerns within the states.

I equally demonstrated how effective NGO engagement with the UPR process could impact state recommendations to their peers by finding a strong positive relationship between state and NGO recommendations in the review of Kenya. I argued that effective NGO engagement with the UPR can enhance state engagement by influencing state recommendations and ensuring that state recommendations to their African peers are relevant and address the major human rights concerns within African states. Nonetheless, I noted the hostile and distrustful domestic NGO operational environment within many African states and limited financial resources of NGOs as some of the factors that could limit their effective engagement with the UPR.
7.4.3. Impact of the UPR on other Human Rights Mechanisms

In Chapter 5, I engaged with the ongoing debate about the relationship between the UPR and other international human rights mechanisms. Scholars such as Bernaz, Rodley and Frouville either argued that the UPR duplicates and overshadows the work of the UN treaty bodies or weakens their recommendations. However, my findings in this thesis with respect to the African states examined reinforce Quane’s findings in relation to ASEAN states, to the effect that the UPR has enhanced the nature and level of relationship between African states and the UN treaty bodies. In addition, my findings in Chapter 5 in relation to Kenya demonstrated the ability of the UPR to reinforce and amplify the concerns of domestic, regional and international human rights mechanisms. The ability of the UPR to strengthen and reinforce human rights concerns raised by other human rights mechanisms was seen to serve as a model that has inspired proposals on human rights and the post-2015 development agenda that would advocate for a web of global effective monitoring that complements and reinforces efforts at the domestic and regional levels.

In the case of Kenya, my analysis demonstrated that the UPR has been used as an international platform to strengthen and support the call for judicial and police reforms and the work of the truth and reconciliation process in the region among other human rights issues challenging the state.

7.5. Implementation of UPR I Recommendations

Measuring implementation of UPR recommendations and its impact on improving the human rights situation on the ground was a vital part of the four-step approach to evaluating the effectiveness of state engagement with the UPR. In 2001, Heyns and Viljoen observed that the success of any

945 See Frouville, above n 12, 250-55; Bernaz, above n 63; Nowak, ‘It’s Time for a World Court of Human Rights’ above n 17, 23.
946 Quane, above n 70, 289.
international human rights system should be assessed with respect to its impact on the human rights situation on the ground within states.\textsuperscript{948} However, until recently, little attention has been paid by researchers to measuring UPR implementation by states and the extent to which it contributes to improve the human rights situation on the ground.\textsuperscript{949} This thesis therefore adds to the existing scholarship by measuring the aggregate percentage of implemented UPR recommendations by the three states under examination at the conclusion of the UPR I implementation timeframe. This helped determine the extent to which the states’ engagement with the UPR contributed to human rights implementation that positively impacted on the human rights situation within the respective states.

The findings in each of the three African states examined in this thesis indicate that the percentage levels of the combined fully and partially implemented UPR recommendations were relatively high. About 43\% of the UPR I recommendations to Nigeria was implemented, 59\% in the case of Kenya and 59\% in the case of South Africa. This demonstrates the potential for the UPR, as a cooperative mechanism, to contribute to human rights implementation within states. However, the findings equally indicate a significant percentage of recommendations that were not implemented by each of the three states examined. In the case of Nigeria, many of the recommendations on justice and detention, women’s rights and torture were not implemented. Nevertheless, I argued that the implementation gap can be narrowed over time through the process of acculturation and that effective NGO engagement may over time help narrow the implementation gap. My argument was strengthened by evidence which demonstrated the potential for states to implement some of the UPR recommendations outside the implementation timeframe and the ability for states to emulate good practice in the UPR through the acculturation

\textsuperscript{948} Heyns and Viljoen, above n 209, 483-535.
\textsuperscript{949} One significant exception is UPR Info’s 2014 landmark report which evaluated progress towards implementation of UPR recommendations in 165 countries. See UPR Info, ‘Beyond Promise: The Impact of UPR on the Ground’ (2014) <http://www.upr-info.org/sites/default/files/general-document/pdf/2014_beyond_promises.pdf>; While it address implementation in relation to two of the states under examination (Nigeria and Kenya) the assessment of implementation was limited to mid-term and did not assess full implementation at the completion of the entire UPR I.
microprocesses of identification and mimicry. Examples of UPR recommendations subsequently implemented included: in the case of Nigeria by the enactment of the *Administration of Criminal Justice Act* in 2015,\(^{950}\) in the case of Kenya by the enactment of the *Freedom of Information Act* in 2016,\(^{951}\) and in the case of South Africa by its subsequent ratification of the ICESCR. These are examples of UPR I recommendations in all three states that were implemented outside their respective UPR I implementation timeframes.

However, this thesis also examined the impact of terrorism and ritualism on a state’s implementation of its UPR recommendations and on its overall engagement. In Chapter 4, I demonstrated the potential for conflicts and security threats to have a regressive effect on a state’s implementation of its human rights commitments. I found that despite the UPR commitment of the Nigerian government with respect to ending torture and extra-judicial executions, the escalation of the conflict between *Boko Haram* and the government resulted in further human rights violations. In Chapter 6, I examined in detail the phenomenon of rights ritualism and its impact in relation to South Africa’s engagement with the UPR with regards to the government’s implementation of recommendations on the issue of corporal punishment, violence based on sexual orientation, and racism and xenophobia. I noted the South African government’s participation and support for the UPR process but its reluctance to address the inadequacy of existing human rights measures or increase the protection of human rights within the state. Evidence of ritualism also included where a state criticised another state for rights failures but refused to itself provide adequate protection for the right in question. This was demonstrable in the UPR engagement of Kenya and Nigeria where they made a recommendation to their peers but were unwilling to accept a similar recommendation. These finding on ritualism are consistent with the earlier analysis of Charlesworth and Larking of the tendency of the UPR towards ritualism that could undermine its ability to address human rights violations.

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\(^{950}\) *Administration of Criminal Justice Act*, 2015 (Nigeria).

\(^{951}\) See *Freedom of Information Act, 2016* (Kenya), Law No. 31 of 2016.
While ritualism impacts negatively on the UPR process, I also argued that effective NGO engagement in the UPR can contribute to countering state ritualism.

### 7.6. Concluding Comments

The UPR mechanism with its inclusive, cooperative and collaborative framework is an important human rights mechanism with the potential to evolve over time into an effective cooperative tool for monitoring human rights implementation. The level of state commitment to the UPR process, as evident in the three African states examined, has improved across UPR I and II in spite of the criticised voluntary nature and state-control of the UPR process. The UPR is a meaningful process which has contributed to human rights implementation within African states in terms of the implementation of some of the UPR I recommendations. With the beginning of the third cycle of the review, there is potential for the UPR to achieve greater impact and contribute even more strongly to promoting human rights implementation within states. There is therefore future need to analyse changes in the aggregate levels of state implementation across UPR I, II and III. While the problem of non-implementation and factors such as cultural relativism and ritualism may negatively impact the review process, the positive attitude of African states towards cooperation could well have long term positive implications for the nature of their implementation of UPR recommendations. The cooperative and non-coercive nature of the UPR can be a catalyst for incremental improvement of the human rights situation on the ground.

Taken as a whole, this socio-legal research is significant for three main reasons. First, this research offers new insights into the effectiveness of African states’ engagement with the UPR mechanism and its potential impact within African states at the end of UPR I and II. Second, this research introduced an original conceptual and theoretical framework to comprehensively assess African state engagement with the UPR mechanism. The four-step approach to evaluating state engagement with the UPR incorporates aspects such as the pre-review

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952 See Charlesworth and Larking, above n 49.
national consultation process and implementation which, until recently, have received little attention by scholars. Finally, the conceptual and theoretical approach taken by this research allows for the drawing of some broad conclusions which may apply across many African states. It is therefore reasonable to assume that similar African and non-African states like the three examined, who oppose coercive/confrontational approaches to human rights implementation and have shown strong support for the UPR, would present similar observations and conclusions on the UPR and the potential for acculturation. The approach adopted for this research can thus serve as a model to enhance human rights implementation around the world.
APPENDIX I – IRI NIGERIA

The responses which are used to calculate the Implementation Recommendation Index (IRI) of Nigeria for UPR 1 are gleaned from the mid-term implementation reports submitted by the state, National Human Rights Commission and UPR stakeholders on the implementation of various recommendations which can be found at OHCHR database and the database of UPR info. Additional information is gleaned from the UPR II reports of the state and other stakeholders. The following Stakeholders provided responses on the implementation of various UPR recommendations by Nigeria:

- Human Rights Agenda Network (HRAN)
- The Nigerian National Human Rights Commission (NHRC)
- Amnesty International (AI)
- Commonwealth Human Rights Initiative (CHRI)
- Centre for Reproductive Rights (CRR) and Women Advocates Research and Documentation Centre (WARDC)
- Cleen Foundation (CF)
- Coalition of Nigerian Human Rights CSOs on the UPR (nigerianhrcsos-UPR)
- Pen International et al
- The Niger Delta UPR Coalition
- UPR Coalition Southeast Nigeria

958 Centre for Reproductive Rights (CRR) and Women Advocates Research and Documentation Centre (WARDC), ‘Report on Nigeria’s Compliance with its Human Rights Obligations in the Area of Women’s Reproductive and Sexual Health’ (2013) 1-17.
The IRI is an index developed by UPR Info which brings together an average of stakeholder’s responses. It shows the implementation level of states for recommendations that were received by the state during the UPR review. The value of this index is that it takes into account stakeholders’ responses and any dispute which they may have over the implementation of a recommendation. As mentioned earlier, implementation is not binary. This index captures three stages of implementation. When all stakeholders agree that a recommendation was fully implemented the recommendation is scored 1. Whenever a stakeholder claimed that no aspect of a recommendation was been implemented, the index score is 0. The score is 0.75 when the state under review claims that the recommendation has been fully implemented but a stakeholder says it has only been partially implemented. In some cases, partial implementation of a recommendation was indicative that an action was started by the state such as introducing a bill but the final action, enacting a law, was not realised. The average of the scores is then transformed into an implementation level where 0-0.32 = Not Implemented, 0.33-0.65 = Partially Implemented and 0.66-1 = Fully Implemented.

The analysis is based on the 32 UPR I recommendations made to South Africa. Out of 30 UPR I recommendations accepted by Nigeria, about 17% were fully implemented (FI), 30% were partially implemented (PI), 50% were not implemented (NI). One of the recommendations made to South Africa (Recommendation 32) was not assessed because stakeholders did not provide any information on its implementation.

Feedback on Recommendations and IRI

I. Recommendation 1 (Fast-track the process of accession to human rights instruments to which it is not party yet…) – IRI (0.4) – PI

❖ HRAN response:
  • Nigeria ratified OPCAT and set up the National Committee on Torture as a national torture prevention mechanism. However the committee has not been supported by the government, as a result it had not undertaken any meaningful action since its establishment in 2010 (Partially Implemented – 0.75).

❖ NHRC response:
  • Nigeria ratified OP-CAT, CPPCG, ICCPED, CRPD, OP CRC on Sale of Children, child prostitution and child pornography but did not ratify OP CRC on child soldiers and no legislation to make ESCR justiciable (Partially Implemented – 0.75).

❖ Commonwealth Human Rights Initiative (CHRI) response:
  • Of the international human rights instruments Nigeria was recommended to ratify, Nigeria did not ratify the Second Optional Protocol of the ICCPR, which abolishes the death penalty. It has also not ratified the first Optional Protocol to ICCPR or the Optional Protocol to the ICESCR (Not Implemented – 0).

❖ CRR and WARDC:
• In its 2009 report to the Universal Period Review, the Nigeria government stated its commitment to ratify, sign or domesticate outstanding United Nations human rights instruments and protocols. However, Nigeria has not fulfilled this pledge. It has yet to ratify several international human rights treaties, including the International Convention on the Protection of all Migrant Workers and their Families, the Convention on the Rights of Persons with Disabilities and the International Convention for the Protection of All Persons from Enforced Disappearance (Not implemented – 0).

II. Recommendation 2 (Accelerate the process of passing into law various human rights Bills before the National Assembly…) – IRI (0.5) - PI

❖ HRAN response:
   • The National Assembly had passed the Freedom of Information Act (FOI), National Human Rights Commission (Amendment) Act, and Legal Aid Council (Amendment) Act. Many other Bills such as the Gender and Equality Bill, Prohibition of Torture and other cruel and inhuman treatment Bill, Witness Protection Bill, Victim’s compensation Bill etc were still pending (Partially Implemented – 0.75).

❖ NHRC response:
   • Passage of the FOI Act, Employees Compensation Act, partial passage of the New Prison Act, deposit of the NAP at the UN OHCHR but no structure to implement NAP, CEDAW remains un-domesticated, Disability Bill not passed and many human rights and justice Bills in the National Assembly had not been passed (Not implemented – 0).

