RESERVATIONS TO HUMAN RIGHTS TREATIES IN RECOMMENDATIONS FROM THE UNIVERSAL PERIODIC REVIEW: AN EMERGING PRACTICE?

ABSTRACT

The Universal Periodic Review (UPR) process of the UN Human Rights Council has issued thousands of recommendations to States undergoing the review process. An increasing number of them concern legal subjects and this article explores recommendations in relation to reservations to human right treaties. Although the UPR process was designed to be distinct to treaty bodies UPR recommendations are increasingly overlapping with their work. The UPR process is showing signs of developing its own approach to reservations which could help address the problem of impermissible recommendations to human rights treaties.

KEYWORDS

UN Human Rights Council, Human Rights Treaties, Reservations, CEDAW, Universal Periodic Review

Introduction

The UN Human Rights Council's Universal Periodic Review (UPR) process recently celebrated its 11th birthday – every member State of the UN has had their human rights record reviewed at least twice. Every four years the review process requires a State to submitt information about their domestic record of protecting human rights, their reports from human rights treaty bodies along with other materials, to a panel consisting of fellow States from the UN Human Rights Council (HRC). The State under review then engages in an interactive dialogue with the States conducting the review at the end of which recommendations are issued to them. During the two full cycles of reviews that have taken place to date, tens of thousands of recommendations on every aspect of human rights law and policy have been issued to States under review.

As end of the third cycle of country reviews approaches it is noteworthy that a number of recommendations have been made on the reservations entered by States to human rights treaties. The ability to enter reservations to specific treaty provisions, exempting the reserving State from being bound by them, is an important part of treaty law and is seen by some scholars as vital for maintaining the principle of State consent in international law.[1] Yet, at the same time many States have used reservations to effectively remove or reduce any meaningful obligations upon them under certain human rights treaties.[2] The treaty bodies of the major human rights treaties and other international bodies have tried a number of different approaches for dealing with reservations, which undermine a treaty or fall outside the established rules on permissible reservations, with varying degrees of success. Even though some reservations have been withdrawn and modified in response to treaty body criticism, there are still a number of reservations to human rights treaties which remain a major impediment to the realisation of the rights contained within them.

The UPR was designed to be a political process and its recommendations do not formally have any direct legal effect, yet UPR recommendations have been complementing and enhancing the work of the human right's treaty bodies in relation to reservations. This may seem unusual as the UPR process was not meant to duplicate the work of treaty bodies, but over successive review cycles recommendations have evolved into a complex web of institutional practice. As this article demonstrates recommendations on reservations can have a positive impact on some State's commitment to human rights law, pushing them towards the removal of reservations incompatible with the object and purpose of a human rights treaty. There have been studies attempting to assess the impact of UPR recommendations and in some policy areas it has been possible identify where the UPR has caused States to improve their human rights records.[3] However, in respect of reservations to human rights treaties the process is more complicated as what recommendations on treaty reservations are doing is attempting to make an existing legal process work more effectively, rather than encourage specific domestic legal and policy changes.

At the time of writing across all three review cycles (ongoing and completed) there have been just under 400 recommendations on reservations to human rights treaties issued to States undergoing review. Using the outcome reports from UPR reviews, the reports that countries submit as part of the review process, as well as legal documents from other sources referring to UPR recommendations, the text of these recommendations will be analysed in order to identify key patterns or themes in recommendations on reservations. The first two parts of this article briefly examine the approaches of different human rights bodies to reservations and the nature of UPR recommendations before going onto look at recommendations on reservations. Although at an early stage it is possible to identify a distinct aspect of what might be termed

'UPR practice' when it comes to reservations to human rights treaties, which is outlined in the latter two sections of this article. As the conclusion sets out there are ways of identifying the specific impact that recommendations on reservations are having as well as ways of improving such recommendations. This may in turn have a broader impact on the protection of human rights under the main human rights treaties.

The Approach of Human Rights Treaty Bodies towards impermissible reservations

The contractual understanding of international treaties whereby the provisions and reservations are treated as the outcome of an individual State's negotiations can be difficult to square with human rights treaties whose purpose is to give rights to individuals living within a State party against the government of that State.[4] This creates a notional incentive on States to enter reservations so as to gain the relational benefits for becoming a party to a human rights treaty whilst limiting its legal obligations under that treaty to change its domestic laws and policies affecting human rights.[5] The Human Rights Committee (HRC) – the treaty body of the International Covenant on Civil and Political Rights (ICCPR) - recognised this when they acknowledged in a General Comment that some reservations showed 'a tendency of States not to want to change a particular [domestic] law' in order to achieve compliance with an international treaty which can result in a situation where 'no real international rights or obligations' are accepted by the State party.[6] This concern was reflected in the 1993 Vienna Declaration, from the Second World Conference on human rights, which encouraged States to limit 'the extent of any reservations' formulating them 'as precisely and narrowly as possible'.[7] The 2011 Guide on reservations from the International Law Commission (ILC) cautioned against vague reservations noting that they needed to be worded in such a way as to 'allow its

meaning to be understood' in order to assess 'its compatibility with the object and purpose' of a treaty.[8]

