How 'Universal' is the United Nations' Universal Periodic Review?

An Examination of the Discussions Held on Female Genital Mutilation in the First Cycle of Review

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Hailed as the most innovative and unique human rights monitoring mechanism at the United Nations, the Universal Periodic Review process promises to promote and protect the universality of all human rights issues and concerns in an objective, universal, and transparent manner. With the interactive dialogue session being at the heart of the review, coupled with the possibility of peer States potentially raising any international human rights norm to hold States accountable, there is a possible challenge to the universality of human rights norms, vocalised by State representatives when certain contentious issues are raised during State reviews. Selecting one such issue, this paper uses the issue of Female Genital Mutilation (FGM) as a focus to explore whether, and to what extent normative claim of universality of international human rights norms in relation to FGM is challenged during the State reviews in the first cycle of the UPR process.

I. Introduction

A question that may gander into one's thoughts when reading international human rights law is: does international human rights law make a difference? Professor Douglass Cassel emphasises that the importance of this question is obvious as 'the institutions of international human rights law deserve our energetic support only to the extent they contribute meaningfully to protection of rights'[1] A promise of improving the human rights situation on the ground, in all member States, was made by the United Nations Human Rights Council ("HRC") in 2008 in the establishing resolution of the new human rights monitoring mechanism, the Universal Periodic Review ("UPR") process[2]. The central aim of the UPR process is to undertake a peer review of the human rights records of each United Nations ("U.N.) member State through an interactive dialogue, once every four years under the same

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[1] Douglas Cassel, *Does International Human Rights Law Make a Difference?* 2 CHI. J. INT'L L. 121, 121 (2001).
[2] Human Rights Council Res. 5/1, U.N. Doc. A/RES/5/1, at 3-4 (Jun. 18, 2007).

uniform procedure.[3] Described by U.N. Secretary General Ban Ki-Moon as having "great potential to promote and protect human rights in the darkest corners of the world"[4], the review process has separately been applauded as "one of the most important and innovative mechanisms of the Council."[5] One of the primary reasons for the optimism is largely based on a significant trait of the UPR process, its *universal* nature. It is precisely this unqualified universalist claim in the work and operation of the review process that forms the central focus of this paper. Before setting out the aims of this paper in detail, it is important to define and distinguish the two grounds, which the claimed universality of the UPR process is founded upon.

The first claim is based on the universal applicability of the UPR process. It is the first human rights monitoring mechanism whereby all 193 U.N. member States are reviewed periodically under a uniform process.[6] Moreover, each State under review is subject to strict formality requirements before, during, and after to ensure equal treatment for every country when its human rights situations are assessed.[7] Human rights records are reviewed according to the States' compliance with human rights obligations arising from the U.N. Charter, the Universal Declaration of Human Rights (UDHR), and any other human rights instruments to which the State is a party, as well as any voluntary pledges and commitments.[8] The extent to which the State under review has complied with its international obligations is recorded in three different reports. The first report is submitted by the State under review providing a self-assessment of the human rights situation in the domestic context.[9] The other two reports provide an external account of the States' human rights obligations: one report is a collection of information provided by a number of U.N. bodies, and the other report is based on information provided by stakeholders, such as non-governmental organisations ("NGOs"), or other national human rights institutions ("NHRIs").[10] Collectively, the three reports form the foundations of the review. State representatives consult these reports to devise questions and

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[3] Human Rights Council Res. 60/251, U.N. Doc. A/RES/60/251, at 5(e), 14 (Apr. 3, 2006).
[4] U.N. OHCHR, *Universal Periodic Review*, http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx (2006); *see also* HILARY CHARLESWORTH & EMMA LARKING, *Introduction: the regulatory power of the Universal Periodic Review, in* HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RITUALS AND RITUALISM 1, 1 (2015).
[5] Hon. K.P. Sharma Oli, Deputy Prime Minister and Minister of Foreign Affairs and the Leader of the Nepalese Delegation, Address at the First Session of the Human Rights Council in Geneva (June 19, 2006), http://nepalconflictreport.ohchr.org/html/documents/2006-06-19_document_govt-of-nepal_eng.html.
[6] U.N. OHCHR, *Basic Facts About the UPR, Human Rights Bodies*, http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx.
[7] OHCHR, *supra* note 4.
[8] H.R.C. Res 5/1, *supra* note 2, ¶1.
[9] *Id.*, at ¶ 15(a).
[10] *Id.*, at ¶ 15(b)-(c).

recommendations to the State under review at the interactive dialogue session, where the State under review is required to provide an instantaneous response.[11]

At the conclusion of the interactive dialogue stage, and following brief plenary session at the HRC to clarify any pending matters from the interactive session,[12] a Final Outcome Report is produced which consists of all the comments, questions and recommendations and responses provided by the States partaking in the review.[13] The recommendations that enjoy the support of the State under review will be identified as being 'accepted', and those recommendations that are not accepted will be 'noted'.[14] As such, no recommendations are recorded as being 'rejected' by the State under review in the UPR process.

The second ground is embedded in the normative claim of universality of international human rights norms, the promotion and protection of which forms one of the fundamental aims of the UPR process.[15] This aim is recognised by reviewing the extent to which a State under review is in compliance with a number of human rights obligations listed under a comprehensive set of human rights documents, including the Charter of the UN and UDHR. Nevertheless, as with most claims of universality of human rights norms, the foundations upon which the claim of universalism is based on can be challenged. The most significant challenge is grounded in the theory of cultural relativism. For present purposes, and at the risk of oversimplification, cultural relativism is grounded in the belief that values and beliefs embedded in culture should be a - or indeed, *the* - legitimating factor in assessing the validity of international human rights law. At the heart of the theory is an emphasis on the significance of *culture* in influencing and shaping human behaviour and perceptions in society.[16] It is argued that the influence of culture is so fundamental that an individual's perception of the world is unconsciously conditioned by the standards and beliefs of a particular culture.[17] On this basis, the cultural relativist critique challenges the international normative universalist claim of human rights by arguing that moral value judgments, such as

[11] Human Rights Council 8/PRST/1, U.N. Doc. A/HRC/PRST/8/1, at 4, 11 (Apr. 9, 2008).
[12] H.R.C. Res 5/1, *supra* note 2, ¶29.
[13] H.R.C. 8/PRST/1, *supra* note 11, ¶8.
[14] H.R.C. Res 5/1, *supra* note 2, ¶32.
[15] *Id.*, at ¶¶3(a), 54.
[16] CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 12 (1973); Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives: A Preliminary Inquiry*, 3 HARV. HUM. RTS. J. 13, 15 (1990).
[17] ALISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM 62 (2013).

interpretations of what constitutes human rights, are relative to different cultural contexts from which such moral judgments arise.[18]

With the focus of this paper on the normative claim of universality embedded in the aims and operation of the UPR process, and in light of the significant challenge posed by the theory of cultural relativism, the central aim of this paper is to assess whether, and to what extent, member States adopt positions that affiliate with the cultural relativist position by using culture as a foundation to challenge the claimed universality of human rights interactive dialogue stage in the UPR process during State reviews. More specifically, this paper will explore whether, and to what extent, the States under review use culture as a foundation to accept, justify or criticise certain practices when their human rights records were subject to review during the UPR process. In the same manner, to obtain a complete investigation of the discussions held in the UPR process, this paper will explore whether, and to what extent, the observer States that undertake the review made references to culture when approving, assessing or criticising certain practices when reviewing human rights records of States. By answering the two central questions, the findings of this investigation are valuable in two significant ways. First, it will further our understanding of the manner in which the unique and innovative review process operates in practice, particularly in light of its fundamental aim to promote and protect the universality of all human rights. This is because, the approach of this investigation moves away from a solely technocratic and constitutional analysis of the UPR process in the current literature[19] toward considering the UPR process as a

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[18] ELVIN HATCH, CULTURE AND MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY 64-65, 81 (1983); Christopher C. Joyner & John C. Dettling, *Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law*, 20 CAL. W. INT'L L.J. 275, 295 (1990); Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law* 5 BUFF. HUM. RTS. L. REV. 211, 215 (1999)