❖ CF:
   • The Persons with Disability Law, the Child Rights Act had been passed but the VAW (VAP) had yet to be passed (Partially Implemented – 0.75).

III. Recommendation 3 (Continue to Strengthen its human rights institutions…) – IRI (0.63) - PI

❖ CF response:
   • Beyond the amendment of the National Human Rights Commission law, nothing else had been done in this regard (Not Implemented – 0).

❖ NHRC response:
   • NHRC Act amended and governing Board appointed and inaugurated. However, insufficient funding of NHRC (Partially Implemented – 0.75).

❖ State Response:
   • Government had made concerted efforts since 2009 to strengthen human rights institutions by amending the National
Human Rights Commission Act, the Legal Aid Act, and the Law Reform Commission Act (Fully Implemented – 1).

IV. **Recommendation 4 (Amend the National Human Rights Commission Act to encourage the Commission to regain its “A” rating…) – *IRI*- FI**

- **CF response:**
  - The government has taken some practical steps by amending the law governing the National Human Rights Commission to make it more independent. The amendment of National Human Rights Commission Act to guarantee its independence is a step in this direction (Fully Implemented – 1).

- **NHRC response:**
  - NHRC Act Amended, independence and financial autonomy of the NHRC now guaranteed. New powers of investigation and enforcement given to NHRC (Fully Implemented – 1).

- **State response:**
  - Nigeria fully implemented this recommendation by amending the National Human Rights Commission Act in 2010 which had enabled it to regain its ‘A” rating in 2011 (Fully Implemented – 1).

- **AI response:**
  - Nigeria implemented this recommendation by amending the Human Rights Commission Act in 2010 with Provisions granting the NHRC financial autonomy and independence (Fully Implemented – 1).

V. **Recommendation 5 (Envisage the possibility of making the National Consultative Forum an annual event…) – *IRI*- NI**

- **HRAN response:**
  - The consultative forum between government CSOs and the general stakeholders had not held since after the preparation of UPR reports in 2009 (Not Implemented – 0).

- **NHRC response:**
  - The Annual Consultative Forum on Human Rights had never held (Not Implemented - 0).

- **State response:**
  - The process of institutionalizing the National Consultative Forum was on-going (Not Implemented - 0).

- **Nigerianhrpcsos-UPR:**
  - The Nigerian government promised to engage Civil Society Organisation on annual Consultative meetings as part of its mandate during its report in the last UPR. However, as at January 2013, the government has not met this recommendation. They promised to call for a meeting late last year and did not fulfil it (Not Implemented – 0).
VI. Recommendation 6 (Continue on achievements in the field of human rights…) - IRI- NI

❖ NHRC response:
  • Corruption was still a major challenge of governance. Electoral management remained a major challenge (Not Implemented – 0)

VII. Recommendation 7 (Continue to focus on policies and programmes that would further strengthen the protection and promotion of human rights of its people) – IRI (0.5) - PI

❖ HRAN response:
  • The NHRC embarked on the dissemination of information about the governments National Human Rights Action Plan (NAP) but government had not provided sufficient financial resources for its implementation (Not Implemented – 0).

❖ NHRC response:
  • NHRC Act amended and Governing Council inaugurated but state renders no assistance to NGOs (Partially Implemented – 0.75)

❖ CF response:
  • The policies were there but the engagement with NGOs was dependent on the programmes / projects being implemented by the NGOs and with support from donors. Where the government agencies provide resources the culture of corruption plays a role (Partially Implemented – 0.75).

VIII. Recommendation 8 and 9 (Maintain an open and standing invitation to the United Nations human rights mechanisms, particularly the Special Rapporteur against torture…) IRI (0) - NI.

❖ HRAN response:
  • The reports of the UN Special Rapporteurs on Torture and on extra judicial killings had not been implemented. As a result the rate of impunity with respect to extra judicial killings was above 92 since 2009 (Not Implemented – 0).

❖ NHRC response:
  • Nigeria was yet to extend invitation to UN Human Rights Special Procedures (Not Implemented – 0).

❖ CHRI response:
  • No open invitation was extended (Not Implemented – 0).

IX. Recommendation 10 (Share its experiences in promoting human rights through its role…) – IRI (0.88) - FI

❖ NHRC response:
  • Nigeria was spear-heading resolution of political problems in Cote d’Ivoire, Mali and Guinea Bissau but Boko Haram
insurgency, kidnapping and armed robbery and gender-based sexual violence are its challenges (Partially Implemented – 0.75).

❖ State response:
  • Nigeria signed multi partite agreements on local integration with the governments of Liberia and Sierra Leone, as well as the ECOWAS and the UNHCR to locally integrate some refugees from Liberia and Sierra Leone in Nigeria (Fully Implemented – 1).

X. Recommendation 11 (Continue the actions aimed at raising awareness among religious and customary leaders) – IRI – FI

❖ NHRC response:
  • Inter-religious committees revitalised (Fully Implemented – 1).
❖ State response:
  • The government was supporting the activities of Nigeria Inter-religious Council (NIREC) to promote mutual co-existence, religious harmony and inter-faith dialogue among Muslims and Christians in the country (Fully Implemented – 1).

XI. Recommendation 12 was rejected by Nigeria (Not Implemented – 0).

XII. Recommendation 13 was rejected by Nigeria (Not Implemented – 0)

XIII. Recommendation 14, 15, 22, 23 (Torture and Extra-judicial Execution) - IRI (0) -NI

❖ HRAN response:
  • Many Perpetrators of extra judicial killings (EJK) are not punished. As a result of the fight against terrorism there was an increase in the number of extra judicial killings torture and ill treatment.
  • Recent reports by Human Rights Watch, AI and Legal Defence and Assistance Project on unlawful killings in the North West region had not been investigated by the government (Not Implemented – 0).
❖ NHRC response:
  • EJK remained a major human rights challenge. No legislation to curb EJK.
  • No specific anti-torture law enacted and cruel, inhumane and degrading treatments still used by law enforcement agencies.
  • No body to investigate EJK. The National Committee against torture that was set up does not have investigative power (Not Implemented – 0).
❖ UPR Coalition Southeast Nigeria response:
• No legislation has been crafted specifically targeting torture of suspects by the police. Thus, the police have unfettered impunity to visit various acts of torture on hapless residents in Nigeria (Not Implemented – 0).

❖ CHRI response:
• The government took little action on this recommendation that could be independently validated (Not Implemented – 0).

XIV. Recommendation 16, 18, and 19 - IRI- NI

❖ HRAN response:
• The National Assembly has not passed the Violence against Persons Prohibition Bill, which will criminalise a lot of gender-based violence.
• There are still a lot of cultural, social, tradition and other practices that discriminate against women (Not Implemented – 0).

❖ NHRC response:
• Few states enacted laws on FGM but there are no national legislations on FGM, discrimination against women, child marriage and betrothal or gender based violence (Not Implemented – 0).

XV. Recommendation 17 (Intensify its efforts, through legislation and practical measures, to protect children against all forms of violence) – IRI (0.8) - FI

❖ HRAN response:
• The Child Rights Act (CRA) has been adopted but is not implemented. Family courts in most states are not functional and children are still detained in prison with adults (Partially Implemented – 0.75).

❖ NHRC response:
• CRA was adopted and two states adopted laws prohibiting the branding of children as witches. However, there are no proper structures for implementing the CRA at state and federal level (Partially Implemented – 0.75).

❖ State response:
• CRA is the fundamental legal instrument for the protection of children against violence.
• The Akwa Ibom State has passed a Law abolishing the stigmatisation of children in that state as witches.
• Government supports the Nigerian Children’s Parliament to express concerns on issues affecting their wellbeing (Fully Implemented – 1).

XVI. Recommendation 20 and 31 (Take urgent steps to prevent politically motivated and sectarian and religious-based violence…) – IRI (0.19) - NI
❖ HRAN response:
  • Government has failed to implement the recommendations of the Panels set up to investigate the Jos crisis (Not Implemented – 0).

❖ NHRC response:
  • Even though inter-party and inter-faith dialogue are encouraged, sectarian crisis is increasing, communal conflicts recurring and Boko Haram remains a threat to national peace and security (Partially Implemented – 0.75).

CF response:
  • Nigeria has failed in this regard. The post presidential elections violence, the crisis in Jos and the killings in Maidugri are results of the state’s failure to address these issues providing security for the victims or community members (Not Implemented – 0).

❖ CHRI response:
  • Sectarian violence was an issue in Nigeria throughout the reporting period as violent riots and clashes between Christians and Muslims in certain parts of the country continued. The most serious sectarian violence was experienced in the city of Jos in Plateau State (Not Implemented – 0).

XVII. Recommendation 21 (Take specific measures in order to address the dis-functioning judiciary system and lack of internal and external monitoring of police...) – IRI (0.4) – PI

❖ HRAN response:
  • There had not been any drastic reform of the judiciary. The Administration of Criminal Justice Bill that would reform the criminal justice sector is still pending before the National Assembly (Not Implemented – 0).

❖ NHRC response:
  • There were efforts to reform the criminal justice system with new judges appointed at all level. However, pre-trial system violates human rights, prison system below UN-SMR and police oversight bodies are weak an unable to monitor the excesses of the police (Partially Implemented – 0.75).

XVIII. Recommendation 24 (Continue their efforts with determination for further progress in fighting against corruption) – IRI (0.38) – PI

❖ HRAN response:
  • Corruption was still on the increase. While there were many indictments, many had not been effectively prosecuted since 2003. The two major anti-corruption agencies, EFCC and ICPC suffered from executive influence.
  • Government at federal and state level continue to evict many populations and displace them without alternative accommodation (Not Implemented – 0).

❖ NHRC response:
New Head of EFCC and ICPC were appointed. However, corruption by public officials and corrupt national institutions has negatively impacted on the provision and availability of important infrastructures and other social and economic facilities. (Partially Implemented – 0.75).

Nigerianhrcosos-UPR response:
- The fight against corruption is still on the increase. Despite the fact that the government has set up anti-corruption agencies, incidence in resent passed has proved that the government has little or no commitment to the fight against corruption particularly corruption by former governors, legislators and ministers (Not Implemented – 0.).

UNPO Response:
- In August 2011, Human Rights Watch issued a report analysing the progress of Nigeria's Economic and Financial Crimes Division, the country's most important anticorruption agency. Significant efforts made by the agency in challenging the previously iron-clad impunity of the country's political elite. However, executive interference is identified as one of the main challenges facing the effectiveness of the agency in fighting corruption in Nigeria (Partially Implemented – 0.75).

XIX. Recommendation 25 (Take action to tackle the backlog of prisoners who have been detained without trial or beyond the end of their sentence…) – IRI (0.3) - NI

NHRC response:
- National prison decongestion exercise was commenced and Legal Aid Council got improved funding. However, 62% of prisoners were still awaiting trial, prison conditions not improved, no board of independent inspectors for detention centres and prison infrastructure remain poor (Partially Implemented – 0.75).

CF response:
- There was a program put in place to release those that could be done via bail or decongestion process. This has not yielded much effort and has been tainted with corruption (Not Implemented – 0).

CHRI response:
- The central and state governments repeatedly pledged to address overpopulation in the prison system. Despite these pledges and the occasional amnesty given to some prisoners to ease overcrowding, congestion continued to be a problem in Nigeria, largely due to the fact that 65% (30,000) of Nigeria’s prisoners were still awaiting trial (Not Implemented – 0).

XX. Recommendation 26 (Ensure that freedom of expression is respected and that Nigerian journalists may take on their mission
of providing information without suffering harassment) – *IRI (0.44) - PI*

- NHRC response:
  - Occasional harassment of journalists remained a matter of concern despite the enactment of the FOI Act 2011 (Partially Implemented – 0.75).

- State response:
  - The right to freedom of expression and press are guaranteed under the Constitution and the FOI Act 2011 (Fully Implemented – 1).

- CF response:
  - Journalists were still been harassed (Not Implemented – 0).

- PI International et al response:
  - Journalists investigating the conduct of government security forces face arbitrary arrests, extra-judicial detentions, and warrantless search and seizure, particularly from the Joint Task Force (JTF), a special military unit tasked with combating Boko Haram (Not Implemented – 0).

**XXI. Recommendation 27 (Consider taking more strenuous effort to improve the socio-economic conditions of women…)** – *IRI (0.63) - PI*

- HRAN response:
  - The *Gender and Equal Opportunities Bill* that would domestic CEDAW in Nigeria is still pending (Not Implemented – 0).