The permissibility doctrine, where any reservation which fails the object and purpose test is rendered void regardless of any objection from other States, has some merit for those wishing to protect the integrity of a human rights treaty.[9] In order to give this doctrine practical effect some treaty bodies have followed the severability approach, first developed by the European Court of Human Rights in *Belilos v Switzerland* which established that where a State enters an impermissible reservation they are not entitled to the benefit of that reservation.[10] The HRC when considering a reservation from Trinidad and Tobago to Protocol 1 of the ICCPR on hearing petitions from individuals on death row, found that the reservation was discriminatory and therefore against the object and purpose of the Convention.[11] There has been a noticeable uptake on severability as a doctrine by treaty bodies and international courts, leading to some concern among practitioners and State representatives that this represents a departure from the principles of treaty law in respect of the principle of State consent.[12] Whilst it is now settled that treaty bodies have the authority to review recommendations, as part of their general work in interpreting and monitoring that treaty's implementation, their legal powers are very limited and often their Concluding Observations do not have any direct legal effect on the reserving State.[13]

The approach taken by other human rights treaty bodies has been to try and persuade the reserving State to modify or remove impermissible reservations. For example after its first State Report in 2009 Singapore partially withdrew reservations it had entered to Article 2 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) after pressure from the CEDAW Committee and advocacy from civil society groups within

Singapore.[14] This is however dependent on the Convention working in tandem with socio-political forces and the treaty body itself having some normative political cache with the reserving State which is difficult to guarantee. Because CEDAW is the human rights treaty with the most reservations entered by State parties, the CEDAW Committee has had to repeatedly raise impermissible reservations with States, but at the same time has been criticised for failing to develop a coherent approach to the issue.[15] The Committee on the Rights of the Child – the treaty body of the Convention on Rights of the Child (CRC) is the human rights treaty with the second highest number of reservations – has also called on State parties to remove reservations so open ended they rendered the CRC meaningless, but have been met with hostility from some States who have argued that these reservations are necessary to protect important cultural traditions.[16]

The ILC's conclusion when drawing up the 2011 guidelines that the Vienna Convention framework for dealing with the permissibility of reservations is the same for all kinds of treaties, does ensure a degree of legal consistency but human rights treaties are beset by a series of specific difficulties.[17] States are, as a matter of law, entitled to object to a reservation from another party to a treaty and in their objection state that another State's reservation is in its view incompatible with the object and purpose of a treaty.[18] Yet, the impact that such an objection is meant to have on the reserving State –prohibiting it from enjoying the benefit of a reservation whilst it remains party to the treaty – makes little sense in the context of a multilateral human rights treaty. Human rights treaties directly benefit third parties - the individuals living within a State rather than the government of a State.[19] Yet, the benefits governments accrue from human rights treaties are largely political or reputational and are associated with ratification of that treaty.[20] Therefore, a reservation to one or more of a treaty's substantive provisions can remove protections for individuals living within the reserving State

whilst preserving the government of that State's reputational gains from ratifying the treaty in question.

There is also a compelling case that human rights treaties by their very nature are different from other types of treaty. In the *Genocide Advisory Opinion* the International Court of Justice noted the existence of treaties where parties do not have interests of their own but instead a form of common or community interest among States.[21] Human rights treaties attempt to create a common and collective set of interests by creating legal commitments upon States to secure the substantive rights within treaties.[22] Because human rights treaties try to create what some have described as 'transcendental' norms reservations can explicitly undermine rights not just in the reserving State but also impact the normative order that human rights treaties seek to create.[23] In *Lozidou v Turkey* the ECtHR justified the severability doctrine in relation to reservations because the ECHR was an 'instrument of the European public order'.[24] The idea of treaties creating a broader community interest, as some scholars have noted, can come into tension with the contractarian understanding of reservations and the emphasis on State consent in treaty law.[25] In literature sceptical about the practical effectiveness of international human rights law, reservations have been highlighted as being one of the key features of human rights treaties that can undermine the promotion of the broader community interests contained within them.[26]

All of this puts the international human rights regime in something of a dilemma as encouraging treaty ratification is seen as an essential component of promoting human rights, but ratification allows for reservations to be made to those treaties. Treaty body review processes can play a part in getting States to remove reservations restricting rights and the UPR process provides

another opportunity for reviewing a State's commitment to their legal obligations in international human rights law.