[19]Elvira Dominguez-Redondo, *Universal Periodic Review - Is There Life Beyond Naming and Shaming in Human Rights Implementation?* N.Z. L. REV. 673-706 (2012); Obonye Jonas, *The Quest for Homosexual Freedom in Africa: A Survey of Selected Continental Practices and Experiences,* 12 INT'L J. DISCRIMINATION & L. 221, 225 (2012); Allehone Mulugeta Abebe, *Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council*, 9 HUM. RTS. L. REV. 1-35 (2009); Olivier De Frouville, *Building a Universal System for the Protection of Human Rights: The Way Forward*, *in* NEW CHALLENGES FOR THE UN HUMAN RIGHTS MACHINERY: WHAT FUTURE FOR THE UN TREATY BODY SYSTEM AND THE HUMAN RIGHTS COUNCIL PROCEDURES 241-266 (Cherif Bassiouni & William Shabas, eds., 2011); Edward McMahon & Marta Ascherio, *A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council*, 18 GLOBAL GOVERNANCE 231-248 (2012); Leanne Cochrane & Kathryn McNeilly, *The United Kingdom, the United Nations Human Rights Council and the First Cycle of the Universal Periodic Review*, 17 INT'L J. HUM. RTS. (2013); Gareth Sweeny & Yuri Saito, *An NGO Assessment of the New Mechanisms of the UN Human Rights Council,* 9 HUM. RTS. L. REV. 203-223 (2009); Constance de la Vega & Tamara M. Lewis, *Peer Review in the Mix: How the UPR Transforms Human Rights Discourse*, in NEW CHALLENGES FOR THE HUMAN RIGHTS MACHINERY, 341, 341 (Cherif Bassiouni & William Shabas, eds., 2011); Amartya Sen, *Introduction, in* HUMAN DEVELOPMENT REPORT 2011: THE REAL WEALTH OF NATIONS: PATHWAYS TO HUMAN DEVELOPMENT vi-vii (U.N. Development Programme "UNDP"), hdr.undp.org/sites.default/files/reports/270/hdr_2010_en_complete_reprint.pdf.; Jeremy Sarkin, *The Responsibility to Protect and Humanitarian Intervention in Africa*, 2 GLOBAL RESP. PROTECT 371-387 (2010);

phenomenon of exploration in itself to ultimately further enhance our understanding of how it operates in practice. This is undertaken through a sustained comprehensive analysis of the interactive dialogue sessions of the review to understand the States' positions and attitudes adopted when the issue of FGM was the focus of State reviews. Second, and more significantly, the findings of this investigation will help form an understanding of the possible role and implications of the jurisprudence produced from the first cycle of the UPR process has in shaping the universality of the international human rights project.

In undertaking this investigation, it was difficult to ignore the vast breadth of the potential human rights issues and norms that may be discussed during the State reviews. In fact, a total of fifty-two human rights issues were discussed over the reviews of 193 States in the first cycle of the UPR process. One of the most contentious issues raised during the first cycle of review was the issue of women's rights in the context of female genital mutilation ("FGM"). Whilst the practice of FGM is condemned under international human rights law, the practice is often justified on the basis of religious and/or cultural values. In light of this discrepancy between some domestic laws and the international normative position of women's rights under international human rights law, in this investigation, the issue of FGM will be utilised as a focus to assess whether any disagreement on the issue is vocalised during discussions of State reviews, with justifications of this practice based on cultural grounds.

This paper is organised into five sections. First, in a brief yet necessary section, an overview of the challenge raised by cultural relativism to a universalist claim on international human rights norms will be provided. This theoretical framework will be used to interpret and analyse the discourse on women's rights in relation to FGM. In the second section, the issue of FGM and its inherent relationship with culture is briefly discussed and, then, contextualised under international human rights law. In the third section, the findings of the investigation are presented, which reveal that the overwhelming majority of States formally accepted the recommendations issues on FGM. This shows that there is, at least, a formal acceptance by the participating States that the practice of FGM should be eliminated. However, a closer analysis of the discussions held during the first cycle of review reveals an alternative narrative. The findings reveal that the majority of States on appreciating the association between culture and FGM, the participating States then went on to adopt one of the three different positions during State reviews. The first position adopted by some States is

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Adrienne Komanovics & Nieves Mazur-Kumric, *The Human Rights Council and the Universal Periodic Review: A Novel Method of Promoting Compliance with Human Rights, in* CONTEMPORARY LEGAL CHALLENGES: EU – HUNGARY – CROATIA, PECS-OSIJK 641-669 (Tímea Drónczi, et al., eds., 2012).

to emphasise the relationship between culture and FGM, and then to suggest to eliminate the practice. The second approach adopted by some States used the association between FGM and culture to provide a justification for the continuance of the practice. Whilst the third approach adopted by some States drew upon the relationship between FGM and culture as a basis to suggest reforms to the State under review. In the fourth section, using the theoretical framework adopted for this investigation, the paper will provide an analysis on the findings of the investigation and the implications of the different positions adopted by the States. The final section offers two main conclusions based on the findings and analysis of the investigation. First, that the extent to which the universality of human rights is promoted is contingent on the States participating in the review and the human rights issue being discussed. Second, an unchecked challenge of universalism expressed by some States from a form of cultural relativism threatens not only the creditability of the UPR process, but could potentially question the very infrastructure of international human rights norms.

II. Questioning the 'universality' of the UPR process from a cultural relativist perspective

One key reason for the renowned optimism surrounding the UPR process was based on its *universal* nature. As noted above, this is based on two grounds: the first being the universal applicability of the process as all member States are subject to review. The second aspect to its universal nature is embedded in the aims and operation of the process, which is its normative claim of universality of all international human rights norms. Before understanding the critique of cultural relativism, it is important to briefly define and understand the concept being critiqued; in this case, the claim of universality, and *how* this normative claim is embedded in the work and operation of UPR process.

At the heart of any aim of achieving universal human rights lies the assumption that human rights are the inherent right of every human being, which transcend all national and cultural boundaries.[20] Amongst the various forms of universalisms,[21] the aims and objectives of the UPR process is largely underpinned by what is sometimes referred to as the international normative, or legal, universalist claim on human rights. This form of universalism grounds its claim on two fundamental grounds.

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[20] Michael K. Addo, *Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights,* 32 HUM. RTS. Q. 601, 649 (2010); LOUIS HENKIN, THE AGE OF RIGHTS (1990).

[21] Robert D. Sloane, *Outrelativizing Relativism: **A** Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNATL. L. 527, 591 (2001); *see* MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? (1973); *see also* ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS 41-67 (1982).

First, international normative universality refers to "the system of normative standardisation that was launched by the UDHR" and expanded through the numerous human rights treaties, conventions, resolutions and other international human rights instruments produced by the U.N.[22] For instance, Jack Donnelly terms this form of universalism as "international legal universality", which aims to promote universality of international human rights norms on the grounds that they have been accepted by almost all States as binding obligations under international law.[23]. Donnelly argues the vast expansion of the project of international human rights law, evidenced by some human rights documents attaining the international customary law, is used as a catalyst to further the ultimate goal of universality of international human rights norms.[24] Aspects of this rationale is reflected in the UPR process as observer States are obligated to draw upon a comprehensive list of international human rights obligations by enlisting the UN Charter and the UDHR as one of a number of standards against which a States' records will be reviewed. In this way, States undertaking the reviews in the UPR process are not restricted to discussing or making recommendations on international human rights norms to which the States under review have adopted. Second, the normative claim of universality of international norms is further substantiated on the basis that member States themselves participate in negotiating and implementing international human rights norms at a number of international human rights forums.[25] Thus, the universalist claim is made on the basis that not only are the obligations embedded in international human rights instruments accepted by the majority of States, but also, States globally participate in the interpretation and implementation of these rights at a number of international fora. Such State participation in the discussions on the interpretation and implementation of international human rights law is guaranteed on a unique platform during

State reviews at UPR process, with the ultimate aim to 'promote the universality, interdependence, indivisibility and interrelatedness of all human rights.'[26] Taken together, these two fundamental aspects of the review process provide strong grounds to suggest not only a presumed normative claim of universality of international human rights norms, but also an implicit justification for the promotion and protection of the universality of all human rights norms when undertaking State reviews at the UPR process.

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[22] Addo, *supra* note 20, at 660.
[23] Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281, 288 (2007).
[24] *Id.*
[25] Charlesworth & Larking, *supra* note 4, at 1.
[26] H.R.C. Res 5/1, *supra* note 2, ¶3(a).

As with most claims of the universality of human rights, the foundations upon which the claim of international legal universalism has always been, and is likely to continue to be, subject to persuasive challenges. Arguably, the most significant challenge emanates from the theory of cultural relativism, which has been the subject of a number of academic works, possibly due to its many pronounced variations of the theory. The form of cultural relativism that is often perceived as a direct challenge to international normative universality is the strict form of cultural relativism, which has a double observation at the core of this theory. First, all values and moral belief systems are held to be culturally specific[27]; consequently, 'what is morally right in relation to one moral framework can be morally wrong in relation to a different moral framework.'[28] Second, following from the first belief, strict cultural relativists claim that there are such wide variations between the beliefs of cultures that they are incomprehensible to one another, with no possibility of constructive dialogue between them.[29] In this way, strict cultural relativists advocate an exaggerated claim for the 'impossibility of transcultural justification'.[30] Applying the central beliefs of strict cultural relativism in the context of international human rights law, means that:

> local cultural traditions….properly determine the existence and scope of [human] rights enjoyed by individuals in a given society [and] no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable.[31]

Strict cultural relativists thereby challenge the international normative universalist claim of human rights by arguing that moral value judgments, such as interpretations of what constitutes human rights, are relative to different cultural contexts from which such moral judgments arise.[32] Thus, should a conflict arise between cultural norms and international human rights norms, cultural norms will be given priority as they are considered to be a sole legitimating factor in assessing external norms.