- NHRC response:
  - CBN introduced special loans for women and there was campaign for women education. However, reproductive rights of women were not respected and rural women did not have access to credit for economic improvement (Partially Implemented – 0.75).

- State response:
  - The establishment of the Women Fund for Economic Empowerment (WOFEE).
  - The Business Development Fund for Women (BUDFOW).
  - The Presidential Directive for the inclusion of not less than 35% of women in all government’s committees (Fully Implemented – 1)

**XXII. Recommendation 28 (Take further measures to bolster the national health system…)** – *IRI (0.63) - PI*

- HRAN response:
  - Maternal mortality and infant mortality in Nigeria is still the highest in the world. There are no free health services even for maternity treatment and children. There is no functional health
insurance scheme for the ordinary Nigerians and the existing scheme is not funded (Not Implemented – 0).

❖ NHRC response:

- There were national efforts at improved maternal health reduction of mortality and NACA was strengthened. National average on HIV/AIDS prevalence decreased. However, regional variations on HIV/AIDS prevalence are alarming and NACA is not adequately funded (Partially Implemented – 0.75).

❖ State response:

- Government had further made concerted efforts through various health related projects and programmes such as the National Health Insurance Scheme (NHIS). The Federal government in 2012 signed the implementation plan for the framework partnership with the United States government and commenced the decentralisation of ART services to the primary health care level. Government had commenced the establishment of Geriatric Centres in line with international best practice (Fully Implemented – 1).

XXIII. Recommendation 29 (Continue to invest in education in order to reduce the illiteracy rate further, especially among girls and young women…) – IRI- FI

❖ HRAN response:

- Government budgetary investment in education marginally increased since 2009 although not commensurate with the commitment to eradicate illiteracy (Partially Implemented - 0.75).

❖ State response:

- The government institutionalised Early Childhood Care Development and Education programme, completed 80 Tsangaya schools, established 12 new universities, constructed special girls’ schools in 13 states, established a Special Education Intervention Fund, established a Tertiary Education Trust Fund in 2011 and continued to increase the budget for education within the period under review (Fully Implemented - 1).

XXIV. Recommendation 30 (Take further steps to address discrimination against minority and vulnerable groups …) – IRI - NI
HRAN response:

- The government and its agencies continued to promote the indigene status over and above residence. Government has not improved access to services for disabled persons and other vulnerable groups. There is no National law protecting persons with disability and the Special Persons Bill Passed by the National Assembly in 2011 was not signed into law by the President (Not Implemented – 0).

CF response:

- There have not been steps taken in respect of this. The post-election crisis was tainted with religion and ethnicity (Not Implemented – 0).

XXV. Recommendation 32 (No response was provided by the State, NHRC or domestic NGOs on this issue).
APPENDIX II – IRI KENYA

Appendix II - Kenya

The responses which are used to calculate the Implementation Recommendation Index (IRI) of Kenya for UPR 1 are gleaned from the implementation reports submitted by the state, UPR Info Mid-term Implementation Assessment (Kenya) and NGO stakeholders, and can be found at the database of UPR info. See appendix I above for IRI methodology. The following NGO stakeholders provided commentaries on Kenya’s implementation of UPR I recommendations in their UPR reports:

- The Kenyan UPR Stakeholder Coalition (KSC)
- Article 19 (A19)
- Kenya National Commission on Human Rights (KNCHR)
- PEN International (PEN)
- Africa Platform for Social Protection (APSP)
- Cultural Survival (CS)
- Franciscans International, Edmund Rice International and Marist Foundation for International Solidarity (joint) (FI+ERI+FMSI)
- The Equal Rights Trust
- The Kenya Media Stakeholders UPR Network (KMSUN)
- Commonwealth Human Rights Initiative (CHRI)
- Human Rights Watch (HRW)
- Ogiek People Development Programme (OPDP)
- Civil Society Coalition on Kenya’s 2nd Universal Periodic Review (CSCK-UPR)
- Coalition of Child Rights NGOs.
- Equality Now
- International Service for Human Rights (ISHR)
- Amnesty International (AI)

Centre for Reproductive Rights

The analysis is based on the 150 UPR I recommendations made to Kenya. About 16% were fully implemented (FI), 43% were partially implemented (PI), 37% were not implemented (NI) and 4% of the recommendations were not assessed because stakeholders provided no information and the outcome was difficult to determine.

Feedback on Recommendations and IRI

I. Recommendations 101.1-101.4, 102.1-102.4, and 102.7-102.9 (Signature and Ratification of International Instruments) – IRI (0) – NI

❖ KNCHR response:
- Not implemented. Ratification was halted awaiting the enactment of the Ratification of Treaties Bill, which was enacted as law in September 2012. Since 2010, no optional protocol has been ratified (Not Implemented – 0).

❖ CS Response:
- Kenya is yet to sign and ratify the Convention on the Prevention and Punishment of the Crime of Genocide (Not Implemented – 0).

❖ CHRI response:
- Since the last UPR Kenya has not ratified any core international human rights treaties or their optional protocols (Not Implemented – 0).

II. Recommendation 101.5 (Implementation of International and Regional Human Rights Conventions) - IRI (0.25) - NI

❖ CS response:
- No measures have been taken to sign or ratify ILO Convention 169. The African Charter on Democracy, Elections and Governance has been signed but has yet to be ratified by Kenya, this instrument became binding this year with the required number of state ratifications (Not Implemented - 0).

❖ A19 response:
- Partially implemented (Partially Implemented – 0.75).

❖ KNCHR response:
- Not Implemented (Not Implemented – 0)


❖ State response:
The government has made considerable progress in implementing the recommendations of the National Taskforce on Police Reforms, which was established in 2009. Several key pieces of legislation have been enacted to provide a framework for the reform and transformation of the Police Service in Kenya. These are: The National Police Service Commission Act 2011; The National Police Service Act 2011; and the Independent Policing Oversight Authority Act 2011. The Witness Protection Agency has been operationalised, independent of the Attorney General’s office (Fully Implemented – 1).

**KNCHR response:**
- Partly implemented through undertaking judicial reforms. Police reforms was not implemented. No prosecutions have taken place as torture was only recently (in 2011) defined in the National Police Service Act as a crime attracting a penalty. (Partially Implemented – 0.75).

**AI response:**
- Kenya accepted recommendations to implement reform of the police, to provide human rights education for police and prison staff, to investigate human rights violations committed by police and to establish an independent police oversight authority. Implementation of these recommendations is ongoing although challenges exist. (Partially Implemented – 0.75).

**KSC response:**
- Though the trials of suspected high-level perpetrators are ongoing, low and medium-level perpetrators have not been prosecuted thereby entrenching the culture of impunity (Not Implemented – 0).

**IV. Recommendation 101.10 (Freedom of Information) – IRI- (0) NI**

**State response:**
- The Freedom of Information Bill 2014 and the Data Protection Bill 2013 have been drafted and are currently undergoing stakeholders’ analysis (Not Implemented – 0).

**CHRI:**
- During the last UPR, Kenya accepted the only recommendation it received related to the right to information, which invited the government to enact a Freedom of Information Bill, however, currently there is still no Freedom of Information Law in Kenya (Not Implemented – 0).

**KSC:**
- The Freedom of Information Bill has not yet been enacted and there are no efforts to table the Bill in parliament (Not Implemented – 0).

❖ APSP response:
- Kazi kwa Vijana programme has been revised in collaboration with the Kenya Private Sector Association (KEPSA). The Programme will now offer internship to the youth. Kenya National Policy on Social Protection passed in 2012 (Partially Implemented - 0.75).

❖ KNCHR response:
- Partly implemented through inclusion of Economic, Social and Cultural Rights in the 2010 Constitution. Implementation of Vision 2030 strategy on-going. Article 43 of the Constitution now guarantees the Right to Housing, Education, Water and Health. The Kazi Kwa Vijana Program and Constituency Development Fund have not however progressed well. Others not implemented (Not Implemented – 0.75).

❖ KSC response:
- A number of poverty-alleviation programs have been on-going and budgetary allocation to most of these programs have increased. However, the impact of these programs on alleviating poverty has been minimal. The “Kazi kwa Vijana” programme aimed to reduce vulnerability of unemployment has also yielded fewer tangible results than was anticipated (Not Implemented – 0).

❖ UNCT Kenya (OHCHR) response:
- Kenya adopted the Second Medium Term Plan (2013-2017) as part of the implementation of its Vision 2030 (Partially Implemented – 0.75).

VI. Recommendation 101.30 and 101.116 -101.118 (Internally Displaced Persons) – IRI (0.56) - PI

❖ A19 response:
- Partially implemented. IDP law passed in Dec 2012 (Partially Implemented – 0.75).

❖ CSCK-UPR response:
- The government is yet to operationalise critical aspects of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012 (IDP Act) such as constituting the National Consultative Coordination Committee (NCCC) on IDPs.
FI+ERI+FMSI response:

- Partially implemented. Kenya has intensified its efforts to ensure the resettlement of internally displaced persons, especially of those affected by the 2007/08 post-election violence. In this regard, the government has developed a draft policy and a draft bill on internal displacement and has reinforced its cooperation with the United Nations. The government of Kenya hosted the UN Special Rapporteur on the Human Rights of Internally Displaced Persons in September 2011. Despite some progress in facilitating the return and resettlement of a considerable number of IDPs, there are many IDPs still unsettled. At least 2000 of the unsettled IDPs are in the semi-arid lower Subukia area. Particularly, our coalition expresses concerns as regards IDPs of Ndatho Camp in Lower Subukia. These persons were displaced as a result of the 2007/08 post-election violence and came from all around Kenya and are still facing challenges concerning their reintegration and resettlement (Partially Implemented – 0.75).

KNCHR response:

- Implementation on-going. Some 730 IDP families are yet to be resettled (Partially Implemented 0.75).

Ogiek People Development Programme (OPDP) response:

- The government has failed to resettle the Ogiek living along roadside at Seregonik, Uasin Gishu area. They are more than 1,500 people (Not Implemented – 0).

VII. Recommendation 101.36 - 101.38, 101.77 - 101.83, 102.10, 102.11 and 102.15) (Cooperation with International Mechanisms) IRI – (0.15) - NI

CHRI response

- Kenya’s government has launched an aggressive political campaign against the ICC in the international arena, seeking the support of the African Union and the United Nations Security Council. In January 2014, the prosecutor asked the ICC’s judges for a formal finding of non-cooperation against Kenya. (Not Implemented – 0).

KNCHR response:

- Not implemented. Co-operation has been peace-meal, efforts have leaned towards trying to get the cases back to the country or to the East African Court of Justice (EALA) rather than co-operating with the ICC (Not implemented – 0).

A19 response:

- Kenya is yet to extend official invitations for formal country visits to the UN Special Rapporteurs on freedom of opinion and expression or on human rights defenders, to assist with meeting
its international human rights obligations (Not implemented – 0).

❖ CSCK-UPR response:
- The government has failed to genuinely cooperate with the International Criminal Court (ICC) in relation to the cases against President Uhuru Muigai Kenyatta, Deputy President William Samoei Ruto and Journalist Joshua Arap Sang. The government has consistently utilised judicial processes to subvert its obligations under the Rome Statute. Illustratively, the government has not honored pending requests by the Chief Prosecutor to interview senior members of the national security agencies, owing to a court order that was obtained to block these interviews. The government continues to engage in shuttle diplomacy at regional and international fora to secure a deferral and referral of the Kenyan cases (Not Implemented – 0).

❖ KMSUN response:
- Kenya is yet to extend invitations for formal country visits to the UN and African Commission on Human and Peoples Rights (ACHPR) Special Rapporteurs on freedom of opinion and expression, or on human rights defenders, to assist with meeting its international human rights obligations. Equally, Kenya has often not responded to letters of allegations and urgent appeals. It has also not responded to questionnaires on thematic issues by special mandate holders (Not Implemented – 0).

❖ UNCT Kenya (OHCHR) response:
- In 2011, Kenya accepted the request for country visit of the Special Rapporteur on Internally Displaced Persons and in 2012 the request of the Special Rapporteur on Access to Safe Drinking Water and Sanitation. Kenya is yet to accept requests from the Rapporteur on Torture and Enforced Disappearances, the Rapporteur on Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence and the Rapporteur on Independence of Judges and Lawyers. Kenya is also yet to provide a standing invitation to all UN Special Rapporteurs (Partially Implemented – 0.75).