The status and nature of UPR Recommendations

The early literature on the UPR makes much emphasis of it being a 'dialogic' process, requiring States to engage in an interactive dialogue with the review panel in order to establish areas of agreement on human rights.[27] One important feature of the interactive dialogue, which was under analysed in the early literature on the UPR process but which grew in significance during the first cycle of country reviews in 2008-2011, were the recommendations that States were able to issue towards the end of the review process. At the time of writing in the spring of 2020 – over a decade after the UPR began - there have been 64,164 recommendations issued to States.[28] The State under review's concluding report details the recommendations they supported (or accepted) and it is open to the State under review to give a general or a specific response to a recommendation. Technically States under review do not reject recommendations, instead where a State has signalled that a specific recommendation 'does not enjoy its support' or that it 'does not accept' the recommendation UPR documents record this as 'noted'.[29] Using the term rejected and accepted however, more accurately describes States' actions in relation to recommendations.

Recommendations can cover a wide range of subject areas and recommendations can be issued by any State who wishes to be involved in the interactive dialogue phase of the review process. Edward McMahon's work has been key in establishing how to interpret different types of recommendations based on the words used to frame them and he groups recommendations into five categories based on the type of action required from States.[30] Based on an analysis of the substance of their text over two thirds of all recommendations made can be classed as category four or five. This means that the recommendation either contains words implying definitive

political action, as is the case with category four recommendations which include verbs such as 'accelerate', 'address', 'encourage' and 'guarantee', or as is the case with category five recommendations, the text of the recommendation mirrors legal language, using verbs such as 'abolish', 'accede', 'adopt' and 'amend'.[31] Category five recommendations – which make up nearly a third of all recommendations issued in the review process – are the category where there is often direct reference made to international human rights treaties to which the State under review is a party. Other recommendations in category one-three are mostly focused on making supportive statements in support of the continuation of existing policies and very rarely contain a specific reference to any international instrument or treaty. Some scholars have criticised recommendations in these categories for simply praising a State for its actions in a particular area without making any substantive comment about human rights protection.[32] For example a category two recommendation from Saudi Arabia to the Maldives in the first review cycle to 'continue its efforts aimed at strengthening and protecting human rights' was so broad as to be effectively meaningless.[33] This can be contrasted with a category five recommendation from Slovakia to the Maldives in the same review cycle to 'withdraw reservations to Articles 14 and 21 of CRC as well as to Article 18 of ICCPR' which was far clearer in the course of action to be undertaken.[34] Recommendations in the higher categories make up the vast majority of recommendations issued during the review process but as shown below when they relate to specific legal matters there is a much higher rate of rejection, than there is to recommendations without any reference to legal instruments. For instance, in the example above concerning the Maldives the Saudi recommendation was accepted but the Slovakian recommendation was rejected.

The precise relationship between UPR recommendations referencing treaty obligations and the work of treaty bodies is somewhat unclear; although there is no direct legal status for an

individual recommendation their content can overlap with the work of treaty bodies. UN General Assembly Resolution 60/251, the resolution creating the UN Human Rights Council, made it clear that the review process should 'complement and not duplicate the work of treaty bodies.'[35] However, the line between complementation and duplication was always somewhat blurred, and from the first review cycle States began issuing recommendations on treaty obligations. Some legal experts at the end of the first cycle argued even argued that UPR recommendations should specifically focus on treaty ratification and reservations.[36] Following the first review cycle there was an increase in ratification of the core human rights instruments and an increase in State reporting and whilst this correlation is not proof of causation 25 percent of all recommendations issued in the first cycle concerned an international instrument or treaty body.[37]

The approach to Treaty Reservations in UPR Recommendations

As stated in the introduction there have been a few hundred recommendations concerning reservations to human rights treaties.[38] The vast majority of these – around 84 per cent - concerned reservations to treaties to which the State under review was already a party – the remainder relate to prospective obligations. For example, Uruguay issued a recommendation to Kenya during its second review cycle to 'ratify the International Convention for the Protection of All Persons from Enforced Disappearance without reservations and incorporate it into domestic law' and other States have received recommendations relating to acceding to treaties without reservations.[39] These recommendations don't relate to existing obligations and their wording is often relatively similar. There have been no recommendations to date that directly concern the State under review being praised or complemented for their reservations to a particular treaty, although in the interactive dialogue some States have been praised by other States who have a similar type of reservation to a human rights treaty. Of the recommendations relating to existing legal obligations many are concerned with removing

recommendations featuring words such as 'withdraw' (240 recommendations in total), 'lift' (40) or 'remove' (24). Equally most recommendations relating to treaty reservations are category five – 252 in total - whereas 111 of the remainder are category three or four. Most recommendations on reservations relate to CEDAW, which is unsurprising given it is the treaty with the greatest number of reservations and although many of the examples discussed below are related to CEDAW it is important to look at recommendations involving reservations to all human rights treaties to get a full picture of UPR practice in respect of recommendations on reservations.

In summary most of the recommendations made to States about their reservations to human rights treaties are on withdrawing those reservations, framed in such a way as to demand specific action from the State under review. Whilst small in terms of the overall net numbers of recommendations issued to States in the UPR process as a whole there is a sufficiently large number of recommendations relating to reservations to analyse how these recommendations are framed and the way that States respond to them.