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[27] William H. Meyer, *Human Rights and MNCs: Theory Versus Quantitative Analysis*, 18 HUM. RTS. Q. 368 (1996).
[28] GILBERT HARMAN & JUDITH JARVIS THOMSON, MORAL OBJECTIVITY AND MORAL RELATIVISM (1996)
[29] Torben Spaak, *Moral Relativisim and Human Rights*, 13 BUFF. HUM. RTS. L. REV. 73, 75 (2007); Thomas Kuhn, Metaphor in Science in METAPHOR AND THOUGHT 409-419 (A. Ortony, ed., (1979).
[30] NICK PERRY: HYPERREALITY AND GLOBAL CULTURE (1998); Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 402 (2007).
[31] Fernando R. Teson, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869, 870-871 (1985).
[32] Hatch, *supra* note 18; Joyner & Dettling, *supra* note 18, at 282-283; Binder, *supra* note 18.

Ultimately, the dichotomy between universalism and cultural relativism is not a new one, and has been the focus of a number of scholarly writings.[33] However, as will be demonstrated below, this dichotomy has materialised in a more practical form at the UPR process since its establishment in 2008. This resurrection of old theoretical dichotomy into a new practical light on an international human rights platform calls for a new empirical form of investigation which explores whether the cultural relativist perspective has a presence in a modern human rights mentoring mechanisms that profoundly advocates the universality of human rights norms.

III. Contextualising Women's Rights in relation to Female Genital Mutilation

For the purposes of this investigation, FGM is defined as 'all procedures involving partial or total removal of the external female genitalia…whether for cultural or other non-therapeutic reasons."[34] International human rights treaty jurisprudence declared FGM as a violation of women's (and girls') rights under a range of international human rights instruments.[35] More specifically, clarification on the issue has been provided in the jurisprudence of the Committee on the Elimination of Discrimination against Women ("Committee on the Women's Convention") who have stated that FGM, together with any underlying cultural justifications that endorse the practice, should be eliminated.[36]

Despite the repeated declarations made in treaty jurisprudence that the practice of FGM is in violation of international human rights treaties and conventions,[37] it continues to

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[33] *See* Marie-Benedicte Dembour, *Following the movement of pendulum: between universalism and relativism, in* CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES 56-79 (Jane K. Cowman & Richard A. Wilson eds., 1995); *see also* Renteln, *supra* note 17; *see generally* FEDERICO LENZERINI, THE CULTURALIZATION OF HUMAN RIGHTS LAW (2014); Sally Engle Merry, *Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)*, 26 POLAR. 55, 56 (2003); Tom Zwart, *Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach*, 34 HUM. RTS. Q. 546, 566 (2012); Carla Makhlouf Obermeyer, *A Cross-Cultural Perspective on Reproductive Rights*, 17 HUM. RTS. Q. 366, 368 (1995); Richard Falk, *Cultural Foundations for the International Protection of Human Rights, in* HUMAN RIGHTS IN CROSS CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 44-64 (Abdullahi Ahmed An-Na'im ed., 1992).

[34] World Health Organization [WHO], Female Genital Mutilation: A Joint WHO/UNICEF/UNFPA Statement 7 (1997), http://www.childinfo.org/files/fgmc_WHOUNICEFJointdeclaration1997.pdf (last visted Aug. 31, 2015).

[35] *See* U.N. H.R.C., *General Comment No. 28: The Equality of Rights Between Men and Women (Art. 3)*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000); U.N. CAT, *General Comment No. 2: Implementation of Article 2 by States Parties,* ¶ 18 U.N. Doc. CAT/C/GC/2 (Jan. 24, ¶ 18 2008); G.A. Res. 67/146, at 2 (Mar. 5, 2013); U.N. CRC, *General Comment No. 7 (2005): Implementing Child Rights in Early Childhood*, ¶11(b)(1), U.N. Doc. CRC/C/GC/7/Rev.1 (Sept. 20, 2006).

[36] U.N. CEDAW, General Recommendation No. 14: Female Circumcision' (1990) A/45/38 and Corrigendum 1; U.N. CEDAW, *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, at 1, U.N. Doc A/54/38/Rev.1 (1999).

[37] H.R.C. Res 5/1, *supra* note 2, ¶ 15(a)-(c).

be exercised on women and girls in a number of States.[38] Those that are sympathetic to the practice argue that it is inseparable from the religious and cultural identity of some groups[39] and, therefore, its continuance is often defended as an expression of the traditional and cultural values of a particular society.[40] Justifications for the practice are sometimes based on preserving women and girls' virginity,[41] birth control,[42] or to protect the family honour by preventing immorality and preserving group identity.[43] This inherent relationship between FGM and culture, whereby cultural and religious norms are used to justify the practice, is the primary reason why it has been selected as the focus for this investigation. This recognition was reflected in the UPR process as twenty-nine States adopted a position, which, implicitly or explicitly, highlighted the inherent association between FGM and culture.

The discussion above introduces some of the cultural justifications for the continued practice of FGM. With this in mind, the aim of this part of the investigation is to explore whether, and to what extent, States adopt arguments from a cultural relativist perspective to defend the practice of FGM in the UPR process.

IV. Findings on the issue of Female Genital Mutilation in the UPR process

A. An Overview of the Findings on FGM in the First Cycle

In the first cycle of the UPR process, a total of 205 recommendations were issued to thirty-six States under review. The recommendations that have been issued and received have been categorised according to five U.N. regional groups. These are: African Group (abbreviated as "African"), Asia Pacific Group (abbreviated as "Asian"), Eastern European Group (abbreviated as 'EEG'), Latin American and Caribbean Group ("GRULAC") and the Western European and Others Group ("WEOG").[44] The States that received and issued

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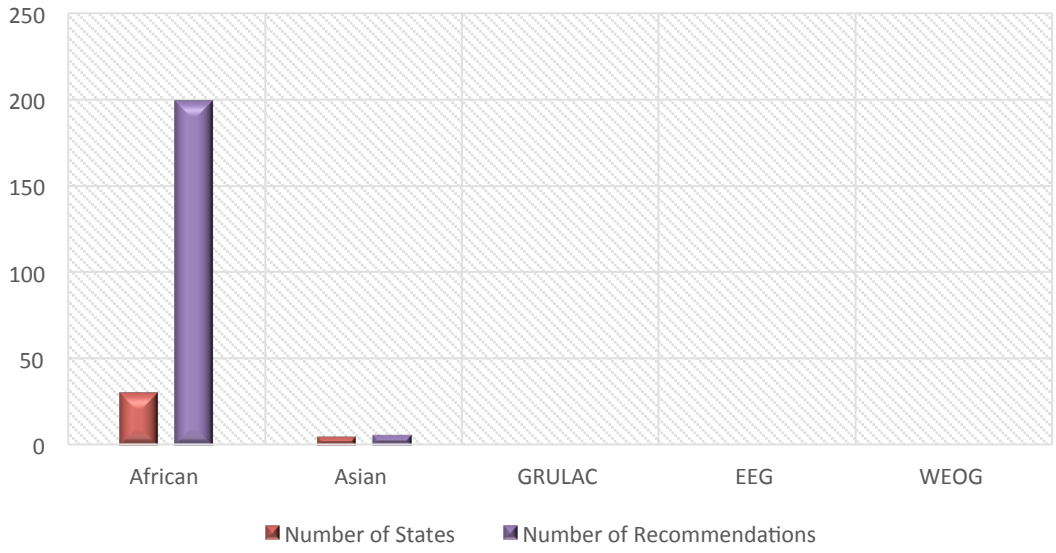
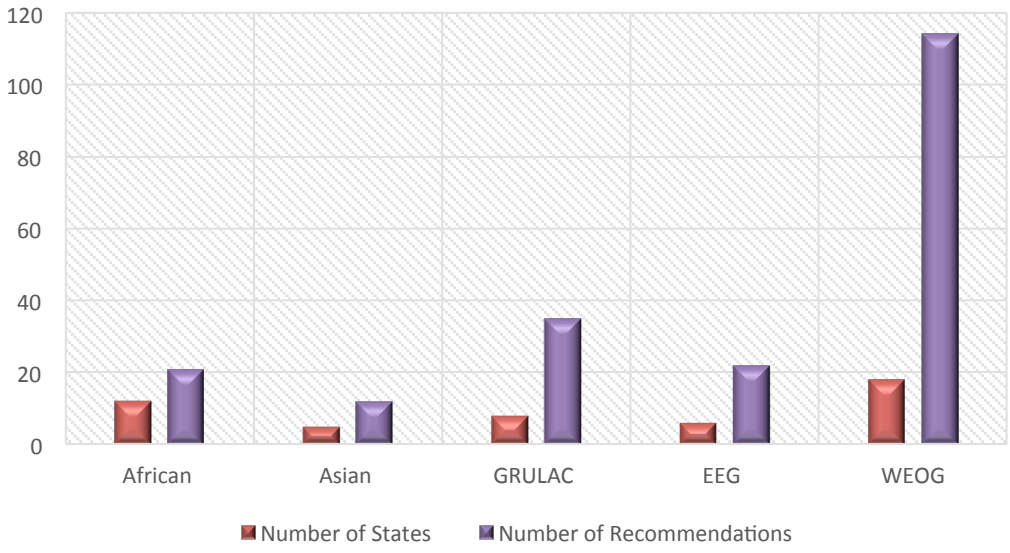
[38] Babatunde Osotimehin, *Let's End Female Genital Mutilation/Cutting in Our Generation,* UNFPA (Oct. 22, 2013), http://www.unfpa.org/public/home/news/pid/15460 (last visited Aug. 31, 2015).
[39] UNICEF, FEMALE GENITAL MUTILATION/CUTTING: A STATISTICAL EXPLORATION 17-19 (2005), http://www.unicef.org/publications/files/FGM-C_final_10_October.pdf (last visited Aug. 31, 2015).
[40] Isabelle Gunning, *Arrogant Perception, World Travelling and Multicultural Feminism: The Case of Female Genital Surgeries,* 23 COLUM. HUM. RTS. L. REV. 237, 238 (1992).
[41] M A Morgan, *Female Genital Mutilation: An issue on the doorstep of the American Medical Community,* 18 J. LEGAL. MED. 93, 95-96 (1997).
[42] L. F. Lowenstein, *Attitudes and Attitude difference to Female Genital Mutilation in the Sudan: Is there a change on the horizon*, 12 SOC. SCI & MED 417 (1978).
[43] Layli Miller Bashir, *Female Genital Mutilation in the United States: An examination of Criminal and Asylum law,* 4 AM. U. J. GENDER & L. 415, 424 (1996).
[44] For a full list of States for all groups *see* U.N. Dept. for G.A. & Conf. Mgmt., *United Nations Regional Groups of Member States,* http://www.un.org/depts/DGACM/RegionalGroups.shtml (last visited Aug. 31, 2015).