VIII. Recommendation 101.42, 103.1 and 103.2 (Public awareness and abolition of the death penalty) – IRI (0.56) - PI

❖ State response:
- Soon after the country’s first review in 2010, the government in collaboration with the Kenya National Commission on Human Rights and other stakeholders begun discussions on how to raise public awareness regarding the abolition of the death penalty, among Kenyans. The KNCHR has commenced a survey on the effects of capital punishment with a view to using
the results for engagement with the public on the desirability of its abolition. There have been no capital punishments carried out during the review period. With regard to recommendation 103.1, the public overwhelmingly rejects the abolition of the death penalty for the most serious crimes (Partially Implemented – 0.75).

❖ A19 response:
  - Partially implemented as most courts do not automatically give death sentences for capital offences (Partially Implemented – 0.75).

❖ KNCHR response:
  - De facto moratorium but not abolished (Partially Implemented – 0.75).

❖ KSC response:
  - The state has acknowledged that the death penalty had not been applied since 1987. However, 1600 have been committed to death row raising concerns about the states willingness to abolish the death penalty (Not Implemented – 0).

IX. **Recommendation 101.61 – 101.64 (Judicial Independence) – IRI (1)**

- FI

❖ State response:
  - The government of Kenya has largely implemented all the recommendations of the Judicial Task Force Report which were further buttressed by the Constitution of Kenya. The enactment of the Constitution of Kenya, 2010, resulted in the adoption of critical legislation and administrative measures that have greatly enhanced the integrity, efficiency and transparency of the judiciary-transforming it into an independent establishment capable of effectively administering justice, checking impunity, upholding and enforcing the Bill of Rights. The Constitution of Kenya 2010 provides comprehensive guidelines against corruption. Parliament enacted the Leadership and Integrity Act 2012 to establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and to promote ethics, integrity and servant leadership among State officers (Fully Implemented – 1).

❖ KNCHR response:
  - Implemented. All Judges and Magistrates vetted to determine their suitability to remain in office. A new Chief Justice appointed. The Judicial Service Commission empowered and appointments to the Judiciary are undertaken in a transparent and fair manner. The Judiciary is currently in the process of devolving with the court of appeal already sitting in 3 regions (Fully Implemented – 1).
CSCK-UPR response:
- New judicial appointments have been made through a competitive and transparent process, and sometimes the public has been invited to submit their views on the candidates. However, no clear guidelines on procedures for public participation are in place. The Vetting of Judges and Magistrates Board has since 2011, declared 41 judicial officers unsuitable to hold office (fully Implemented – 1).

X. Recommendations 101.7 - 101.9 and 101.31 (Adoption of a new Constitution and Promotion of Civil and Political Rights) –IRI (1) - FI
State response:
- Keeping in mind the protection that the Constitution of Kenya, 2010 gives for the protection of the individual, and recognizing that the Country now has robust institutions like those mentioned in this report including the Judiciary and the Independent Police Oversight Authority, it is hoped that no individual will allow violations of any of their rights (Fully Implemented – 1).

A19 response:
- Implemented (Fully Implemented – 1).

KNCHR response:
- Implemented through adoption of a new Constitution in August 2010, particularly through replicating ICCPR in the 2010 Constitution and setting up of a Constitutional and Human Rights Division (Fully Implemented – 1).

XI. Recommendation 101.119 (Engagement with Civil Society) – IRI (0.75) - FI
A19 response:
- Partially implemented – 0.75

KNCHR response:
- Implemented. The state drew up an action plan on the UPR with the assistance of the Kenya National Commission on Human Rights and Civil Society organizations. The action plan has however not been implemented (Partially Implemented - 0.75)

XII. Recommendations 101.109 - 101.113 and 101.126 (Right to Education) –IRI (0.63) - PI
UNCT Kenya (OHCHR) response:
- Progress has been recorded since 2010. At the normative level, the 2010 Constitution sets out the framework for right to
education. The Basic Education Act, 2013 also emphasises on access, standards and quality of education. Other legislative and policy instruments have been developed to address education issues in Kenya including promotion of gender equality in education. Amidst this progress, a lot more needs to be done in respect to enhancing the right to education of marginalised communities (Partially Implemented – 0.75)

❖ (FI+ERI+FMSI) response:

- The Kenyan government has passed a series of bills to put in place a policy and legal framework to actualise the constitutional provisions for education. However, although comprehensive, the National Special Needs Education policy framework is under-prioritised and yet to be fully implemented (Partially Implemented – 0.75)

❖ KSC response:

- Enrolment of children in school, particularly those with special needs, is yet to increase and girls from poor households still miss out on school as they cannot afford sanitary towels. However, there are several efforts in restructuring the education sector (Partially Implemented – 0.75)

❖ KNCHR response:

- Not implemented. Education for the marginalised and vulnerable populations remains a challenge. Children with Disabilities are especially hard-hit, with very few schools able to accommodate them. The Special Schools do not have adequate resources or personnel to cater for the needs of children with disabilities (Not Implemented – 0).

XIII. Recommendations 101.114, 101.96, 102.5, 102.6, 103.6 and 103.7 (Rights of Indigenous Peoples) - IRI (0.25) - NI

❖ State response:

- Kenya’s new Constitution provides several avenues for the protection and strengthening of indigenous peoples’ personal and collective rights (Fully Implemented – 1).

❖ KNCHR response:

- The state has not implemented the recommendations made to it in relation to the rights of Indigenous groups and minorities during the 1st cycle of the UPR process despite the greater protection of their rights in the Constitution (Not Implemented – 0)

❖ CS response:

- Many important recommendations from the Special Rapporteur have not been implemented, such as; constitutionally recognizing indigenous peoples, the creation of effective mechanisms to address historical injustices and settle current
land and natural resource disputes resulting from dispossession of lands traditionally owned by pastoralists and hunter-gatherers (Not implemented – 0).

❖ CSCK-UPR:
- The decision by the African Commission on Human and Peoples’ Rights in the Endorois case is yet to be implemented by the government (Not implemented – 0).

XIV. Recommendations 102.12 and 101.46 (Definition and Prevention of Torture) IRI- 0 (NI)

❖ KSC response:
- The National Police Service Act criminalises torture and provides sanctions for the same. However, with regard to prohibition of torture, there is still no legislation that specifically defines torture and exhaustively deals with the offense (Not Implemented – 0)

❖ KNCHR response:
- Though the Constitution prohibits torture in practice however, torture continues to be practiced despite the recommendations made to the state during the 1st cycle. The state has not put in place measure to eliminate torture (Not Implemented – 0)

XV. Recommendation 101.27 - 101.29 (Corruption and Good Governance) – IRI (0.58) - PI

❖ State response:
- The Constitution of Kenya 2010 provides comprehensive guidelines against corruption. Chapter 6 uniquely sets the guiding lights, principles of leadership and integrity that will underpin those to serve in the public service. The leadership and integrity standards were included in the Constitution to ensure transparency and accountability and good governance in the management of public affairs for the welfare of the sovereign people of Kenya. State Officers are required discharge their public duties in accordance with the leadership principles and the thresholds of integrity enshrined in the Constitution (Fully Implemented – 1).

❖ A19 response:
- On 8 July 2011, Kenya launched an open data portal (www.opendata.go.ke) to enable government agencies to publish data and statistics. The initiative has been welcomed as one of the most significant steps Kenya has made to improve governance and implement Kenya’s constitutional guarantee of access to information. However, the portal is not frequently
updated due to poor coordination and unwillingness of most state departments to proactively provide information (Partially implemented – 0.75).

❖ KNCHR response: Difficult to assess (Not Implemented – 0)

XVI. **Recommendation 101.65 – 101.68 (Witness Protection) – IRI (0.83)** - FI
❖ State response:
  • The Witness Protection Act, 2008 as amended by the Witness Protection Amendment Act, 2010 establishes an independent and autonomous Witness Protection Agency. The Witness Protection Agency has been operationalised, independent of the Attorney General’s office (Fully Implemented – 1).
❖ UNCT Kenya (OHCHR) response:
  • The Witness Protection (Amendment) Act 2010 has been enacted and the Witness Protection Agency (WPA) established. However, the WPA is challenged by lack of resources (Partially Implemented – 0.75)
❖ KNCHR response:
  • Partly implemented through the establishment of a Witness Protection Agency. The Effectiveness of the Agency in protecting witnesses is however yet to be assessed (Partially implemented – 0.75).

XVII. **Recommendation 103.3, 103.4, 101.43 and 101.44 (Extra-judicial killings) – IRI (0) – NI**

❖ ISHR:
  • During the last UPR Kenya accepted ten recommendations on the prevention of extra-judicial killing and torture. However, reports of unlawful killings by the police and incidences of “enforced disappearances” and torture have remained prevalent. The widespread impunity and deliberate reluctance to investigate such cases has reached endemic levels. A preliminary survey on extra-judicial killings released in mid-August 2013 by the Kenyan National Commission on Human Rights (KNCHR) and the Independent Medico-Legal Unit, reported that in 2013 between May and August 120 people were shot dead by police in suspicious circumstances (Not Implemented – 0).
❖ Human Rights Watch:
  • During the UPR review in 2010 Kenya indicated that it was committed to preventing extra-judicial killings and ensuring compensation and justice for the families of victims through due process. Yet over the past five years police have been responsible for hundreds of extra-judicial killings. In 2013, a survey by the Kenya National Commission on Human Rights (KNCHR) found that police unlawfully killed 120 people between May and August 2013 under circumstances that could
have been avoided. The perpetrators have not been investigated or prosecuted, however, due to weak internal accountability structures and an apparent lack of political will (Not implemented – 0)

❖ CS response:
  • No compensation has been given to the Samburu families and communities who have suffered police attacks and killings since 2009. Implementation of the Special Rapporteurs recommendation need to be improved, especially: The government should ensure that compensation is provided to the families of those victims unlawfully killed by the police or other security forces, and, for unlawful killings and other serious human rights abuses, the one-year statutory limitation period on suits in tort against public officials should be removed.

❖ CSCK-UPR response:
  • Instances of extra-judicial killings of HRDs continue unabated such as that of Hassan Guyo, who was fatally shot by State security agents in Moyale in 2013 (Not implemented – 0).

XVIII. Recommendation 101.87 - 101.89 (Human Rights Defenders) – IRI (0) - NI

❖ Pen response:
  • Harassment and attacks against journalists and human rights defenders continue while investigations are frequently inadequate or non-existent (Not Implemented – 0).

❖ CSCK-UPR response:
  • Human Rights Defenders (HRDs) in Kenya remain at risk of threats, persecutions, attacks, arbitrary arrests, judicial harassment and extra-judicial killings. The 2009 killings of Oscar Kingar’a and John Paul Oulu remain unresolved while other instances of extra-judicial killings of HRDs continue unabated such as that of Hassan Guyo, who was fatally shot by State security agents in Moyale in 2013 (Not Implemented – 0).

❖ KSC response:
  • HRDs continue to experience intimidation, threats, harassment, attacks, arbitrary arrest and detention, malicious prosecution, death threats and sometimes killing. Recently, a former BBC journalist, Ms. Lucy Hannan, a long term resident of Kenya was declared persona non grata in December 2013 for alleged acts of subversion; the killing of Hassan Guyo, the director of a human rights NGO who was allegedly shot on 7th August, 2013 by members of the Kenya Defence Forces in Moyale in Marsabit County; the arrest of HRDs who were charged with the offence of rioting after proclamation which attracts the punishment of life imprisonment (Not Implemented – 0).
❖ A19 response:

- Journalists and bloggers continue to be victims of threats, physical assaults and killings mainly related to stories published about corruption by public officials and abuse of office (Not Implemented – 0).

❖ KNCHR response:

- HRDs continue to experience intimidation, threats, harassment, attacks, arbitrary arrest and detention, malicious prosecution, death threats and sometimes killing, in a general environment of impunity and lack of options for redress (Not implemented – 0).

XIX. **Recommendation 101.52 – 101.57 (Female Genital Mutilation) – IRI (0.85) – FI**

❖ UNCT Kenya (OHCHR) response:

- Positive developments include the enactment of the Prohibition of Female Genital Mutilation (FGM) Act (2011) and ongoing review of the FGM Policy. A national FGM Board was also established in December 2013 together with a special unit under the Office of the Director of Public Prosecution (ODPP) to fast-track the prosecution of FGM offences was set up in April 2014. Also, committee of 18 Prosecution Counsels has been constituted to support 21 counties with high FGM prevalence (Fully Implemented - 1).