A. Recommendations on impermissible Reservations

Some States have responded positively to recommendations on impermissible reservations. The far-reaching blanket reservation to CEDAW entered by Mauritania upon ratification stated that they did not consider themselves bound by any provision of the Convention that the domestic authorities held to be incompatible with their interpretation of Sharia law. The CEDAW Committee has long held that reservations such as these are incompatible with CEDAW's object and purpose, and Article 28 of CEDAW clearly reiterates the object and purpose test for CEDAW parties entering reservations.[40] During their first review cycle Mauritania accepted recommendations on amending or withdrawing a reservation and by the

second cycle was able to announce in its country report that it had substantially amended the reservation limiting its scope to bring it into line with the CEDAW Committee's guidelines.[41] Other States with similar blanket reservations to CEDAW were willing to accept recommendations to withdraw reservations on a selective basis. For example, Oman was willing to accept a recommendation to withdraw its reservation to Article 15, which protected the freedom of women to choose where they lived during its second review cycle but has to date rejected other recommendations to remove its blanket reservation to all provisions of the Convention it deems incompatible with the 'provisions of the Islamic sharia and legislation in force in the Sultanate of Oman'.[42] Morocco in its first cycle accepted a recommendation that was in line with commitments already made in its country report to the UPR, on the removal of CEDAW reservations which the committee had held to be impermissible.[43] Whilst, it removed some of the reservations covered by its accepted recommendations it did not remove all of the reservations which had concerned the CEDAW committee.[44]

A few recommendations have been expressly framed to reflect the object and purpose test. Somalia had upon ratification of the CRC in 2015 entered a reservation stating that it did 'not consider itself bound by Articles 14, 20, 21' of the Convention and any other provision 'contrary to the General Principles of Islamic Sharia.'[45] Germany as a fellow party to the CRC had issued a formal objection to Somalia's reservations claiming they were 'incompatible with the object and purpose' of the Convention.[46] At their review during the second cycle in early 2016 Germany issued a recommendation to Somalia to lift its reservations to the CRC as they were 'incompatible with the object and purpose of the Convention.'[47] In this case the recommendation was phrased as a means of restating their original objection. As Marina Girshovich notes, framing objections to reservations as an assessment of their compatibility with the object and purpose of the Convention means that the objection is designed to have a

normative effect on the status of the reservation, as opposed to an objection on political grounds.[48] In other cases recommendations have not shadowed treaty terminology; the Committee on the Rights of the Child has noted that Malaysia's reservations are not in line with the Article 51 of the CRC, containing a restatement of the object and purpose test.[49] Yet recommendations to Malaysia in the second review cycle referring to reservations did not contain any reference to the object and purpose test. Instead the recommendation was framed in general purposive language to suggest the overall principles the State should adopt when withdrawing recommendations. For example, France recommended Malaysia's withdrawal of reservations in order to ensure 'the absence of discrimination between women and men in law' and Norway 'framed its recommendation to withdraw reservations and abandon discriminatory laws against all women' aimed at influencing the broader social conditions behind reservations.[50] Equally a recommendation to Brunei about its reservations to the CRC, which the CRC Committee recommended they withdraw because they negated the 'provisions and principles' of the Convention, was simply described as a series of 'broad' reservations in a recommendation issued in the second review cycle.[51] In all of these cases recommendations were rejected by the State under review.

B. Recommendations Reinforcing Commitments to Withdraw recommendations

Human rights treaty bodies, as the first section of this article sets out, often have a variety of different strategies to deal with impermissible reservations and the UPR process can work in a couple of different ways to assist with their actions against impermissible reservations. Firstly, UPR recommendations can operate in tandem with treaty bodies in terms of coordinating pressure on States with impermissible reservations. During the first review in 2011 the Maldives accepted a series of recommendations in relation to reservations to CEDAW, some of which the CEDAW Committee had previously identified as incompatible with the object and purpose of the Convention.[52] The Committee in their 2015 consideration of the Maldives

national report were able to use the fact that the Maldives had accepted UPR recommendations to reinforce their position on reservations in their subsequent concluding observations.[53] Although the Maldives still retains this reservation the interaction between the two processes creates a regime of complimentary scrutiny on reservations and provides increased focus on reservations failing an individual instruments permissibility provisions'. Both processes can also work in tandem without direct reference to one another; for example, Canada's reservation to Article 37 (c) of the CRC, the substance of which allowed children to be detained with adults in certain prisons, had been repeatedly criticised by the CRC Committee.[54] In their second review cycle they accepted a recommendation to withdraw the reservation, which followed on from a commitment made during their report to the CRC Committee a year earlier to work towards removing these reservations.[55] In the Maldives case the acceptance of recommendations in the first cycle took the form of performative compliance, where a recommendation is accepted to simply get through the review cycle, whereas in the Canadian case the UPR process had the added advantage of reinforcing what was happening at the treaty body.