recommendations on FGM have been presented according to regional groups in Graph 1 and 2, respectively.



Graph 1 States under review that received recommendations on FGM



Graph 2 Observer States that issued recommendations on FGM

Looking at Graph 1 and Graph 2 together, two main findings are revealed. First, it is apparent that whilst States belonging to the African and Asian groups received the highest number of recommendations, the States belonging to the two groups issued the lowest number of recommendations on FGM. Second, States from the GRULAC, EEG and WEOG

issued the highest number of recommendations on FGM, whilst the States from the three groups themselves received no recommendations on the practice. From this preliminary analysis, it can be observed that whilst concerns in relation to continued practice of FGM were raised by States belonging to all five regional groups, the recommendations were only issued to States from the African and Asian groups.

In response to the 205 recommendations issued on FGM, a total of 166 were accepted by the States under review, and the remaining thirty-nine were noted.[45]

Table 1 Recommendations on FGM that were accepted.

	Regional Groups	No. of States	No. of Recommendations
ACCEPTED	**African**	19	160
	Asian	5	6
	GRULAC	0	0
	EEG	0	0
	WEOG	0	0

Table 2 Recommendations on FGM that were noted.

	Regional Groups	No. of States	No. of Recommendations
NOTED	**African**	11	39
	Asian	0	0
	GRULAC	0	0
	EEG	0	0

[45] I have presented the recommendations that were accepted and noted (categorised according to regional groups) in table 1 and 2 respectively.

	WEOG	0	0

From table 1 and 2, it can be observed that all States belonging to the Asian group accepted the recommendations on FGM. On the other hand, whilst the majority of the recommendations were accepted by States from the African group, a significant total of thirty-nine was noted. This shows that disagreements on the nature of the recommendations issued on FGM were *all* vocalised from States belonging to the African group.

B. Nature of the dialogue on FGM in the First Cycle of the UPR process

The nature of the 205 recommendations issued in relation to FGM can be divided into four categories, which have been summarised in table 3.

Table 3 Categories of recommendations on FGM.

Recommendation	**Summary of the nature of the recommendation/Statement**
1	FGM is a harmful cultural practice that is required to be eliminated
2	To implement incremental reforms to address the practice
3	Implement laws to prohibit FGM
4	Comply with international obligations on FGM

The nature of the responses provided by the States under review can be divided into thirteen categories. The comments that were accompanied with recommendations that were accepted have been categorised into six categories, and the comments that were issued when the recommendations were noted are divided into seven categories. Each response has been summarised in Table 4. The categories that begin with the letter 'A' were comments made by the States under review when the recommendations were accepted. On the other hand, the categories that begin with the letter 'N' represent those comments that were issued when the States under review noted the recommendation.

Table 4. Categories of responses on FGM.

Category	Summary of responses made by State under review
A1	Accepted recommendation with no further comments
A2	Domestic Laws already in place against FGM
A3	Domestic Laws under review on FGM
A4	Incremental reforms in place to help eliminate FGM
A5	Cultural justifications for FGM make its elimination challenging
A6	FGM is not embedded in culture
N1	Noted recommendation with no further comments
N2	Laws already in place against FGM
N3	Laws under review on FGM
N4	Incremental reforms in place to address FGM
N5	Cultural justifications hinder the elimination of FGM
N6	FGM does not exist in the State
N7	Legislation was not the answer to FGM

Figure 3 below provides a pictorial account of the nature of discussions held between States on FGM. The representation of the categories of the recommendations is located towards the left of Figure 3. Towards the right of Figure 3, the corresponding category of comments made in response to the recommendations is provided.

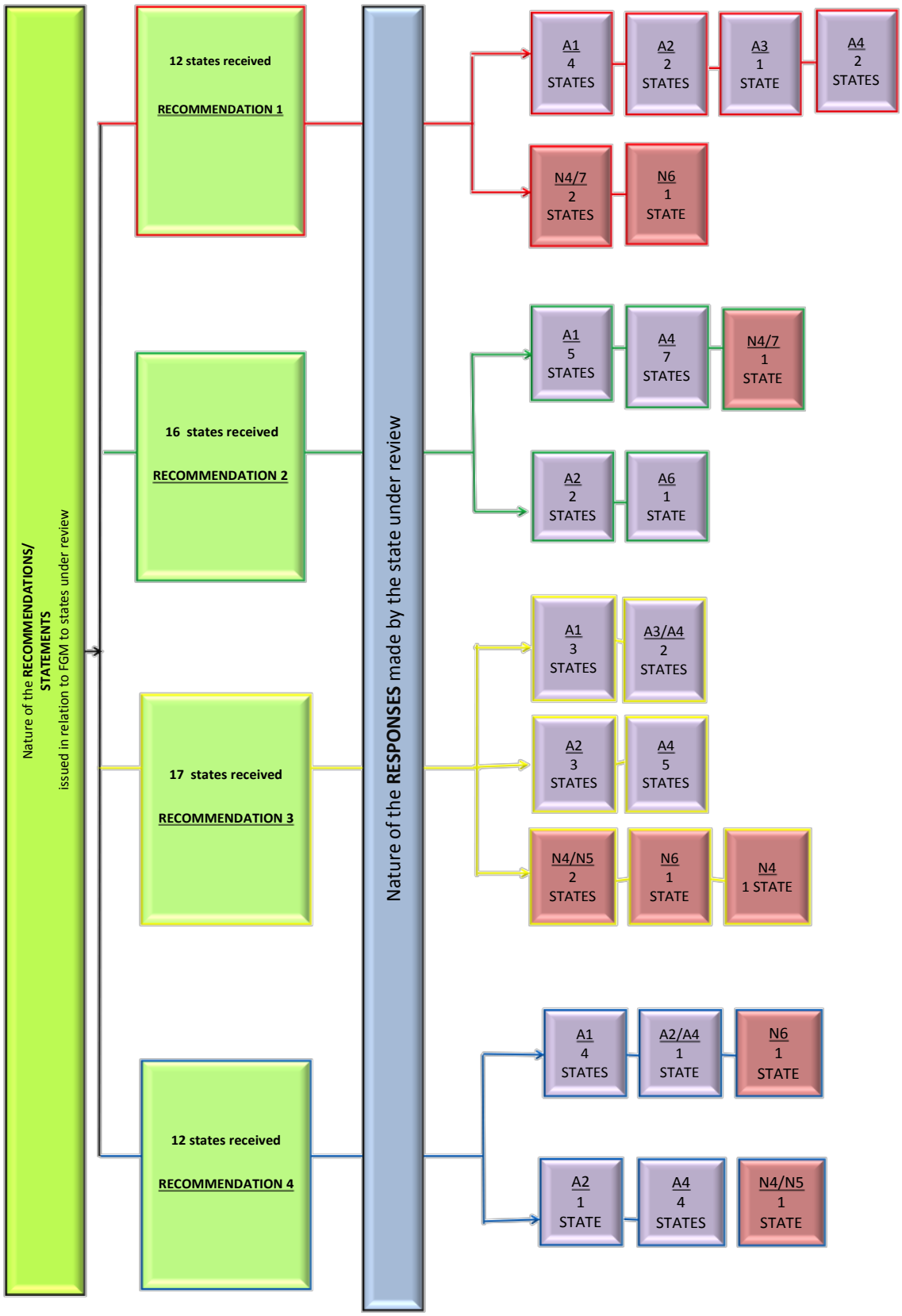


Figure 3 Nature of the dialogue held amongst States on the issue of FGM

i. Express declaration that FGM is a harmful cultural practice that requires elimination

Under the first category of recommendations, observer States expressly recognised FGM to be a harmful traditional/cultural practice, before suggesting that the State under review should eliminate it. A typical example of this recommendation was issued during the review of Cameroon when Chile 'flagged the persistence of deep rooted cultural practice affecting women such as FGM…[and] inquired about steps to…eradicate FGM.'[46] In another example, Mexico issued a recommendation to Ethiopia 'to eliminate harmful traditional practices such as female genital mutilations.' [47] In total twelve States received recommendations of this nature.