❖ Equality Now response:

- Kenya has taken some important steps to outlaw FGM and child marriage and enforce these laws, particularly in response to recommendations made during its 2010 UPR review. In Kenya’s national legal framework, FGM is prohibited under the Prohibition of Female Genital Mutilation Act 2011, and both FGM and child marriage are prohibited under the Children’s Act 2001. In addition, Kenya’s Constitution contains provisions against both FGM and child marriage. In December 2013, Kenya appointed an anti-FGM advocate and former Member of Parliament, Honorable Linah Jebii Kilimo, from an area with high FGM prevalence as new chairperson of the government’s Anti-FGM Board. Most recently in April 2014, Kenya’s Director of Public Prosecutions, Keriako Tobiko, established an Anti-FGM Unit, in order to streamline the prosecutorial management of FGM cases in Kenya. Despite these efforts by Kenyan authorities to address FGM and child marriage, these human rights violations persist and implementation of the relevant laws has been inadequate (Partially Implemented – 0.75).

❖ KSC response:
• The Prohibition of Female Genital Mutilation Act was passed in 2011 and a national policy and action plan on FGM were developed. However, the law is still weak in protecting people against FGM as it is still yet to be aggressively applied. Unless perpetrators of FGM are arrested and prosecuted, the law will remain ineffective in protecting women and girls from FGM (Partially Implemented – 0.75).

❖ KNCHR response:

• The Prohibition of Female Genital Mutilation Act passed in 2011 and a national policy and action plan on FGM developed. The awareness-raising part yet to be implemented (Partially Implemented – 0.75).

XX. Recommendation 101.48 – 101.51 and 101.60 (Violence to women and children) - IRI (O.42) – PI

❖ State response:

• The Office of the DPP has operationalised a Sexual Offences, Gender Violence and Victim’s Rights Section and appointed Special Prosecutors (advocates with expertise) to prosecute selected complicated Sexual and Gender Based Violence cases. The country’s long term development goal is contained in the Vision 2030 document which has set out to reduce gender-based violence through the increased capacity of the police to handle cases of violence against women and to eliminate harmful cultural practices such as Female Genital Mutilation/Cutting. The establishment of the TJRC provides women with a political space through which legacies of abuse and violence against them are likely to be addressed. It is anticipated that the (TJRC), will amongst other things, identify and illuminate patterns of abuse, give voice to victims, and make strong recommendations for gender responsive legal and institutional reforms and improvements (Fully Implemented – 1).

❖ Centre for Reproductive Rights response:

• As recently as March 2013, the Gender Minister reported that 32% of females in Kenya have experienced sexual violence. The use of legal procedures is intimidating for women while legal aid is not easily accessible. The different policies that address sexual violence are not implemented at many health facilities and health workers lack adequate training and may not be aware of the existence of these policies. At the community level, police often respond to reports of sexual violence by subjecting survivors to humiliating interrogations and requests for bribes. Although designated ‘Gender Desks’ were established at many police stations to assist victims of gender
based violence, poor equipment, infrastructure, weak investigation and poor training have combined to undermine their effectiveness (Not Implemented – 0)

❖ FI+ERI+FMSI response:

• Partially implemented. Reportedly, the government through the ministry in charge of gender and children affairs is facilitating trainings for various groups, including law enforcement officials and the judiciary to improve handling of cases of child abuse. This is done in the police academy at Kiganjo to sensitise the police about issues affecting children and women’s rights by having special magistrates in courts to deal with gender related offences, and by training children in schools about their rights. The ministry in collaboration with the police department is also training special police officers to deal with cases of defilement and other forms of violence. There is however, shortage of specialised doctors dealing with child abuse cases which derail legal redress. Moreover, community sensitization about child labour by government is yet to alleviate child labour at dump sites in the urban areas (Partially Implemented – 0.75).

❖ The Equal Rights Trust response:

• Violence against women remains prevalent and the legal and policy framework remains inadequate (Not Implemented – 0)

❖ CSCK-UPR response:

• Despite considerable strides on policy formulation aimed at addressing violence against women and girls, incidents of sexual violence remain on the rise. In 2011, the number of reported sexual offences increased to 4,703 from 3,525 in 2007. In 2013, the Inspector General of Police reported that rape cases had increased by 22% (Partially Implemented – 0.75).

❖ Coalition of Child Rights NGOs for UPR – Kenya response:

• Cases of child rights violations are on the increase, nearly one in three females and one in five males experience at least one episode of sexual violence before reaching age 18 (Not Implemented - 0).

XXI. Recommendation 103.5 (Sexual Orientation and Gender identity) –Rejected – IRI (0) - NI.

❖ State Response:

• Same-sex relations were culturally unacceptable in Kenya (Not Implemented – 0).

❖ KSC response:
• The government is unwilling to recognise and protect the rights of sexual minorities (Not Implemented – 0).

❖ CHRI:

• Homosexuality remains a criminal offence in Kenya. During its first UPR the government rejected all recommendations on the protection of the LGBT community (Not Implemented – 0).

❖ KNCHR:

• Despite the elaborate provisions in the Constitution that prohibit discrimination, sexual minorities continue to face discrimination and persecution on the basis of their sexual orientation and the criminalisation of same sex activity (Not Implemented - 0).

XXII. Recommendation 101.39 - 101.41 (Women empowerment and participation) – IRI (0.38) – PI

❖ KNCHR response:

• Provisions for implementation of this recommendation were put in place through constitutional provisions on equality of men and women. However, implementation of the constitutional provisions has posed a challenge 0.75).

❖ KSC response:

• Though the Constitution has put in place measures to address the inequality between men and women in the political sphere, women are yet to enjoy the stature in the political process (Not Implemented – 0).


❖ KSC:

• Though the trials of suspected high-level perpetrators are ongoing, low and medium-level perpetrators have not been prosecuted thereby entrenching the culture of impunity. The International Crimes Division of the High Court that was anticipated to try the low-level perpetrators has not been set up despite the state indicating that it was and/or is willing to set it up. Some of the victims of the Post-election violence are yet to be compensated (Not Implemented – 0).

❖ KNCHR response:

• The Truth Justice and Reconciliation Commission, constituted to inter alia establish an accurate, complete and historical record of violations and abuses of human rights between 12 December
1963 and 28 February 2008, finalised and submitted its report to the president on 21st May 2013. One year later, the state is yet to act on the recommendations of this report (Not Implemented – 0).

❖ CSCK-UPR response:

- Kenya committed to establish independent investigations into the 2007-08 post-election violence (PEV) but has made minimal steps in this regard. A multi-agency task force established to review all pending investigations and trials reported that there were only 26 convictions from the over 6,000 files reviewed. It also concluded that there is insufficient evidence to prosecute the remaining cases. Furthermore, attempts to establish an International Crimes Division with the initial intention of addressing international crimes committed during PEV have been marred by lack of political will and conflated with transnational crimes. This indicates a systematic failure by the State to conduct credible and adequate investigations and prosecutions of PEV (Not Implemented – 0)

XXIV. Recommendation 101.15 (Independent Police Oversight Authority) – IRI (1) - FI

❖ State response:

- The Independent Police Oversight Authority, created by the Independent Police Oversight Authority Act 2011 has now been operationalised. It is a crucial institution to ensure accountability for police functions (Fully Implemented - 1).

❖ KSC response:

- The National Police Service Act and the Independent Policing Oversight Act were enacted into law and the members of Independent Policing Oversight Authority (IPOA) board sworn in (Fully Implemented – 1).

❖ Amnesty International:

- Kenya established the Independent Policing Oversight Authority (IPOA) in May 2012 (Fully Implemented – 1).

❖ KNCHR response:

- The Independent Police Oversight Authority Act passed in 2011 and the Authority Board sworn in. The Authority is currently staffing and began operations in 2013 (Fully Implemented – 1).

XXV. Recommendation 101.47 and 101.59 (Trafficking of Persons) – IRI (0.25) – NI
UNCT Kenya (OHCHR) response:

- The prohibition of human trafficking in Kenya was achieved with the enactment of the Trafficking in Persons Act (2010). However, implementation of the act to support victims of trafficking remains a gap, as well as addressing issues of smuggled migrants who are not specifically codified in the act (Not Implemented – 0.75).

Centre for Reproductive Rights response:

- Kenya has not ratified Optional Protocol II of the CRC which provides additional rights of protection from child trafficking, pornography and prostitution (Not Implemented – 0)

KSC response:

- The Counter-Trafficking in Persons Act, 2010 was enacted in 2010 but is yet to be operationalised. The State has gazetted it twice without giving it a commencement date. One of the stakeholders’ partner organizations has now sued the State over the delay in implementing this piece of legislation (Not Implemented – 0).

XXVI. Recommendation 101.58 and 101.71 (Detention System) – IRI (0.25) - NI

CSCK-UPR response:

- Humanitarian access to places of detention has been severely restricted, hampering detainees’ access to healthcare and social assistance as well as adequate monitoring of the situation (Not Implemented – 0)

XXVII. Recommendation 101.92 and 101.94 (Reproductive Health) – IRI (0.38) - PI

UNCT Kenya (OHCHR) response:

- Progress has also been made towards improving the rights of persons deprived of their liberty and adherence by the prison authority to the minimum rules for the treatment of prisoners. However, there is need for increased national budgetary allocation to correctional institutions and the larger prisons reforms (Partially Implemented – 0.75).

KSC response:

- Not Implemented - 0

KNCHR response:
- The state is commended for introduction of free maternity services in public hospitals. However, access to highest attainable standards of health is still a challenge, despite the UPR recommendations made to the state in 2010. Access to reproductive health services has not improved despite constitutional provisions and policy directive (Not Implemented – 0).

- **FI+ERI+FMSI response:**
  - Partially implemented. Despite limited resources the government of Kenya is currently making significant efforts to improve health services, particularly for pregnant women and infants. In this regard, the government, through the Ministry of Public Health and Sanitation, has developed a policy which outlines a Child Survival and Development Strategy 2008-2015. The strategy aims at reducing health inequalities with a specific focus on child survival and development. In terms of implementation, some progress is noted with regard to improving infant nutrition through breastfeeding (intensified campaigns on breastfeeding); ensuring safe breastfeeding for HIV infection mothers using Highly Active Antiretroviral Therapy (HAART); promoting countrywide immunization (i.e. recently completed measles and vitamin B immunization); treatment and prevention of malaria by providing free mosquito nets to pregnant women. The government however, is challenged in terms of ensuring there are enough health facilities to reach all citizens (Partially Implemented – 0.75).

- **CSCK-UPR response:**
  - Deaths from unsafe abortion account for 13% of maternal mortality in Kenya. The Ministry of Health developed National Standards and Guidelines for the Reduction of Maternal Mortality from Unsafe Abortion in 2012 and a National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies in a bid to provide a framework on access to safe abortion care. These guidelines were un-procedurally withdrawn in 2013. This is likely to lead to an increase in the number of unsafe abortions in Kenya, and a further rise in maternal mortality and morbidity (Partially Implemented – 0.75).

- **KSC response:**
  - Access to reproductive health services for women has also remained a challenge in the period under review. A report released by KNCHR in May 2012 revealed that access to reproductive health services is still a challenge to many women. The Reproductive Health Bill has not yet been passed (Not Implemented – 0).
XXVIII. Recommendation 101.13 and 101.14 (National Human Rights Institutions) – IRI (0.58) – PI

❖ State response:

- The Kenya National Commission on Human Rights (KNCHR) has been restructured, transformed and established into a constitutional body pursuant to Articles 59 (4) of the Constitution of Kenya (2010) and the Kenya National Commission on Human Rights Act, 2011. The Commission operates independently and its functions include promotion of respect for human rights and it acts as the principal organ of the State in ensuring compliance with obligations under international and regional treaties and conventions relating to human rights. Article 249(3) of the Constitution directs Parliament to allocate adequate funds to enable the Commission perform its work effectively. The budget of the Commission is a separate vote of the consolidated fund. The government is committed to ensure that the KNCHR will be allocated adequate funds to facilitate its mandate (Fully Implemented – 1).

❖ A19 response:

- Not implemented - 0

❖ KNCHR response:

- Partly implemented through re-establishing the commission as a constitutional body. However, the Commission is yet to receive from the state the resources it needs to carry out its constitutional mandate (Partially Implemented – 0.75)


❖ State response:

- National Policy and Action Plan on Human Rights has been finalised and adopted by Cabinet in 2012. The Policy now known as Sessional paper No. 3 of 2014 is due for publication and tabling before Parliament (Fully Implemented - 1).

❖ KNCHR response

- Implemented. The National Policy and Action Plan developed and at an advanced stage. Awaiting adoption (Fully Implemented - 1).