Secondly, recommendations can serve to reinforce commitments made to withdraw recommendations in previous UPR cycles. Niger committed to a series of recommendations relating to the withdrawal of its reservations to CEDAW during its first review cycle, some of which the CEDAW Committee had previously observed were incompatible with the object and purpose test, leading to Slovenia to recommend in Niger's second review cycle that it fulfil its commitments from the first cycle.[56] In Niger's third Country Report to the CEDAW Committee in 2017 this pressure seemed to be bearing fruit with the country conceding that there had been a 'delay' in withdrawing its reservations, but reassuring the Committee that were still intending to do so and detailed in their submission to Committee the extensive law reforms and domestic

campaigns they had undertaken in order to achieve a 'shift in cultural attitudes' as a precursor to withdrawing recommendations.[57] As noted above one of the documented successes of the UPR after the first cycle was the improvement in State reporting to treaty bodies and incidents such as these provide further evidence of the overall shift in attitudes of States towards treaty bodies encouraged by the UPR. Singapore's modification of its reservations to CEDAW followed a prolonged interaction with the CEDAW Committee in response to its country reports and in 2011 shortly before the government announced a partial withdrawal of its reservations to CEDAW it accepted a recommendation during its first cycle review to 'withdraw its reservations on key principles of CRC and CEDAW.'[58] The acceptance of the recommendation did not appear to have a direct impact on the decision to withdraw the recommendation but in the interactive dialogue and in its State reports, in both its first and second cycle the Singaporean government made clear that it viewed the UPR process as a means of reviewing its human right's commitments and reservations, illustrating how the review cycle acted as a reinforcement mechanism.[59] The process of reinforcing however requires that recommendations complement treaty bodies work in a way that can be difficult. For the most part States author and issue recommendations individually, not collectively, so recommendations of reinforcing the work of treaty bodies require one or more of the States conducting the review to be aware of the issue that a State under review faces with a treaty body and to issue a recommendation accordingly.

Finally, recommendations can be useful where a State has entered reservations in respect of a the Treaty Body; for example, some recommendations have been issued to States on their reservations to Article 20 the Convention Against Torture (CAT) – the provisions governing investigations by the Committee Against Torture.[60] A recommendation to the Philippines in its first cycle to withdraw its reservation to the Optional Protocol to the CAT served a similar

function.[61] Even though the States under review rejected these recommendations the fact the recommendations were made serves an important function. As all States in the General Assembly go before the UPR and there are no limitations on the scope of recommendations offered to them, a wide range of human rights issues including rights that are subject to reservations can be raised with the State under review and a response from them obtained. This is something which is unique to the UPR process and forces States to address human rights issues in a way that they are not often required to elsewhere. If sustained into the fourth review cycle these approaches towards recommendations on reservations could help compliment the work of treaty bodies – one of the functions that was originally envisaged for the review process – by creating a forum for directing political pressure on States in relation to reservations.[62]

Interpreting State Responses to Recommendations on Reservations

The UPR process is not currently recognised as having any form of independent legal authority. The UPR's creators seemingly did not intend it to become a legal process with many of the official descriptions of it in 2006-2008, before the first review cycle started, describing it as a political process.[63] The recognition of non-formal sources of international law, which involve taking into consideration the social effect of an instrument or process rather than its source, is an open subject of theoretical debate in international law.[64] Although it is unclear as to what precise formal legal status recommendations could have, it is clear that recommendations are viewed in the review process as consequential and are designed to change State behaviour.

An example of this is the evolution of the follow up process in respect of accepted recommendations. In 2011 the Council adopted decisions on the implementation of recommendations aimed at encouraging reviews during the second UPR cycle to focus on ensuring that recommendations made during the first UPR cycle had been implemented, by asking the State under review about domestic law reforms and accession to international

treaties.[65] Navi Pillay, the then UN High Commissioner for Human Rights, issued a press release at the end of the first cycle calling for States to start issuing more precise recommendations and for States going through the review process to work with the Council in the implementation of accepted recommendations.[66] States are now required to formally set out their response to recommendations and these are publicly recorded, so that States can be scrutinised in relation to previous commitments. During the second and third review cycles there were a number of recommendations issued referring to recommendations in previous review cycles. Some of these were general in nature –such as Uganda's recommendation to India to 'put in place a specific mechanism for implementing previous accepted recommendations' – whereas others were more specific in the requirements and obligations upon the State's accepting them.[67]

There is other evidence (presented already and further analysed below) of States changing their behaviour in response to recommendations. There are also cases of States responding to recommendations offered to them in a risk averse manner, potentially because they are wary of the consequences stemming from acceptance. During the second and third cycle there have been fewer examples of States engaging in what can be termed performative compliance in relation to recommendations on reservations (the acceptance of recommendations to simply get through the review process). Yet, the fact that recommendations are apparently being treated as consequential does not really explain why recommendations impact upon State behaviour. Absent a formal legal obligation to alter their existing policy on a particular matter, there is nothing requiring a State, having accepted a recommendation, to alter its behaviour. In respect of recommendations on reservations there are three different types of State behaviour, all of which explain how some States have acted in response to some recommendations and helps

understand how specifically the UPR contributes to the process of removing or modifying reservations.