In response, a total of nine States under review accepted the recommendations issued under this category. Of these, Djibouti, Tanzania, Liberia and Guinea Bissau all accepted the recommendations without providing any further comments. These were categorised as an A1 response. Botswana[48] and Niger provided an A2 response, as they insisted that domestic legislation already prohibited the practice. For instance, Niger stated that 'a law criminalizing [FGM] had been adopted in 2003.'[49] On the other hand, Cameroon stated that "the reform of the criminal code is underway" to address the practice of FGM, and thus provided an A3 response.[50] The delegates of Somalia and Ethiopia[51] in response to a recommendation under this category provided an A4 response, as both States recognised FGM as a "harmful traditional practice", but went on to highlight the long term policies that were already in place to help eliminate the practice.[52] For example, Somalia noted that it had implemented 'educational awareness campaigns, and a dialogue with traditional and religious leaders, women's groups and practitioners to eliminate the practice of FGM.'[53]

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[46] Hum. Rts. Council, Rep. of the working Group on the Universal Periodic Review: Cameroon of its Eleventh Session, ¶ 24, UN. Doc. A/HRC/11/21 (Mar. 3, 2009) [hereinafter *Cameroon*].
[47] Hum. Rts. Council, Rep. of the working Group on the Universal Periodic Review: Ethiopia of its Thirteenth Session, ¶41, U.N. Doc. A/HRC/13/17 (Jan. 4, 2010) [hereinafter *Ethiopia*].
[48] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Botswana of its Tenth Session, ¶63, U.N. Doc. A/HRC/10/69 (Jan. 13, 2009) [hereinafter *Botswana*].
[49] Hum. Rts. Council, Rep. of the working Group on the Universal Periodic Review: Niger of its Seventeenth Session, ¶48, U.N. Doc. A/HRC/17/15, para 48 (Mar. 25, 2011) [hereinafter *Niger*].
[50] Cameroon, *supra* note 46, at ¶38.
[51] U.N. Secretary-General, Note, *Annotations to the agenda for the thirteenth session of the Human Rights Council*, ¶ 93, U.N. Doc. A/HRC/13/1 (Jan. 14, 2010).
[52] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Somalia of its Eighteenth Session, ¶69, U.N.Doc. A/HRC/18/6 (Jul. 11, 2011) [hereinafter *Somalia*].
[53] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Somalia: Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review of its Eighteenth Session, ¶ 98.21, U.N. Doc. A/HRC/18/6/Add.1 (Dec. 16, 2011) [hereinafter *Somalia Addendum*].

On the other hand, a total of three States under review noted recommendations issued under this category and all provided an explanation for their adopted positions. First, Malawi provided an N6 response as the delegates explained that it could not accept the recommendation because 'female genital mutilation…had never been practiced here.'[54]

Second, Mali and Liberia[55] provided very similar responses as the comments issued by the delegates combined an N4 and N7 response. For instance, at the interactive dialogue session, Mali stated that the 'policy on female genital mutilation centred on awareness-raising and education and was based on the belief that it was essential to obtain widespread public support for the eradication.'[56] At the HRC plenary session, the delegate added "that excision was deeply rooted in Malian cultural practice", and so the State has "given priority to public education and awareness-raising campaigns rather than the adoption of repressive measures whose practical application could not be guaranteed without the support of all segments of society."[57] In this way, Mali and Liberia insisted that whilst incremental methods of reforms were in place to address FGM, as the practice was deeply engraved in the cultural value belief system of the State, legislation against it was not the answer now.

Overall, it can be observed that when States were issued with recommendations under this category, nine out of twelve States under review provided explanations for their positions with their responses. What is notable is that no States under review in their responses challenged the declaration made by the observer States that FGM was a harmful cultural/traditional practice. In fact, it can be noted that whilst observer States drew upon the link between culture and FGM as a basis to issue criticism during State reviews, the States under review did not use this link to defend FGM on cultural grounds. Instead, seven out of the twelve States that were issued with a recommendation under this category made references to the laws and policies that were already in place to address FGM.

ii. Implement incremental reforms to eliminate FGM

Observer States that issued recommendations under this category began by recognising the inherent association between culture and FGM. The observer States then went on to suggest that the State under review should implement incremental policies, such

[54] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Malawi of its Sixteenth Session, ¶77, U.N. Doc A/HRC/16/4 (Jan. 4, 2011) [hereinafter *Malawi*].
[55] Bente Angell-Hansen (Vice-President & Rapporteur), Rep. of the Hum. Rts. Council on its Sixteenth Session, ¶542, U.N. Doc. A/HRC/16/2 (Nov. 14, 2011).
[56] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Mali of its Eighth Session, ¶¶30, 54, U.N. Doc. A/HRC/8/50, (Jun. 13, 2008) [hereinafter *Mali*].
[57] Alejandro Artucio (Vice-President & Rapporteur), Rep. of the Hum. Rts. Council on its Eighth Session, ¶997, U.N. Doc. A/HRC/8/52 (Sept. 1, 2008).

as engaging in a constructive dialogue with relevant stakeholders, with the aim to reform any sympathetic attitudes in favour of FGM. A typical example of recommendation under this category was when Slovenia suggested that Niger implement "sensitization activities for practitioners, families, traditional or religious leaders and the general public in order to encourage change in traditional attitudes."[58] A total of sixteen States under review received recommendations of this nature.

In response, eleven States accepted the recommendations. Liberia, Chad, Ghana, Tanzania and Senegal all provided an A1 response, as no further comments were provided. On the other hand, the States of Togo[59] and Uganda provided an A2 response as the delegate insisted that 'Parliament had passed the Prevention of Female Genital Mutilation Act 2009'.[60] Somalia, Niger,[61] Sierra Leone[62], Eritrea[63], Ethiopia.[64], Cameroon[65] and Djibouti[66] all provided A4 responses. A typical example is when Somalia stated that it recognized the importance of "dialogue with traditional and religious leaders, women's groups and practitioners of FGM to eliminate the practice of FGM."[67] On the other hand, when Congo was issued with a recommendation under this category, the delegate provided an A6 response insisting that the "the practices of genital mutilation that had been referred to were not rooted in Congolese culture."[68]

Gambia was the only State under review that noted recommendations issued under this category. Gambia explained there was 'continued public education on the dangers of this practice' and that 'legislation was not the answer right now.'[69] Thus, the Gambian delegate provided a combination of an N4 and N7 response.

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[58] Niger, *supra* note 49, ¶29.
[59] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Togo on its Nineteenth Session, ¶ 67, U. N. Doc. A/HRC/19/10 (Dec. 14, 2011)
[60] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Uganda on its Nineteenth Session, ¶ 22, U.N. Doc. A/HRC/19/16 (Dec.22, 2011).
[61] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Niger, on its Seventeenth Session, ¶ 23, U. N. Doc. A/HRC/17/15/Add.1 (Jun. 8, 2011) [hereinafter *Niger Addendum*].
[62] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Sierra Leone, on its Eighteenth Session, ¶ 26, U. N. Doc. A/HRC/18/10 (Jul. 11, 2011) [hereinafter *Sierra Leone*].
[63] Hum. Rts. Council, Universal Periodic Review Rep. of The Working Group on the Universal Periodic Review: Eritrea on its Thirteenth Session, ¶ 72, U. N. Doc. A/HRC/13/2 (Jan. 4, 2010) [hereinafter *Eritrea*].
[64] Ethiopia, *supra* note 47, ¶ 93.
[65] Cameroon, *supra* note 46, ¶ 40.
[66] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Djibouti on its Eleventh Session, ¶ 34, U. N. Doc. A/HRC/11/16 (Mar. 3, 2009) [hereinafter *Djibouti*].
[67] Somalia Addendum, *supra* note 53, ¶ 98.21.
[68] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Democratic Republic of the Congo on its Thirteenth Session, ¶45, U.N. Doc. A/HRC/13/8 (Jan. 4, 2010) [hereinafter *Congo*].
[69] Bente Angell-Hansen (Vice-President & Rapporteur), Rep. of the Hum. Rts. Council on its Fifteenth Session, ¶542, U.N. Doc. A/HRC/15/60 (Oct. 31, 2011).

Overall, only one State noted a recommendation under this category. This makes the nature of reforms suggested under this category the most well received recommendations by the States under review on the issue of FGM. Even Gambia noted the recommendation did not challenge the aim to eradicate the practice; rather, the delegate challenged the nature of the reforms suggested to address the practice. Further, it can be observed that of the twelve States that provided additional comments in relation to their position, the central focus of nine of the State responses were very similar, despite the official position of the State in response to the recommendation being different. For instance, the nine States in their comments focused entirely on the long-term policies in place, such as public awareness programmes and engagement in a dialogue with local leaders, to help eradicate FGM.