NB. The National Policy and Action Plan on Human Rights was published in August 2014 within the UPR I implementation timeframe.
XXX. Recommendation 101.120 – 101.124 and 101.128 (Technical Assistance and Support) – Difficult to Assess

XXXI. Recommendation 101.23 - 101.25 (Transitional Justice) – IRI (0) – NI

❖ CS response:

- The Truth Justice and Reconciliation Commission (TJRC), established in 2008 completed its assignment and handed its final report to the President in 2013. The report was subsequently submitted to Parliament for consideration. The report has not been debated in parliament and the recommendations of the Commission are yet to be implemented (Not Implemented – 0)

❖ KNCHR response:

- The TJRC, constituted to *inter alia* establish an accurate, complete and historical record of violations and abuses of human rights between 12 December 1963 and 28 February 2008, finalised and submitted its report to the President on 21st May 2013. One year later, the state is yet to act on the recommendations of this report (Not Implemented – 0).

❖ KSC response:

- The Truth Justice Reconciliation Commission (TJRC) completed its report and handed it to the President on 21st May 2013. The report, however, has not been implemented despite the clear framework for implementation. It seems the victims of PEV will not get any justice after all. The TJRC has become another white elephant and some IDPs still languish in camps. (Not Implemented - 0).

❖ CSCK-UPR:

- Kenya committed to establish independent investigations into the 2007-08 post-election violence (PEV) but has made minimal steps in this regard. A multi-agency task force established to review all pending investigations and trials reported that there were only 26 convictions from the over 6,000 files reviewed. It also concluded that there is insufficient evidence to prosecute the remaining cases. Furthermore, attempts to establish an International Crimes Division with the initial intention of addressing international crimes committed during PEV have been marred by lack of political will and conflated with transnational crimes. This indicates a systematic failure by the State to conduct credible and adequate investigations and prosecutions of PEV (Not Implemented – 0).
XXXII. Recommendation 101.93 (Rights to water and food) – *IRI* (0.5) – PI

- **UNCT Kenya (OHCHR) response:**
  - Statistics from the last four bi-annual food security assessments (2012-2013) show that on average, 1.9 million Kenyans are chronically have been in need of immediate food assistance aid and 65% of that population is women and children. The national budgetary allocation for agriculture however remains significantly low at 4.2% compared to the 10% threshold of CADeP (Not Implemented – 0).

- **KSC response:**
  - The Constitution recognises the right to water and sanitation. Despite this provision, access to safe water and sanitation is wanting and few Kenyans access piped water. The government is in the process of reviewing the legal framework on water to align the sector with constitutional provisions on access to water and sanitation (Partially Implemented – 0.75)

- **(FI+ERI+FMSI) response:**
  - The government of Kenya has adopted a new National Food and Nutrition Security Policy (2011) that addresses issues of a strategic food reserve and food trade as well as cultural, social and political factors in accessing food and increases the quantity, quality of food available, accessible and affordable at all times. However, as a matter of fact, the policy in its resolve to respond to critical food emergencies falls short of an express commitment to tackle food distribution during times of drought. This is evidenced by the fact that private citizens had to mobilise themselves to contribute and distribute food to the drought stricken areas with the support of the Kenya Red Cross in 2011. Many of the initiatives on water security in the semi-arid and drought stricken areas of the country are largely launched and implemented by NGOs (Partially Implemented – 0.75).

- **KNCHR response:** Not Implemented - 0

XXXIII. Recommendations 101.11, 101.12, 101.70, 101.85, 101.86, 101.90 and 101.91 (Child Labour, Marriage and Criminal Responsibility) – *IRI* (0.38) – PI

- **UNCT Kenya (OHCHR) response:**
  - While the Constitution provides for protection of children from exploitative labor, elimination of child labor is also reinforced in the draft Child Labor Policy. The Basic Education Act 2013 also prohibits employment of children of school going age. To reinforce and operationalization these frameworks, the government has institutionalised Child Labor Committees at the
County level. Minimal government resource allocation has however slowed down the implementation of these legal frameworks and structural reforms (Partially Implemented – 0.75).

❖ Equality Now response:

- Kenya has taken important steps to outlaw early marriages. However, these human rights violations persist and implementation of the relevant laws has been inadequate (Partially Implemented – 0.75).

❖ KSC response:

- Critical legislations have not been enacted. A child labour policy was proposed in June 2012 at a conference organised by the Ministry of Labour with support of other NGOs (including CISP) and other organizations with the theme “Human Rights and Social Justice, lets end child labour”. Unless this policy is drafted and implemented child labor will continue to be prevalent. The concerns still remains that there is need to raise the age for criminal responsibility from eight to twelve years (Not Implemented – 0).

❖ Coalition of Child Rights NGOs for Kenya response:

- The amendment of the children Act, 2001 has been ongoing since 2006 and has not yet been completed. The development of the comprehensive National Plan of Action for Children (NPA) 2013-2017 has equally not been completed. The ongoing processes have been delayed due to lack of political good will and financial support from state and non-state actors (Not Implemented – 0).

XXXIV. Recommendation 101.115 (Rights of Refugees) – IRI (0) – NI

❖ Human Rights Watch response:

- In spite of having accepted a recommendation to “continue the current policy vis-à-vis Somali refugees, based on solidarity and the protection of fundamental human rights”, the Kenyan government increased its hostile rhetoric against Somali refugees in 2013 when the Uhuru Kenyatta administration came to power, accusing them of responsibility for the many un-investigated gun and grenade attacks, calling for the refugee camps to be closed, and for Somalis to return to Somalia despite the ongoing conflict and insecurity in that country. Kenya stopped registering urban refugees in December 2012, and a government relocation plan the same month that would have forced all urban refugees to relocate to overcrowded camps was quashed by a Kenya High Court ruling in July 2013 (Not Implemented – 0).

❖ CSCK-UPR response:
The government has advanced a strict, discriminatory refugee encampment directive in contravention of a 2013 High Court ruling. In April 2014, the government launched Usalama Watch, an anti-terror security operation which has in resulted serious human rights violations against refugees and asylum seekers such as arbitrary arrests and detentions, ill treatment of detainees, extortion, deportations and family separations through forced relocation from urban centres to camps (Not Implemented – 0).

❖ KSC response:

The government has attempted to enforce encampment and in so doing, has induced refoulement in contravention of the signing of a Tripartite Agreement between UNHCR, the Kenya government and the government of Somalia in November 2013. In addition to the inability to access services as a result of non-registration and punitive measures against undocumented persons, recent terror attacks have compounded the already precarious protection environment of refugees with cases of harassment, extortion and discrimination being documented by Human Rights Watch (Not Implemented - 0).
APPENDIX III – IRI SOUTH AFRICA

The responses which are used to calculate the Implementation Recommendation Index (IRI) of South Africa for UPR 1 are gleaned from the implementation reports submitted by the state and NGO stakeholders. See appendix I above for IRI methodology. The following NGO stakeholders provided commentaries on South Africa’s implementation of UPR I recommendations in their UPR reports:

- South Africa Human Rights Commission (SAHRC)
- Global Initiative to End all Corporal Punishment of Children (GI)
- Joint Report by Istituto Internazionale Maria Ausiliatrice and VIDES International
- Joint Report by Save the Child South Africa (SC SAf), Umthatha Child Abuse Resource Centre (UCARC) and Care Excellence Development Centre (CEDC)
- Human Rights Institute of South Africa (HURISA), People Opposing Women Abuse (POWA) Consortium for Refugees and Migrants in South Africa (CoRMSA), CIVICUS, Centre for Human Rights (CHR), and Coalition of African Lesbians (CAL)
- Ubuntu Centre South Africa
- Community Law Centre University of the Western Cape
- Amnesty International
- Joint report by Lawyers for Human Rights (LHR) and CoRMSA
- Joint report by The Centre for Applied Psychology at the University of South Africa and others
- Human Rights Watch

968 Istituto Internazionale Maria Ausiliatrice and VIDES International
972 Community Law Centre University of the Western Cape, ‘Stakeholder Submissions; South Africa Universal Periodic Review – 13th Session 2012’ (2011).
975 The Centre for Applied Psychology of the University of South Africa et al, ‘Violate Hate Crimes in South Africa’ (2012).
The analysis is based on the 22 UPR I recommendations made to South Africa. 14.80% were fully Implement (FI), 43.60% were partially implemented (PI), 41.60% were not implemented (NI). Two of the recommendations made to South Africa (Recommendations 3 and 18) were not assessed because stakeholders did not provide any information on their implementation.

Feedback on Recommendations

I. Recommendations 1 (Corporal Punishment) – IRI (0) – NI

- SAHRC - response:
  - South Africa has not taken steps to give effect to UPR recommendation 1 (Not Implemented – 0)

- Global Initiative to End all Corporal Punishment of Children (GI) - response:
  - Corporal punishment of children is lawful in South Africa, despite recommendations made during the review of South Africa by the HRC in UPR I. The legality of corporal punishment of children in South Africa has not changed since 2008. While it is prohibited in schools, it continues to be lawful in the home (Not Implemented – 0).

- Save the Child South Africa (SC SAf), Umthatha Child Abuse Resource Centre (UCARC) and Care Excellence Development Centre (CEDC) - response:
  - 2008 recommendation from the HRC to criminalise corporal punishment has not been implemented (Not Implemented – 0)

- Istituto Internazionale Maria Ausiliatrice and VIDES International - response:
  - Corporal punishment is still practiced in schools (Not Implemented – 0).

- Human Rights Institute of South Africa (HURISA), People Opposing Women Abuse (POWA) Consortium for Refugees and Migrants in South Africa (CoRMSA), CIVICUS, Centre for Human Rights (CHR), and Coalition of African Lesbians (CAL) - response:
  - The government lacks mechanism to control corporal punishment in the private sphere (Not Implemented – 0).

II. Recommendation 2 (legislation to prevent and eliminate torture, and to ratify OP-CAT – IRI (0) - NI
Ubuntu Centre South Africa - response:

- South Africa has not yet criminalised torture and OP-CAT is not ratified (Not Implemented – 0).

Amnesty International - response:

- Since its previous review South Africa has not adopted legislative measures to prevent, prosecute and punish acts of torture and other ill-treatment, and has not ratified OP-CAT (Not Implemented – 0)

Community Law Centre University of the Western Cape - response:

- The act of torture has not been criminalised under South African law and the South African government is yet to ratify OPCAT (Not Implemented – 0).

SAHRC - response:

- South Africa is yet to criminalise torture as required by CAT and recommended by UPR recommendation 2, and the South African government is yet to ratify OPCAT as per UPR recommendation 7 (Not Implemented – 0).

III. Recommendations 4, 5 and 6 (violence against women and children) – IRI (0.5) - PI

SAHRC - response:

- The reinstatement of the specialised Family Violence, Child Protection and Sexual Offences Unit (FCS) is welcomed. However, South Africa needs to increase measures to protect and provide redress to women at risk of gender-based violence (Partially Implemented – 0.75).

HURISA, POWA, CoRMSA, CIVICUS, CHR and CAL - response:

- Despite recommendations made by the HRC in 2008, minimal progress has been made in addressing the challenges in the gender-based violence sector (Partially Implemented – 0.75).

SC Saf, UCARC and CDEC:

- The government also provides comprehensive post sexual assault care and treatment through the provisions of the Criminal Law (Sexual Offences and Related Matters) Act; children who have been sexually violated also have access to
counselling and Post Exposure Prophylaxis (PEP) (Fully Implemented – 1)

❖ IIMA and VIDES - response:

• Several cases wherein police officers were involved in episodes of violence and ill-treatments against children have been reported. While recognising the efforts by the government to realise specific training for police officers, we remain highly concerned for the inadequacy of such measures (Not Implemented – 0).

❖ Amnesty International – response:

• Discrimination against women persists despite the normative framework guaranteeing non-discrimination (Not Implemented – 0).

IV. Recommendations 7 and 8 (Ratification of ICESCR and ICPPED) – IRI (0) - NI

❖ SAHRC:

• Despite previous UPR recommendation 7, South Africa is yet to ratify ICESCR. UPR recommendation 8 to sign and ratify the CPPED has also not been implemented (Not Implemented – 0).

❖ Amnesty International:

• In its response to recommendations made during its previous review, delivered on 11 June 2008, South Africa expressed support for a recommendation to ratify the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol. However, at the end of November 2011 this was still under discussion (Not Implemented – 0).

❖ Lawyers for Human Rights (LHR) and CoRMSA:

• South Africa committed to the ratification of ICESCR and ICPPED in 2008 but ratification of these instruments is still pending (Not Implemented – 0).

V. Recommendations 9 and 10 (Refugees and Migrant Workers) – IRI (0) - NI

❖ SAHRC:

• South Africa needs to give effect to its CERD recommendations and ensure that measures are taken to address hate crimes.
South Africa needs to ratify ICRMW in order to strengthen protection of the rights of migrant workers (Not implemented – 0)

❖ Amnesty International - response:

- Despite President Jacob Zuma denouncing targeted violence against refugees and migrants, serious incidents continue to occur across the country. Refoulement remains a problem (Not Implemented – 0).