A: States are socialised into changing their policy on certain reservations

Recommendations can be seen as part of a wider institutional practice. An institutional practice is where the framework established by the rules of an international organisation changes State behaviour, either by shaping their behaviour through their socialisation in organisational processes or more directly by the institution pressuring a State into changing its behaviour.[68] Constructivist theorists of international relations have argued that norms and concepts are socially constructed through interactions with other States or, through international institutions.[69] Interactional theorists of international law, branching off from constructivism have argued that this generates a form of legal obligation, by the process of interaction with an organisation engendering a sense of fidelity to the organisation, which in turn develops into an obligation.[70] Critics of this line of scholarship have argued that it drifts towards describing the way in which the law ought to be, rather than providing a normative description on how the law actually works.[71] Yet, constructivism can offer a useful framework for understanding why States comply with international obligations and some scholarship has identified the role of socialisation in encouraging compliance with existing obligations in international law.[72] The UPR process was created to perform a set of socialising functions in that it was designed to provide a political process for assessing a State's overall human rights performance.[73] A study on recommendations concerning domestic violence observed that the volume and specificity of recommendations relating to the prevention of domestic violence was the critical factor in ensuring that they resulted in domestic legal changes in the State under review.[74] In effect a string of recommendations on domestic violence contributed to the political pressure for law reform.

In relation to recommendations surrounding reservations, as already explored in section three, the UPR process can progressively alter State behaviour on reservations, but there are limits to this form of socialisation. For example during the second cycle in 2012 Switzerland accepted a recommendation from Germany which stated 'with regard to Article 16 paragraph 1 (g) of CEDAW' Switzerland should 'withdraw reservations' in relation to forthcoming citizenship laws.[75] The Swiss government withdrew this reservation to CEDAW in 2013, but in their review during the third cycle in 2017 declined to accept recommendations from three States on withdrawing all remaining reservations to CEDAW.[76] The remaining reservations the Swiss have to CEDAW, as a clarification issued to Secretary-General in December 2013 noted, are required for their domestic marriage laws, some which restrict the acquisition of Swiss nationality.[77] Morocco accepted recommendations during its first cycle review to withdraw reservations to CEDAW in relation to Article 9, 15 and 16 and to engage in appropriate domestic legal reforms to recognise the rights contained in the provisions which had been previously subject to reservations.[78] Two months prior to their review Morocco indicated at the CDEAW Committee that they were looking into withdrawing these reservations.[79] By their second cycle review in 2012 they had withdrawn reservations to Article 9, and introduced a new family law to bring the country's laws into line with CEDAW.[80] Morocco also announced that it had withdrawn its reservations to Article 16 but not Article 15. At its third cycle review in 2017 it received considerable praise from States for making these steps, only one recommendation in relation to its remaining reservations to CEDAW was received and no mention was made in the interactive dialogue about its remaining reservations.[81] Morocco was undergoing a considerable process of internal change during this time and pressure from international human rights bodies, of which the UPR was part, of provided tactical pressure for some domestic law reforms.[82]

B: States adopt strategic behaviour in response to recommendations on reservations

Rationalist theory suggests that a State's actions within an organisation are guided by a set of choices about the relative costs to them of different forms of participation in that organisation.[83] Rationalists as Christian Reus-Smit describes it, believe that a State 'recognises that their interests can be achieved through mutual cooperation' and as a consequence would favour institutional forms to help manage these interests and cooperation.[84] Rational design theory, which emerged from the rationalist school, contends that the rules and frameworks of international institutions are explained by the underlying cooperation problem that the institution was designed to solve.[85] The UPR was designed to create a more sophisticated institutional framework for promoting human rights that went beyond the 'naming and shaming' of individual States thought to be violating human rights, but also one which would improve States human rights records.[86] At the same time the cooperation problem underpinning the UPR can be understood in the broader context of States needing to demonstrate compliance with human rights law for broader reputational reasons, whilst at the same time controlling the scope of the commitments they accept in relation to reforming their domestic human rights laws. This is the specific problem of reservations to human rights treaties as outlined in the first section above; some States decided to become party to human rights treaties whilst at the same time entering reservations which fail the requisite permissibility standards for reservations to those treaties.[87] Given that they have already made this decision in relation to their legal obligations, by process of entering a reservation, certain States may adopt a strategic position in relation to UPR recommendations offered to them on reservations. This position would both signal their willingness to engage in human rights reform whilst managing the consequences that might flow from any recommendations.