Therefore, the pattern that emerged is that when States under review were issued with recommendations that focused on incremental reforms to eliminate FGM, the recommendations were not only well received, but also the majority of the States provided very similar comments in their responses.

iii. Implement domestic laws to prohibit FGM

Under the third category of recommendations, observer States suggested that States under review should enact legislation against the practice of FGM. A typical example of this recommendation is when the Czech Republic 'recommended the adoption and implementation of legislation prohibiting and criminalizing FGM' during the review of Mali.[70]

A total of seventeen States under review were issued with recommendations of this nature. Of these, thirteen States accepted recommendations. Senegal, Chad and Kenya accepted the recommendations without any further response, and therefore provided an A1 response. On the other hand, Benin,[71] Uganda[72] and Iraq insisted the domestic laws were already in place, which prohibited the practice, and thus, provided an A2 response. For instance, Iraq stated that 'the crime of female genital mutilation was dealt with under the Penal Code.'[73] Niger,[74] Djibouti,[75] Eritrea,[76] Mauritania,[77] and Sierra Leone[78] all provided an

[70] Mali, *supra* note 56, ¶16.
[71] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Benin, ¶31, U.N. Doc. A/HRC/8/39 (May 28, 2008) [hereinafter *Benin*].
[72] Uganda, *supra* note 60, ¶22.
[73] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Iraq, ¶48, U.N. Doc. A/HRC/14/14 (Mar. 15, 2010) [hereinafter *Iraq*].
[74] Niger, *supra* note 49, ¶29.
[75] Djibouti, *supra* note 66, ¶34.
[76] Eritrea, *supra* note 63, ¶72.

A4 response as it placed emphasis on the policies that were already in place to raise awareness and engage in a constructive dialogue with the stakeholders involved in the practice. Adopting a slightly different position, Guinea Bissau and Somalia[79] insisted that the domestic legislation on the issue of FGM was under review, and that educational awareness policies were being implemented to help discourage the practice, and thus provided an A3/A4 response. For instance, the delegate of Guinea Bissau stated that 'regarding the adoption of a specific legislation criminalizing female genital mutilation…the process is on-going as the country has just started awareness raising campaigns in order to reach the targeted population.'[80]

On the other hand, a total of four States under review noted the recommendations under this category. Of these, Lesotho provided an N6 response as it insisted that "Lesotho did not practice female genital mutilation."[81] Gambia provided an N4 response stating that "continued public education on the dangers of the practice were under way."[82] Mali[83] and Liberia both noted the recommendation issued under this category and provided a combination of an N4 and N5 response. Also, Liberia and Mali began its responses by providing details of the incremental reforms that were in place in its respective States. However, the States then explained that the cultural nature of the practice hindered the complete elimination of FGM through punitive measures. For example, Liberia at the interactive dialogue stage stated that it 'was engaging all segments of society in inclusive and constructive nationwide dialogues to determine the extent and the forms of harmful traditional practices, and those dialogues would form the basis for programme planning in the eradication of female genital mutilation.'[84] Liberia also stated that it "continued to take measures to eliminate the practice of female genital mutilation, while respecting the cultural rights of citizens to engage in non-harmful, human rights-conscious traditional and cultural practices."[85]

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[77] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Mauritania, ¶49, U.N. Doc. A/HRC/16/17 (Jan. 4, 2011) [hereinafter *Mauritania*].
[78] Sierra Leone, *supra* note 62, ¶26.
[79] Somalia, *supra* note 49, ¶69.
[80] Angell-Hansen, *supra* note 69, ¶676.
[81] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Lesotho, ¶62, U.N. Doc. A/HRC/15/7 (Jun. 16, 2010), [hereinafter *Lesotho*].
[82] Hisham Badr (Vice-President & Rapporteur), Rep. of the Hum. Rts. Council on its Fourteenth Session, ¶593, U.N. Doc. A/HRC/14/37 (Oct. 23, 2012).
[83] Artucio, *supra* note 57, at ¶997.
[84] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Liberia, ¶50, U.N. Doc. A/HRC/16/3 (Jan. 4, 2011) [hereinafter *Liberia*].
[85] *Id*.

At the HRC plenary session, Liberia explained that FGM is a "deep- rooted traditional practice [and] still shrouded in myth and secrecy. Often, discussions of both are strongly resisted and perceived as attempts to destroy the cultural and traditional heritage of the country . . . it is currently unable to take a position on recommendation relating to female genital mutilation."[86] This statement indicates that whilst Liberia was committed to taking measures to eliminate FGM, such action was contingent to respecting the cultural rights to engage in "non harmful" cultural/traditional practices. This point of discussion then turns on the definition of "harm" as interpreted by Liberia. Indeed, if Liberia considered some forms of FGM to be "non harmful", then the statement indicates that the State will consider it to fall within the cultural right of the citizens, which ought to be respected.

In this way, whilst Liberia and Mali did not use culture to explicitly *justify* the practice, both States used the association between FGM and culture to *explain* why the practice continued to exist in the respective States under review. I argue that this explanation at the HRC session, together with the fact that both recommendations were noted, gives reason to suggest that Liberia and Mali implicitly challenged the suggested reforms to enact laws against the practice on the basis that the cultural nature of the practice hindered the implementation and acceptance of such laws.

Overall, it can be noted that the majority of recommendations that were issued to States under this category were accepted. Of these, eleven out of the total eighteen States responded by drawing attention to non-punitive policies that were already implemented to address the practice of FGM. Thus, regardless of the official position in response to the recommendations, the essence of the comments issued by the States under review was that long-term policies were in place at domestic level to address the practice.

iv. Comply with international obligations on FGM

Under this category of recommendations, observer States suggested that the States under review should take measures against FGM to ensure compliance with the State's international obligations in relation to the practice. A typical example is when Mali was issued with a recommendation by Canada to 'take the necessary measures to implement the recommendations of CEDAW and the Human Rights Committee concerning…FGM'.[87] A total of twelve States under review were issued with a recommendation under this category.

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[86] Hum. Rts. Council, Rep. of the Working Group on the Universal Periodic Review: Liberia Addendum, ¶10, U.N. Doc. A/HRC/16/3 Add.1 (Mar. 15, 2011), [hereinafter *Liberia Addendum*].
[87] Mali, *supra* note 56, at ¶27.

A total of ten States under review accepted the recommendations issued to it in relation to FGM under category 4. Of these, Chad, Guinea Bissau, Senegal, and Ghana accepted the recommendation and provided no further comments, and therefore provided an A1 response. Iraq provided an A2 response stating that laws against the practice were already in place.[88] The nature of the response provided by Burkina Faso was a combined A2 and A4 response, as the State insisted that measures were in place "to enlist the support of traditional leaders. Female Genital mutilation was punishable by law."[89] On the other hand, the comments made by Ethiopia[90], Sierra Leone, Cameroon[91] and Djibouti[92] were categorised as an A4 response. A typical example of this response was when Sierra Leone stated that whilst "the Government accepted in principle that the practice ought to be abolished, but recalled that some traditions were deeply rooted and pleaded for implementation on a progressive basis."[93]

On the other hand, two States under review noted the recommendations issued to them under this category. First, Malawi provided an N6 response, as it explained that "Malawi did not have female genital mutilation, which had never been practiced there."[94] On the other hand, Mali provided a combined response of N4/N5, as it stated whilst awareness raising campaigns against FGM were in place, the cultural nature of the practice was the reason why it continued to exist in the State.[95]

Overall, when observer States drew upon the States' international human rights obligations in relation to FGM, the majority of the States under review accepted the recommendation. Of the States that provided additional statements with its official response, the essence of the majority of the comments was that laws and/or gradual reform policies were being implemented at domestic level to address FGM.

V. Discussion on the Findings of FGM in the First Cycle of the UPR process

Of the 205 recommendations that were issued on FGM in the first cycle of the review process, a total of 199 recommendations were accepted. In the first instance, one may conclude that the vast number of recommendations being accepted indicates two things: first,

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[88] Iraq, *supra* note 73, ¶48.
[89] Hum. Rts. Council., Rep. of the Working Group on the Universal Periodic Review: Burkina Faso, ¶63, U.N. Doc. A/HRC/10/80 (Jan. 1, 2009) [hereinafter *Burkina Faso*].
[90] Ethiopia, *supra* note 47, ¶41.
[91] Cameroon, *supra* note 46, ¶24.
[92] Djibouti, *supra* note 66, ¶34.
[93] Sierra Leone, *supra* note 62, ¶26.
[94] Malawi, *supra* note 54, ¶77.
[95] Mali, *supra* note 56, 27.

that there is a consensus amongst States that FGM should be eliminated and second, that the discourse held on the issue in the review process was relatively contentious in nature.

However, an analysis of the nature of the positions adopted by States during the discussions reveals how some States grappled with the inherent relationship between FGM and culture. In total, fifty-seven States, in its capacity as observer States or States under review, recognised the association between FGM and culture during discussions held in the first cycle. However, on appreciating the association between culture and FGM, the participating States then went on to adopt one of the three different positions during State reviews.