❖ LHR and CoRMSA - response:

- Due to inefficiencies in the asylum management system, many asylum seekers wait for long period of time for their status to be adjudicated. The recommendations by the Special Rapporteur on the Rights of Migrants is yet to be considered or implemented by the government (Not Implemented – 0).

VI. Recommendation 11 – IRI (0.5) - PI

❖ Amnesty International - response:

- Although the statutory oversight body responsible for investigating allegations of torture and unlawful killings by police has now been re-established on the basis of its own independent legislation, Amnesty International is concerned that it is still not sufficiently independent and under-resourced in relation to the scale of abuses to be investigated (Partially Implemented – 0.75).

❖ SAHRC - response:

- The reinstatement of the specialised Family Violence, Child Protection and Sexual Offences Unit (FCS) is welcomed. However, South Africa needs to increase measures to protect and provide redress to women at risk of gender-based violence (Partially Implemented – 0.75).

❖ HURISA, POWA, CoRMSA, CIVICUS, CHR and CAL - response:

- Although policies and guidelines have been developed to improve services for ameliorating the after effects of rape and improve access to justice, many women do not receive adequate support. Medical treatment that is time-dependent for its efficacy is often delayed. Post-exposure prophylaxis (PEP), is frequently not available after-hours, when most attacks are reported. The majority of women who receive their first PEP treatment do not return for essential subsequent doses (Not Implemented – 0).
VII. Recommendations 12, 13 and 14 (HIV AIDS) - *IRI (0.83)* - FI

- SC Saf, UCARC and CDEC - response:
  
  - We commend the government for working with civil society to provide a platform for children and young people to participate in and provide input into the new National Strategic Plan (NSP) on HIV and AIDS (2012-2016). This addresses recommendations made in 2008 on the need to provide comprehensive HIV and AIDS care and treatment particularly for young people (Fully Implemented – 1)

- SAHRC – response:
  
  - South Africa must be acknowledged for the progress it has made in addressing HIV/AIDS, thereby giving effect to UPR recommendations 12, 13 and 14. In April 2010, a new AIDS treatment policy and awareness campaign, the HCT Campaign, was launched. Over the 15 month course of the campaign, 14 million people were counselled and over 13.5 million were tested for HIV, a sixfold increase in the number of people tested over the previous year. Of those tested, two million people were declared HIV positive and were referred for further support and care. Whilst South Africa retains the highest number of people living with HIV and AIDS, it also has the largest antiretroviral therapy programme in the world. However, access to treatment is still a challenge; at the end of 2009, an estimated 37% of infected people were receiving treatment for HIV, according to the latest WHO guidelines (2010). Although the number of people on ARV treatment increased significantly during the HCT campaign, there are still many, particularly those who are poor and living in rural areas, who still lack access to ARVs (Partially Implemented – 0.75).

- Amnesty International - response:
  
  - Substantial progress has been made since the last review to expand access to treatment for HIV/AIDS to over 1.4 million people by 2011. Physical and economic barriers to access to health services, however, continue to affect poor and particularly rural households (Partially Implemented – 0.75)

VIII. Recommendations 15 and 16 (Education) – *IRI (0.63)* - PI

- SC Saf, UCARC and CDEC - response:
  
  - The Education Laws Act was amended to incorporate the State’s commitments towards ensuring reasonable accommodation for children with disabilities in order to
make schools and learning centres more accessible to children with disabilities. This is in line with the 2008 HRC recommendations to strengthen the prevention of discrimination in the education system. However, the understanding and implementation of Inclusive Education is limited and this has contributed to further marginalisation and exclusion of children with disabilities from mainstream schools. In 2011, the Department of Basic Education introduced a national policy aimed at promoting school attendance. We commend the government for putting in place a policy which promotes

- responsibilities and accountability between different role players, encouraging them to work together in supporting children to excel at school (Fully Implemented – 1).

❖ SAHRC response:
- South Africa has done much to ensure access to education (UPR recommendation 15). The major challenge facing the country is the persistence of gross inequities permeating the education system (Partially Implemented – 0.75).

❖ HURISA, POWA, CoRMSA, CIVICUS, CHR and CAL - response:
- Most of the schools located in the rural areas lack proper building infrastructure, portable water and sanitation are rare in local communities. CHR noted that the quality of physical assets and infrastructure at school level is highly unequal. Literacy and numeracy test scores are low by African and global standards. Early childhood development is still regarded by many as unnecessary and is underfunded by government. Teachers in black South African schools teach an average of 3.5 hours per day compared to 6.5 hours per day in former white schools. This amounts to a difference of three years of schooling (Not Implemented – 0).

IX. Recommendation 17 (Poverty and Social Inequality) – IRI (0.38) - PI

❖ SAHRC - response:
- The creation of the Department for Women, Children and Persons with Disabilities in 2009 served to focus poverty alleviation strategies on the most vulnerable groups in South Africa. The government has also taken the welcome step of launching the National Planning Commission (NPC) in 2010, which is tasked with a broad remit, involving developing long term strategies for development and growth in South Africa. As such, the NPC recognises that ‘linkages
between income poverty and deprivations in health care, education and social infrastructure are direct’ and acknowledges the persisting and widespread inequalities in the country. The National Development Plan, published in November 2011, is a comprehensive step forward in identifying key issues affecting South Africa’s development, including the scourge of poverty and divisions in society, and proposing actions to tackle those obstacles (Fully Implemented - 0.75).

❖ HURISA, POWA, CoRMSA, CIVICUS, CHR and CAL - response:

- As the Millennium Development Goals deadline to half poverty by 2015 nears, child mortality of under 5 year olds by two thirds and maternal mortality by three quarters, abject poverty is rife in poor provinces, particularly in the most extreme rural areas. Limpopo Province accounts for the highest number of 83.3% while the Eastern Cape Province has 71.5% (Not Implemented – 0).

X. Recommendations 19 (Racism and Xenophobia) – IRI (0) – NI

❖ SAHRC – response:

- South Africa still needs to give effect to its CERD recommendations and ensure that measures are taken to address hate crimes. South Africa has witnessed a concerning increase in hate crimes perpetrated not only on the basis of racial discrimination but also on the basis of nationality and sexual orientation. There is an urgent need to ensure that hate crimes are addressed through legislation and that measures are put in place to raise public awareness about these crimes and sensitise officials to handling them (Not Implemented – 0).

❖ The Centre for Applied Psychology at the University of South Africa and others (joint Submission 6) - response:

- In March 2010, the South African Human Rights Commission (SAHRC) issued a comprehensive report outlining its findings and recommendations relating to a wave of xenophobic violence in 2008 that targeted migrants, refugees. Several academic and civil society reports have also examined the May 2008 attacks that broke out in as many as 135 different locations across the country leading to at least 62 deaths (two-thirds of the victims were foreign nationals), over a hundred thousand people displaced, and substantial property damage. Before the 2008 violence, at least another 72 foreign nationals had been
killed since 2000 in attacks thought to be xenophobic. Patterns of violence included a number of cases of attacks on all foreign nationals living in a given neighbourhood as well as attacks specifically targeting foreign-owned shops (Not Implemented – 0).

❖ Amnesty International - response:
  • Foreign nationals, whether refugees, asylum-seekers or ordinary migrants, continue to be victims of human rights abuses since the large-scale violence in 2008. Despite periodic public denunciations by President Jacob Zuma of targeted violence against refugees and migrants, very serious incidents of targeted violence continue to occur across the country, as well as looting of small businesses and property destruction. In some incidents, the passive or active complicity of law enforcement officials has been evident. In addition, there is a continuing lack of a more systematic country-wide and effective police response to prevent or de-escalate the violence (Not Implemented – 0).

❖ Human Rights Watch – response:
  • Human Rights Watch documented that migrants are not only subject to xenophobic violence, internal displacement, and discrimination, but also face serious discrimination in health care facilities, including verbal abuse, unlawful user fees, and denial of basic and emergency health care services (Not Implemented – 0).

❖ Human Rights Watch – response:
  • South Africa has witnessed several incidents of xenophobic violence such as the stoning to death of a Zimbabwean man by a mob in Polokwane, Limpopo in June 2011; the stoning to death of a Mozambican man in GaPhasha, Limpopo in July 2011; threats of violence against foreign nationals occupying government - provided housing in Alexandra as well as violence in Laudium, Pretoria in October 2011; and threats of violence against foreign business owners in Ekurhuleni, Gauteng by South African business owners in November 2011 (Not Implemented – 0).

XI. Recommendation 20-22 (Sexual Orientation and Gender Identity) – IRI (0.63) - PI

❖ SAHRC – response:
• South Africa still needs to give effect to its CERD recommendations and ensure that measures are taken to address hate crimes. South Africa has witnessed a concerning increase in hate crimes perpetrated not only on the basis of racial discrimination but also on the basis of nationality and sexual orientation. There is an urgent need to ensure that hate crimes are addressed through legislation and that measures are put in place to raise public awareness about these crimes and sensitise officials to handling them (Not Implemented – 0).

❖ Amnesty International - response:
• Civil society campaigning has led to the establishment of a joint government-civil society “task team” in 2011, to identify and implement solutions. The Department of Justice in late 2010 also began a process of developing a ‘hate crimes’ legislative framework following the recommendations of a cross-sector civil society hate crimes working group. On July 2011, the UN HRC passed a historic resolution on Sexual Orientation and Gender Identity sponsored by South Africa, which affirmed the existing rights of LGBT person (Fully Implemented – 1).

❖ HURISA, POWA, CoRMSA, CIVICUS, CHR and CAL - response:
• The government is commended for making efforts to advance Hate Crime Bill to address challenges based on intolerance through interaction with CSOs in various platforms.
• However the delay in creating measures for remedies in dealing with situation of hate crimes in the short and medium terms is a concern (Partially Implemented – 0.75).

❖ Human Rights Watch – response:
• As recommended in the 2008 UPR, South Africa showed leadership at the international level in promoting the right of all persons to equality without discrimination based on sexual orientation. During the 17th UN Human Rights Council Session in June 2011, South Africa successfully pushed through the adoption of the first-ever UN resolution on Sexual Orientation and Gender Identity. This action affirmed South Africa’s endorsement of the rights of lesbian, gay, bisexual, and transgender (LGBT) people worldwide. However greater efforts are still needed to ensure such protection at the national level (Partially Implemented – 0.75).

❖ The Centre for Applied Psychology at the University of South Africa and others (joint Submission 6) - response:
• South Africa’s Constitution guarantees a wide range of rights for lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals. However, the day-to-day reality for many LGBTI individuals remains
grim due to the ongoing harassment, intimidation, and violence motivated by a sexual orientation or gender identity bias. Lesbians from urban townships are affected by the heinous practice of “corrective” rapes, in which victims are targeted with the specific goal of “curing” them of homosexuality. Openly gay men and women - as well as human rights defenders working to promote the rights of LGBTI individuals - have been targeted across the country due to their visibility (Not implemented – 0).
## APPENDIX IV – COEFFICIENT ANALYSIS: STATE AND NGO RECOMMENDATIONS

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BIBLIOGRAPHY

A  Primary Sources

I.  International Treaties/Conventions/Resolutions


_Charter of the United Nations._

_Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,_ opened for signature 10 December 1984, UNTS 1465 (entered into force 26 June 1987).


II.  United Nations General Assembly Resolutions, Reports and Other Committee Reports.

Committee Against Torture, ‘Concluding Observations of the Committee on the Rights of the Child, South Africa’ UN Doc CAT/C/ZAF/CO/1 (7 December 2006).


*Human Rights and Unilateral Coercive Measures*, GA Res 70/151, UN GAOR, 70th sess, 80th plen mtg, Agenda Item 72 (b), UN Doc A/RES/70/151 (7 March 2016).


United Nations Committee against Torture, ‘Conclusions and recommendations of the Committee against Torture, South Africa) UN doc. CAT/C/ZAF/CO/1 (7 December 2006) [3].

UN GAOR, 60th sess, 72nd plen mtg, UN Doc A/60/PV.72 (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 (3rd April 2006) (‘Resolution 60/251’)


### III. United Nations Human Rights Council Resolutions/Reports


IV. Domestic Legislations

Administration of Criminal Justice Act, 2015 (Nigeria).

Administration Proclamation No. 145/2005 (Eritrea).

Civil Union Act 2006 (South Africa).


Freedom of Information Act, 2016 (Kenya), Law No. 31 of 2016.


Native Law Ordinance (Nigeria), cap 211 of 1948, laws of Nigeria, s. 19.