Some States clearly see the virtue in accepting recommendations which are sufficiently open ended so as to make it easy to demonstrate implementation in response to any follow up questions and recommendations. For example Malaysia in all of its reviews thus far have rejected recommendations on withdrawing reservations to CEDAW, except for one in the first cycle which called on the government to promote gender equality by 'giving due consideration to the recommendations of the [Malaysian] Inter-agency Committee coordinated by the Ministry of Women, Family and Development' in relation to CEDAW reservations.[88] Malaysia has publicly supported the review process highlighting its 'belief in [the] UPR and its follow-up' clear so by avoiding accepting recommendations that are clearly designed to require them to withdraw reservations they can simply respond in general terms that their CEDAW reservations are being reviewed by a domestic committee and refuse to accept any recommendation that would involve greater scrutiny as to their implementation in a subsequent review cycle.[89] A similar set of responses can be seen in relation to recommendations concerning reservations to Optional Protocol II of the ICCPR – which requires States to abolish the death penalty in all circumstances. Where the reservation to States was procedural in nature the recommendation was generally adopted – for example Slovenia's recommendation to Niger in the first cycle to 'improve cooperation with treaty bodies… [and] consider ratifying outstanding human rights instruments' one of which was the ICCPR-OP2 was accepted.[90] However, where the recommendation had the broader aim of making a statement about the death penalty – such as Slovenia's recommendation to Mali to ratify 'ICCPR-OP2 without reservations aiming at the abolition of the death penalty' – it was rejected.[91]

It also seems that during the first cycle, as the Malaysian example illustrates, States may have been willing to accept recommendations, but subsequently became more risk averse to accepting them in later cycles. In Oman's second cycle review some States praised Oman for

removing reservations to the CRC as a sign of progress since the first review cycle but when the Netherlands issued a recommendation requiring Oman to withdraw reservations to CEDAW 'as supported by Oman during its first cycle universal periodic review' it was rejected.[92] This may have been in response to reforms that were made in relation to recommendations as well as States growing understanding about the UPR process and the expectations of them in relation to previously accepted recommendations. Out of all of the recommendations on reservations issued at the time of writing 40% of all accepted recommendations and 50% of all issued recommendations (rejected and accepted) were made during the first review cycle. The 68 per cent rejection rate of recommendations concerning reservations across all three cycles contains more recommendations from the second and third cycle than the first. However, the rejection rate may also be a sign of another feature of State behaviour towards recommendations. Given that the majority of recommendations concerning reservations are in action category five, the rejection rate seems to fit into the general trend of recommendations relating to legal obligations or recommendations framed in expressly legal language, being treated with caution by States – over 60% of all category five recommendations are rejected.[93] This data and the examples presented above would give credence to rationalist explanations for State behaviour in response to recommendations on reservations. As Jane Cowan and Julie Billaud noted in a study of State delegations during the review process, States often treat the UPR process like an 'exam' that has to be 'passed', giving credence to the idea of them acting strategically in accepting or rejecting recommendations.[94]

C: Replication of existing patterns of behaviour with respect to the institutional protection of human rights

The response to recommendations on reservations might also be a continuation of political attitudes regarding human rights in other international bodies. The HRC's predecessor the UN

Commission on Human Rights was often criticised for its factionalism and bloc voting which led to it becoming politicised in a way that allowed States to protect their political allies and single out certain other States as the subject for scrutiny and criticism.[95] This led to a situation where certain States were effectively shielded from any form of meaningful investigation about their human rights record. As Louise Arbour, the former UN High Commissioner for Human Rights, noted in a 2005 speech (shortly before the Commission was replaced by the HRC) it was 'wrong and obscure' that States were able to block the scrutiny of other States viewing it as 'a political triumph'.[96] Criticisms such as these were an important factor in the replacement of the Commission by the HRC which was intended to remove some of the problems of double standards when it came to the protection and promotion of human rights.[97] The UPR was at the centrepiece of the reforms in the move from the Commission to the HRC precisely because it treated States equally.[98] As UN Secretary General Ban Ki Moon said peer review would send a 'clear message that all countries would have their human rights record and performance examined.'[99] Yet there has been some evidence of the continuation of factionalism and double standards at the HRC, with different blocs of States engaging in behaviour that favours their political allies.[100] Some writers have noted how the behaviour of some States 'filibustering' the interactive dialogue or offering up a string of inconsequential recommendations can neuter the effectiveness of a review and allow a State under review to escape any meaningful consideration of their human rights record.[101] In fact the UPR has arguably seen a continuation of double standards over the politicisation of the protection of human rights both in the Commission and in other international human rights bodies.

In relation to recommendations on reservations there are two areas where the UPR's practice reflects similar behaviour in other international bodies. Firstly, it is clear that recommendations on reservations are made by the same States who often object to treaty reservations elsewhere.