First, the observer States that issued recommendations under the first category expressly declared FGM to be a harmful cultural practice that was required to be eliminated. From the nature of the recommendations under this category there are two implicit suggestions made by the observer States. The statements indicate that the observer States believed that FGM continued to be practiced due to justifications that were embedded in some aspects of cultural belief systems.

Second, that the observer States are at the outset making clear that the continuance of the practice, despite being condoned by some cultural values and traditions, is in violation of international norms and thus should be eliminated. This indicates that observer States issuing recommendations under the first category adopted a position that resonates with the strict universalist position. This is because strict universalists, whilst recognising that cultural differences exist, insist that universal human rights norms should transcend cultural idiosyncrasies.[96] Similarly, in the UPR process, observer States issuing recommendations under the first category, whilst recognising the inherent relationship between FGM and culture, insisted that the international norms should transcend these cultural particularities, and thus, the practice should be eliminated.

The implications of the strict universalist position adopted by some observer States during the discussions of FGM becomes apparent when one analyses the underlying presumptions of the States adopting this position. To begin with, the essence of the recommendations issued under the first category is that whilst observer States recognised the cultural nature of FGM, suggestions were made to eliminate the practice. This recognition that FGM is embedded in some aspects of culture means that the observer States hold the presumption that such beliefs are formulated over a period of time. On the nature of culture,

[96] Robert Sloane, *Outrelativising Relativism: A Liberal Defence of the Universality of International Human Rights*, 34 VAND. J. TRANSNATIONAL L. 527, 541-542 (2001).

Clifford Geertz argues that cultural values are a synthesis of moral belief systems that are formulated, developed and reaffirmed over a period of time.[97] In this way individuals through a process of "enculturation" acquire the standards, values and categories of culture unconsciously.[98] Following this logic, any reforms to values and beliefs embedded in culture must be undertaken gradually over a period of time to ensure that such reforms are accepted.[99] Therefore, reforms undertaken to discourage attitudes in favour of the practice cannot be undertaken in a precipitous manner, and rather require long term reform polices, and a constructive dialogue with relevant stakeholders in a community.[100] In light of this, suggestions made by observer States under the first category to precipitously eliminate the cultural practice of FGM indicates that the observer States have not fully appreciated the nature of culture and process of enculturation, which deeply embeds the sympathetic attitudes held by individuals towards FGM.[101]

In fact, the observer States' lack of appreciation of the nature of culture and the enculturation process, in relation to sympathetic attitudes towards FGM, confirms some of the theatrical critiques of the strict universalist position.[102] For example, Dembour argues that the sole reliance on universalism is likely to breed moral ignorance 'because it excludes the experience of the other."[103] Further, An-Na'im warns about the dangers of the "claims of universalism that are in fact based on the claimant's rigid and exclusive ethnocentricity."[104]

These theoretical criticisms of strict universalism are confirmed in the underlying presumptions of the observer States who recommended the elimination of FGM by adopting a strict universalist position. This is because, despite the observer States recognising the cultural nature of the practice, the position of the observer State clearly indicated that the States under appreciated the nature of enculturation as they suggested precipitously eliminating the practice. Consequently, whilst the overwhelming acceptance of the recommendations from a strict universalist position may indicate a universal consensus on

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[97] CLIFFORD GEERTZ, *The Impact of the Concept of Culture on the Concept of Man*, *in* INTERPRETATIONS OF CULTURES: SELECTED ESSAYS 49 (1973).
[98] Renteln, *supra* note 17, at 58.
[99] *Id*. at 49. See also section 2.3.1.
[100] See the nature of internal discourse on human rights suggested by Abdullahi Amhed An-Na'im, *The Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia*, *in* THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 147, 156 (Joanne R. Bauer & Daniel A. Bell, eds., 1999).
[101] On the process of enculuration *see* Renteln, *supra* note 17, at 58. See section 2.3.1.
[102] Sonia Harris Short, *Listening to 'the other'? The Convention on the Rights of the Child*, 2 MELBOURNE J. INT'L L. 305, 308 (2001); ABDULLAH AHMED AN-NA'IM, *Toward a Cross Culture Approach to Defining International Standards of Human Right: The Meaning of Cruel, Inhuman or Degrading Treatment*, *in* HUMAN RIGHTS IN CROSS CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS 19, 25 (1995).
[103] Dembour, *supra* note 33, at 58.
[104] An-Na'im, *supra* note, 102, at 25.

the issue, the underlying assumptions held by the States give reason to question whether recommendations issued by observer States under the first category are realistically attainable in the manner suggested.

The second significant aspect of discussions on FGM in the first cycle also emanated from States recognising the association between culture and FGM. However, in contrast to those observer States that used the link between FGM and culture to adopt a strict universalist position, Liberia and Mali used the same association to challenge the reforms suggested by observer States on the practice.[105] The positions adopted by Liberia and Mali in response to recommendations on FGM seems problematic. Whilst neither of the two States has expressly adopted the strict cultural relativist position to justify FGM, it is suggested that the implications of the nature of the responses provided by both States means that its positions are open to the same profound criticism that is subject to strict cultural relativism. One of the most profound criticisms of strict cultural relativism is the possibility of the notion of culture being invoked by oppressive States to justify 'cruel and degrading practices' and to deflect international scrutiny.[106] This criticism can be subject to the positions of Liberia and Mali on the basis that both States used the cultural association of FGM as a basis to not accept the suggested reforms during State reviews.

The third position adopted by States can be described as being a more nuanced approach when discussing the issue of FGM and its association with culture. In total, on twenty-eight different instances, observer States and States under review recognized the significance of implementing incremental methods of reform to help modify cultural norms and attitudes that condone the practice. For instance, some States insisted that changes in the attitudes towards FGM needed to be instigated from within the culture itself. This was to be carried out by incorporating relevant stakeholders such as tribal chiefs, religious leaders, and FGM practitioners in a national dialogue as part of the reform process.[107] It can be noted that the nature of this position was adopted by States in the discussions of all four categories of recommendations.

The nature of this discussion held amongst States affiliates with the moderate cultural relativist position, which aims to implement reforms in a culturally legitimate manner.[108] This

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[105] Mali, *supra* note 56, ¶27; Liberia, *supra* note 84, ¶50.
[106] Massimo Iovane, *The Universality of Human Rights and the International Protection of Cultural Diversity; Some Theoretical and Practical Considerations*, 14 INT'L J. MINORITY & GROUP RTS. 231, 241 (2007).
[107] See examples under recommendation 2 above.
[108] Abdullah Ahmed An-Na' im, *Problems of Universal Cultural Legitimacy for Human Rights*, *in* HUMAN RIGHTS IN AFRICA: CROSS CULTURAL PERSPECTIVES 327, 332 (Abdullah Ahmed An-& Francis M. Deng, eds., 1990).

is because one of the central premises of moderate cultural relativism is the belief that the only way of furthering universal human rights is to ground international human rights norms in cultural values and beliefs.[109] One method of doing this is to undertake an internal discourse within the culture itself with the aim of reinterpreting certain values and beliefs, which are inconsistent with human rights law, to bring them in line with current international human rights standards.[110] The fundamental aspect of such a discourse is that any reforms of cultural beliefs need to be undertaken from within the culture itself, by 'internal actors,' to avoid the appearance of 'dictation by others'.[111] Evidence of suggestions that affiliate this internal discourse were recognised by some States during discussions on FGM, who encouraged a constructive dialogue between relevant stakeholders with the aim of changing sympathetic attitudes towards the practice.

The implications of States adopting a position that is comparable with the moderate cultural relativist position is that they indicate that some States in the UPR process recognise that international norms on FGM are more likely to be observed if such norms are rationalised at local level, so that the content and the goals of the norms are better understood by members of local societies.[112] In this way, by encouraging the involvement of local leaders in the reform process, any suggested reinterpretations of cultural values and beliefs are more likely to be observed by individuals practising FGM.[113] Further, evidence of States recognising the significance of an internal discourse on FGM indicates a substantial commitment by the States involved to ending the practice. This is because implementing policies and strategies with the aim of encouraging an internal dialogue to discourage FGM requires demanding levels of political, social and economic commitment, through initiatives such as public awareness campaigns and engaging in a dialogue with relevant stakeholders. By comparison, acceptance of recommendations by States to enact laws arguably requires less commitment than those committing to reforms based on moderate cultural relativism.

Overall, the findings of this section reveal there was at least a formal consensus amongst States on the elimination of FGM, as the majority of the recommendations were accepted by the States. However, an analysis of the discussions reveals how the States

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[109] Renteln, *supra* note 17, at 116.
[110] Abdullahi Ahamed An-Na'im, *State responsibility Under International Human Rights Law to Change Religious and Customary Law, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 167, 174-175 (Rebecca Cook, ed., 1994).
[111] *See* Abdullahi Ahmed An-Na'im, *The Rights of Women in International Law in the Muslim Context*, 9 WHITTER L. REV. 491, 515 (1987).
[112] *See* L Amede Obiora, *Feminism, Globalization, and Culture: After Beijing*, 4 IND. J. GLOBAL LEGAL STUD. 355, 377 (1997).
[113] *See* An-Na'im, *supra* note 111, at 515.

grappled with the relationship between FGM and culture. Those observer States that used the relationship between FGM and culture to review States from a strict universalist position showed that the presumptions held by States gave grounds to question the attainability of the recommendations issued. On the other hand, the delegates of Liberia and Mali used the same relationship between FGM and culture to explain the continuance of the practice. These positions were open to criticisms that were associated with the strict universalist positions. Finally, some States during the discussions used the association between FGM and culture to adopt a moderate cultural relativist position. This position adopted by States proved to be most fruitful as reforms were suggested in a manner, which recognised the cultural nature of the practice.