Non-Governmental Organizations Co-Ordination Act 2012 (Kenya)

Non-Governmental Organizations Co-Ordination Regulations 1992 (KENYA).

Penal Code 2012 (Kenya)

Prohibition of Female Genital Mutilation 2011, Law No. 32 of 2011 (Kenya).

Prevention and Combating of Hate Crimes and Hate Speech Bill 2016 (South Africa).

Same Sex Marriage Prohibition Act 2013 (Nigeria).

Statute Law (Miscellaneous Amendments) Bill 2013 (Kenya), Kenya Gazette Supplement No. 146 (Bills No. 32).

Violence Against Persons (Prohibition) Act, 2015 (VAPP) [Nigeria]

Uganda Anti-Homosexuality Act, 2014 (Uganda).

Terrorism (Prevention) Act 2011 (Nigeria).

Terrorism (Prevention) (Amendment) Act 2013 (Nigeria).


The Public Benefit Organisations Act 2013 (Kenya), Law No. 18 of 2013.


V. Cases

Andrew Ireri Njeru and 34 others v County Assembly of Embu and 3 others [2014] eKLR [57].

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v The Republic of


Eric Gitari V Non-Governmental Organisation Coordination Board and 4 Others [2015] eKLR.


Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education and Others, (2013) eKLR Petition No. 133 of 2013.


Robert W Gakuru and Others v The Governor Kiambu County and 3 others (2014) eKLR Petition No. 532 of 2013 (Consolidated with) Petition Nos. 12, 35, 36, 42 and 74 of 2014.

South Africa v Minister of Education 2000 (4) SA 757.


Trusted Society of Human Rights Alliance v Cabinet Secretary Devolution and Planning & 3 others [2016] eKLR, 59.

B Secondary Sources

I. Books and Book Chapters

Afredsson, Gudmundur, ‘Concluding Remarks: More Law and Less Politics’ in Gudmundur Alfredsson and others (eds), International Human Rights
Monitoring Mechanisms: Essays in Honour of Jakob Th Möller (Martinus Nijhoff, 1st edn, 2001)


Anheier, K Helmut and Stefan Toeple (eds), International Encyclopaedia of Civil Society (Springer, 2009)

Ayittey, B N George, Africa Unchained (Palgrave Macmillanm 2005)

Azzam, Fateh, Arab States and the Universal Periodic Review (UNDP Cairo, 2013)

Bassiouni, M Cherif and William A Schabas (eds), New Challenges for the UN Human Rights Machinery (Intersentia, 2011)


Black, David, ‘South Africa, Multilateral Institutions and the Promotion of Human Rights’ in Philip Nel et al (eds), South Africa’s Multilateral Diplomacy and Global Change: The Limits of Reformism (Ashgate, 2001) 76

Boyle, Kevin (ed), New Institutions for Human Rights Protection (Oxford University Press, 2009)

Braithwaite, John and Peter Drahos, Global Business Regulation (Cambridge University Press, 2000) 558

Braithwaite, T Makkai and V Braithwaite, Regulating Aged Care: Ritualism and the New Pyramid (Edward Elgar Publishing, 2007) 7

Brand, Danie and Christof Heyns, Socio-Economic Rights in South Africa (PULP, 2005)

Brysk, Alison, Global Good Samaritans: Human Rights as Foreign Policy (Oxford University Press, 2009) 171-196


Centre for Child Law, Promoting Effective Enforcement of the Prohibition against Corporal Punishment in South African Schools (Pretoria University Press 2014)


Daws, Sam, ‘The Origins and development of UN Electoral Groups’ in Ramesh Thakur (ed) *what is Equitable Geographical Distribution in the 21st Century* (United Nations University, 1999) 11-12


De Frouville, Olivier, ‘Building a Universal System for the Protection of Human Rights: The Way Forward’ in M Cherif Bassiouni and William A
Schabas (eds), *New Challenges for the UN Human Rights Machinery* (Intersentia, 2011)

De La Vega, Constance and Tamara N Lewis, Peer Review in the Mix: How the UPR transforms Human Rights Discourse’ in M Cherif Bassiouni and Dexter, Tracy and Philippe Ntahombaye, *The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations The Case of Burundi* (The Centre for Humanitarian Dialogue, 2005).


Kimemia, Douglas, ‘Non-governmental Organizations and Corruption: The Case of Kenya’ in Gedeon M Mudacumura and Gökşüş-Morçöl (eds), *Challenges to Democratic Governance in Developing Countries* (Springer, 2014)


Krommendijk, Jasper, *The Domestic Impact and Effectiveness of the Process of State Reporting under the UN Rights Treaties in The Netherlands, New Zealand and Finland: Paper Pushing or Policy Prompting* (Intersentia, 2014) 368-375


McConville, Mike and Wing Hong (Eric) Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007)

McGregor, Judy, Sylvia Bell and Margaret Wilson (eds), *Human Rights in New Zealand: Emerging Faultlines* (Bridget Williams Books, 2016)


Mutua, Makau, *Human Rights NGOs in East Africa* (University of Pennsylvania Press, 2008)

Nowak, Manfred, ‘It’s Time for a World Court of Human Rights’ in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery* (Intersentia, 2011) 23


Schabas, A William (eds), *New Challenges for the UN Human Rights Machinery* (Intersentia, 2011) 353-376


Young, R Oran, *Compliance and Public Authority, A Theory with International Application* (Johns Hopkins University Press, 1979)


II. Journal Articles


Brennan, Mariette, ‘To Adjudicate and Enforce Socio-Economic Rights: South Africa Proves that Domestic Courts are a Viable Option’ (2009) 9 Queensland University of Technology Law and Justice Journal 79


Charlesworth, Hilary, ‘Kirby Lecture in International Law - Swimming to Cambodia: Justice and Ritual in Human Rights After Conflict’ (2010) 29 The Australian Year Book of International Law 1

Charlesworth, Hilary, ‘Swimming to Cambodia: Justice and Ritual in Human Rights after Conflict’ (2010) 29(1) Australian Yearbook of International Law 1


Hassan Sheba Abdulkadir, ‘Challenges of implementing internal control systems in Non-Governmental Organizations (NGO) in Kenya: A case of Faith-Based Organizations (FBO) in Coast Region’ (2014) 16(3) IOSR Journal of Business and Management (IOSR-JBM) 57-62


Jordaan, Edoard, ‘South Africa and Abusive Regimes at the UN Human Rights Council’ (2014) 20 Global Governance 233


Krommendijk, Jasper, ‘The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies. The Case of the UN Human


Merry, Sally Engle, ‘Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)’ (2003) 26(1) *PoLAR* 55-76


Moody, Peter R, ‘Asian Values’ (1996) 1 International Affairs 50


Munro, James, ‘The relationship between the origins and regime design of the ASEAN Intergovernmental Commission on Human Rights (AICHR)’ (2011) 15 (8) The International Journal of Human Rights 1185


Nathan, Laurie, ‘Consistency and Inconsistencies in South Africa’s Foreign Policy’ (2005) 81(2) International Affairs 361-372


Redondo, Domínguez Elvira, ‘Rethinking the Legal Foundations of Control in International Human Rights Law-The Case of Public Special Procedures’ (2011) 29(3) Netherlands Quarterly of Human Rights 261


Redondo, Domínguez Elvira and Edward R McMahon, ‘More Honey than Vinegar: Peer-review as a Middle Ground between Universalism and National Sovereignty’ (2013) 51 Canadian Yearbook of International Law, 61-98


341
Simmons, A Beth, ‘Compliance with International Agreements’ (1998) 1 Annual Review of Political Science 75

Slaughter, Anne-Marie, ‘International Relations, Principal Theories’ (2011) 4 Max Planck Encyclopaedia of Public International Law 1


Stevens, J Caleb, ‘Hunting a Dictator as a Transnational Legal Process: The Internalisation Problem and the Hissène Habrè Case’ (2012) 24(1) Pace International Law Review 190

Subedi, Surya P, ‘Protection of Human Rights through the Mechanism of UN Special Rapporteurs’ (2011) 33 Human Rights Quarterly, 228


Turiansky, Yarik, ‘South Africa’s Implementation of the APRM: Making a Difference or Going through the Motions’ (2014) South African Institute of International Affairs 1

Vernon, Rebecca B, ‘Restrictions on Foreign Funding of Civil Society’ (2009) The International Journal of Not-for-Profit Law 1


III. National Institutional Reports/Studies

a. Nigeria


Federal Ministry of Justice (Nigeria), Members of Inter-Ministerial Committee on the UN Universal Periodic Review (UPR) Reporting Process (International and Comparative Law Department, 2016)


b. Kenya


c. South Africa


IV. State, NGO/CSO Reports and Official Statements

African Peer Review Mechanism (APRM), ‘APRM Country Report for South Africa No. 4’ (May 2007) [3.134]


Chenwi, Lilian, South Africa: State of State Reporting under International Human Rights Law (Community Law Centre, 2010)


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)

Excerpts from a speech given by Mr. Ositadinma Anaedu, Representative of the Nigerian delegation to the United Nations on behalf of the African Group (minus South Africa) http://www.familywatchinternational.org/fwi/Anaedu_Nigerian_speech_excerpts.pdf


Hua, Dui, ‘NGO Submission for the Universal Periodic Review of the People’s Republic of China’ (March 2013) para 16


Human Rights Institute of South Africa (HURISA) et al, ‘Joint Submission to the Universal Periodic Review’ (28 November 2011)

Human Rights Institute of South Africa et al, ‘Republic of South Africa: Joint Submission to the UN Universal Periodic Review (UPR) 13th Session of the UPR Working Group (2011) 2 <http://www.upr-

Human Rights Watch, “"Keeping the Momentum”: One Year in the Life of the UN Human Rights Council” (September 2011) <http://www.hrw.org/node/101646/section/6>


Karimova, Takhmina, ‘UPR in the CIS Countries: Regional Trends’ (Analytical Report, United Nations Development Programme in Ukraine, 2013)


Kenyan Stakeholder Coalition for the UPR, ‘UN Human Rights Council - Universal Periodic Review Kenya’s Human Rights Balance Sheet: The


NPC and UNICEF Nigeria, ‘Children's and Women's right in Nigeria: A wake up call - Situation Assessment and Analysis of Harmful Traditional Practice (FGM)’ (Abuja, 2001) 195-200


University of Pretoria. Centre for Human Rights, The Nature of South Africa's Legal Obligations to combat Xenophobia (Centre for Human Rights, Faculty of Law, University of Pretoria 2009) 1-117

V. Office of the High Commissioner for Human Rights (OHCHR) Submissions, Reports and other Publications


356


OHCHR, ‘Requests for financial assistance under the Voluntary Fund for Participation in the UPR Mechanism’ (As of 24 February 2012) <http://www.ohchr.org/EN/HRBodies/UPR/Documents/VPUFinancialRequest.pdf>

OHCHR, ‘Requirements and implications of the ongoing growth of the treaty body system on the periodic reporting procedures, documentation and meeting time’ (2011) 12


OHCHR, ‘Status of Late and Non-reporting by state Parties’ <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/LateReporting.aspx>


VI. Research Papers/Theses/online Articles


Afesorgbor, Sylvanus Kwaku and Renuka Mahadevan, ‘The Impact of Economic Sanctions on Income Inequality of Target States’ (EUI Working Paper No MWP 2016/04, European University Institute, April 2016)


Economic and Social Research Council (UK) (ESRC), ‘Joint AHRC ESRC Statement on Subject Coverage - Interfaces between the Arts and Humanities and the Social Sciences’ <http://www.esrc.ac.uk/files/funding/guidance-for-applicants/interfaces-between-the-arts-and-humanities-and-the-social-sciences/>


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) 35-37


Schmaljohann, Maya, ‘Pretending to be the Good Guy. How to Increase ODA Inflows while Abusing Human Rights’ (Discussion Paper Series No 549, University of Heidelberg Department of Economics, September, 2013)
VII. Electronic Newspapers, Press Releases and other Internet Materials


De Lange, Deon, ‘Call to suspend ANC MP for opening fire on gay rights’, Cape Times, (Cape Town), 8 May 2012, 4


Media 21 < http://www.media21ltd.com/>


‘Obama and Kenyan President Spar Over Gay Rights in Joint Speech’ < https://www.youtube.com/watch?v=JZPa2CxiGRQ>

Ogiek People Development Programme (OPDP) - UPR Info < www.upr-info.org/followup/assessments/.../kenya/Kenya-OPDP.xls>


UPR Info, <http://upr-info.org/>


UPR Info, Mid-term Implementation Assessment on China (13 February 2012) 13


Worldwide Human Rights Movement (FIDH), ‘Sudan blocks civil society participation in the UN-led human rights review’ (2016)