Even though 62 States have issued recommendations in action category five relating to reservations, 45 per cent of all of those recommendations come from just 10 States all of them in Europe and many of whom have repeatedly objected to reservations entered to human rights treaties. Some States have coordinated their objections to reservations and some commentators have noted the so-called 'Nordic practice' in relation to reservations, where States from Scandinavia and Northern Europe coordinate the structure of objections to reservations in a specific human rights treaty with the aim of preventing reserving States from benefitting from their reservations.[102] Whilst coordination of this sort is helpful increasing the consistency of recommendations on reservations there is a real risk that this results in a "west versus the rest" stand-off as was the case when attempts to address reservations by the CEDAW committee and the UN General Assembly in the 1980s descended into political acrimony.[103]

Secondly some States can simply use the UPR as another forum to reassert their reluctance to act on or remove reservations which are incompatible with the object and purpose of a treaty. For example when undergoing it's second cycle review Lebanon had identical recommendations offered to it from Portugal, Croatia and Slovenia in relation to its reservations to CEDAW.[104] It rejected all of these recommendations and at the CEDAW Committee's consideration of its country reports a month after its UPR review, it again signalled its reluctance to remove it's reservations.[105] The CEDAW committee report noted the Lebanese government had not had a dialogue with civil society or religious leaders over the substance of the reservations, and recommended initiating one in order to take 'into consideration best practices in the region, with a view to overcoming the resistance to the withdrawal of its reservations.'[106] On other occasions States have supported the State under review's practice of rejecting recommendations on reservations when they also have similar reservations to a treaty. Egypt during the interactive dialogue at the UAE's first cycle, without

directly mentioning CEDAW, commended it for its strategy towards women's rights saying that the UAE should 'continue to refuse to apply any standards or principles' that were outside those it had agreed to and should resist 'any attempt to impose foreign values and customs on the Emirati people.'[107] Both sets of behaviour are suggestive of a wider politics of reservations to CEDAW which scholars have observed elsewhere in other international forums, where impermissible reservations are defended either without explanation or as a symbol of national or cultural distinctiveness by the State in question.[108] In this regard the consequential effect of recommendations, makes the UPR like other international forums for promoting and protecting human rights.

Conclusion: A UPR Practice on Recommendations?

UPR practice toward recommendations is best understood as a process of underpinning, or more accurately is an attempt to underpin the authority of international human rights law within an institutionalised political foundation. It provides a powerful public forum for the restatement of the legal principles governing reservations. Recommendations can underpin commitments made by State's to remove reservations serving to reinforce the overall normative political pressure behind international legal norms. The nature of the review process which every four years requires a public accounting of the discharge of all human rights obligations and has far more leeway than a treaty body in relation to the nature and type of recommendations it can issue, can offer a powerful political framework to an at times fragmented system of human rights treaty bodies.[109] Absent a 'world court' of human rights – something that has been discussed as a potential answer to the issue of fragmentation – international human rights treaties will rely on the construction of a normative political climate to underpin and reinforce their legal obligations.[110]

In terms of understanding the causal effect of UPR recommendations it is worth noting there are three basic motivations or motivational patterns from States when accepting recommendations on reservations. Firstly, there is what can be described as motivational alignment, where it is in the interest of the State under review to remove a reservation and a recommendation correlates with that interest. As some scholars have noted the UPR can perform an important function in this respect as through a process of acculturating States it helps strengthen their motivations and preferences towards human rights compliance.[111] Secondly there is what can be called performative compliance where a State accepts a recommendation in order to pass the 'exam' of the review but with only limited, or no, intention of implementing its substance.[112] As noted above in section four, this type of behaviour seems to be becoming rarer. Finally, there is what can be termed tactical pressure, where the UPR helps underpin the overarching pressure on a State through a public process of accountability.[113]

Given the evolution of international political institutions and the ongoing debate about the law-making capacity of institutions such as the UN General Assembly, it is convincible the UPR will evolve from a political process and its practice concerning recommendations will begin to assume greater legal significance.[114] At the moment however the UPR's role will be to coordinate and construct a political climate which underpins the existing law on reservations. But in order for underpinning to a be remotely effective States need to improve the issuing of recommendations on reservations and coordinate their actions with treaty bodies. For example, recommendations should more clearly cite the object and purpose test or be targeted at specific reservations which treaty bodies have found to be incompatible with the object and purpose of that treaty. Strategic behaviour of reserving States, of the sort described in the final section, can be facilitated by a lack of coordination between States that are concerned about the

protection of human rights under human rights treaties which issue recommendations on reservations. Especially when there are often relatively low-cost recommendations during a review which a State can accept and there is inconsistent follow up in subsequent cycles of existing accepted recommendations on reservations.

Equally underpinning cannot occur in a vacuum, there needs to be a broader mobilisation of political and legal pressure on a State party and action from treaty bodies which pressure from a UPR review can then lock-in – underpinning only works if there is something tangible to be underpinned. In the Singaporean case discussed above there had been some mobilisation of civil society in relation to its CEDAW reservations and the recommendation occurred in tandem with a commitment made at treaty body.[115] The dialogic benefits of the UPR process depend both on the formal sources of international human rights law and the mobilisation of human rights defenders on the ground. Therefore, to be effective in relation to reservations to human rights treaties the UPR requires States to reconceive the process as being integral to human rights protection and to issue far more recommendations on reservations than is currently the case.

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