VI. Conclusion

The innovative and ambitious nature of the UPR process is primarily based on its egalitarian principles, whereby the aim of the review is to treat all States equally using highly formal and rigid procedures. Moreover, one of the central aims of the review process is its normative claim of universality of promoting and protecting all human rights in the reviews of States' human rights records.[114] As the findings of this investigation the majority of States, either explicitly or implicitly, States, at least formally by accepting the recommendations, adopted positions to reaffirm the jurisprudence on international women's rights, which provides protection against FGM.

However, looking beyond the formal acceptance of the recommendations, an analysis of the discussions held in the first cycle on the issue of FGM provides a more informative narrative on the nature of discussions held amongst the States on the issue. In this way, an analysis of the discussions reveals that despite the wide ranging formal acceptance of the recommendations on FGM, the claim of promoting and protecting the universality of *all* human rights can be challenged. This is because in response to in response to recommendations from a strict universalist position, it was found that States under review were overtly defensive in their responses as they either referred to existing laws and policies that were already in place, or justified the continuance of the practice on cultural grounds. For example, in relation to FGM, whilst the States did not expressly challenge the universality of international norms on FGM from a strict cultural relativist perspective, the implications of the positions adopted by Mali and Liberia were similar to that of the strict cultural relativist position. From this, it became clear that this fundamental aim of promoting universality of all

[114] G.A. Res. 60/251, ¶5(e) (Oct. 3, 2006).

human rights UPR process is not consistently applied by all States during the State reviews in the first cycle of review.

This shows that when States under review did not adhere to the international standards on FGM, the platform of the UPR process was utilised to voice a justification for the deviations of standards from the universal protection of international human rights norms on FGM. Thus, in answering the central question of this investigation, it is clear that the central aims of the UPR process to promote and protect the universality of all human rights norms is not consistently adhered into relation to all human rights issues and concerns, moreover, in relation to FGM the claim universality of women's rights protection was challenged by State representatives at the discussions held by State in the UPR process. More specifically, some member States adopted positions that affiliated with the strict cultural relativist position in not only challenging reforms to align their domestic regulation of FGM with international norms, but also to justify FGM based on cultural and or religious norms.

Paving a middle ground between the strict universalist and strict cultural relativist positions adopted by some States in the first cycle, a significant proportion of States adopted a position during the reviews that resonated with the moderate cultural relativist position during the State reviews. For example, 16 observer States suggested reforms, which can be interpreted as the moderate cultural relativists' position. This is primarily because the nature of the suggested reforms encouraged the implementation of gradual reforms to attitudes sympathetic to the practice, including through a form of internal discourse on FGM. Similarly, on 16 different instances, the responses issued by States under review in relation to FGM indicated appreciation of the reforms from a moderate cultural relativist position. The implications of States adopting a position that affiliated with the moderate cultural relativist positions during the review of States on the issue of FGM is that States not only demonstrated a recognition of the association between FGM and culture, but also suggested to reforms in order to engage in an internal discourse on the issue, as well as implementing awareness-raising programmes, to help discourage the sympathetic attitudes in relation to the practices that are deeply embedded in cultural and traditional norms.

This approach is beneficial because not only have the States acknowledged the relationship between culture and FGM, but have recognised the significance of suggesting reforms that are culturally legitimate to ensure compliance with international human rights norms.[115] Evidence of this was shown in the discussions as where there was evidence of some

[115] An-Na'im, *supra* note 108, at 332. See section 2.3.3.3. (← no clue what this refers to)

s adopting a moderate cultural relativist position, these lines of discussions were more fruitful as States recognised the need to engage in an internal discourse with those that sympathise with the practice to help eliminate it.

There are two main conclusions that can be drawn based on the findings and discussions of this investigation.

To begin with, the UPR process is a peer review nature of the review process means that there will be a unique composition of State participants that will undertake the review for each member State. As the findings of this investigation shed light on the fact that State representatives are willing to use the international platform of the UPR process to challenge the universality of human rights if the State does not share the universal claim in relation to the particular issue. Following from this, the promotion and protection of universal human rights is also contingent on the human rights issue that is the focus of discussions during State reviews. As evident from the findings of this investigation, the universality of women's rights protection against FGM has been implicitly challenged by State representatives during their reviews in the first cycle of the UPR process both in the form of simply not accepting the recommendations, and in some cases, expressly justifying the continuous of the practice on cultural and religious grounds. This in turn means that the nature of discussions during the interactive dialogue stage, that form the focus of all State reviews, will change and adapt depending on the States participating in the reviews and, more importantly, the human rights issue being discussed. Naturally, this means that the extent to which the embedded universalist claims of promoting all human rights norm is met will vary not only between State reviews, but also, within the lines of dialogue in relation to the specific human rights issue itself. In the same way, the extent of the challenge from a degree of cultural relativism will similarly vary depending on the State being reviewed and the human rights issue at stake. Consequently, despite the universalist claims that are embedded in the fundamental aim of the UPR process of promoting universality of all human rights norms, and, indeed, in the name of the process itself, the findings of this project give reason to question the overarching universalist aims and principles on the basis that the nature of each State review is unique in nature as it will be formed depending on the participants of the State review and the human rights issues discussed.

The second conclusion of this investigation emanates from the challenge of strict cultural relativism that was raised by some States in the discussions held on FGM in the first cycle of reviews. The findings of this project not only adds weight to the significance of the cultural relativist critique of international human rights law, but the context in which the

cultural relativist perspective was raised shows how profound the theory is in practice. For instance, the States of Mali and Liberia adopted positions that had implications that were similar to the strictest form of cultural relativism to challenge the universality of human rights on an international human rights platform at the U.N. in a process, which repeatedly asserts its aim of promoting the universality of all human rights. In addition, the strict cultural relativist position was raised in a setting where one may have anticipated that State representatives would have exercised a diplomatic attitude in light of the international and political pressure that it imposed on the UPR process due to its inherent political nature.

Therefore, despite the repeated assertion of the universalist aims of the UPR process, and the review process being subject to an international spotlight, it was striking to note that States expressly challenged reforms to comply with international women's rights on an international platform such as the UPR process, rather than remain silent on the issue. This gives reason to suggest that some States perceive the UPR process to be more than a monitoring mechanism, and rather a platform to express the discontent with some international human rights norms in relation to women's rights issues.

Leading from the implicit challenge from a strict cultural relativist position on the platform of the UPR process, what was also striking to note was that the States themselves were not held accountable for their challenge to the universality of international women's rights. This silence by the observer States in response to an implicit challenge to the universality of human rights norms from a strict cultural relativist perspective gives reason to question whether the States participating in the reviews are committed to promoting the universality of all human rights, as provided in the founding resolution of the review process. More fundamentally, if a challenge from a strict cultural relativist position is expressed in a sustained manner in the second cycle and beyond, and the observer States remain silent and refrain from holding the State to account, then this could result in having wider ramifications to the universality of women's rights protection. This is primarily because an unchecked challenge to the universality of women's rights on an international platform such as the UPR process, may in fact undermine the universality of the particular women's rights obligations when raised on different platforms, whether that be on UN treaty bodies, advocated by NGOs or in the national jurisprudence.

These conclusions provide a significant contribution to enhancing the understanding of how the UPR process operates in practice by providing a unique insight into of the manner in which discussions are undertaken during State reviews. Whilst these conclusions can be significantly grounded on the findings of this project, what cannot be overlooked is that one

of the obvious limitations of this study is that it focuses on only one out of the fifty-two human rights issues that were raised in the first cycle of the UPR process. It cannot be denied that the UPR process is a mechanism that will produce a colossal number of documents that will inform the jurisprudent of international human rights law. As a result, a full understanding of the UPR process is not the work of one project, but rather an on-going project of research in itself. Nevertheless, the findings of this investigation are significant because they provide reasons to suggest that there is a serious and significant challenge being raised to the universalist claim of the UPR process from a cultural relativist perspective during State reviews in the first cycle of the process. It has been argued in the literature that the outcomes of the UPR process can potentially be significant enough to be considered as contributing to the international human rights law itself. However, if such gravity and importance is given to those outcomes where States show evidence of consensus on international human rights protection, then similar grave concern should be raised when States challenge the universality of international human rights norms on the UPR process.

On this basis, it seems essential to undertake further exploration of the UPR process with a particular focus on the universalist claim of the review process, and the significant and serious challenge raised by States from a cultural relativist perspective to the universality of other international human rights norms. If nothing else, this is particularly necessary as a sustained and unchecked challenge to the universality of international human rights norms on an international platform like the UPR process could potentially have wider ramifications for the international human rights infrastructure itself. Such research seems particularly apt as the second cycle of this innovative review process which will complete the second cycle of review this year.