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MASTERARBEIT

Titel der Masterarbeit

„The Universal Periodic Review and the Anti-
Bribery Convention:
Peer reviews and their effectiveness in pushing legislative
reform“

Verfasserin

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angestrebter akademischer Grad

Master (MA)

Wien, 2013

Studienkennzahl lt. Studienblatt:

A 067 805

Studienrichtung lt. Studienblatt:

Individuelles Masterstudium:
Global Studies – a European Perspective

Betreuerin / Betreuer:

Dr. Jan Pospisil



universität
wien

UNIVERSITÄT LEIPZIG

MASTERARBEIT / MASTER THESIS

Titel der Masterarbeit /Title of the master thesis

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Foreword

This study is indebted to the support and guidance of several people, whose insights have gone a long way into transforming an idea into a thesis. I would like to express my great appreciation for the encouragement provided by my supervisor, Dr. Jan Pospisil, who helped nurture and shape my original concept, and showed great patience with the many transformations it underwent before emerging in its present form. I would also like to thank all professors as well as non-teaching staff who have guided me at the Universities of Vienna and Leipzig, during my studies in the Erasmus Mundus Global Studies Programme. Finally, I would also like to convey here my gratitude to friends and family for their support and forbearance throughout this endeavour.

Abbreviations

ABC – Anti-Bribery Convention

CAT – Convention Against Torture

CEDAW – Convention to Eliminate All Forms of Discrimination Against Women

CERD – Convention on the Elimination of All Forms of Racial Discrimination

CHR – Commission on Human Rights

CRC – Convention on the Rights of the Child

CRPD – Convention on the Rights of Persons with Disabilities

HRC – Human Rights Council

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICRMW – International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families

ICPED – International Convention for the Protection of All Persons Against Enforced Disappearance

OECD – Organisation for Economic Co-operation and Development

OP – Optional Protocol

UPR – Universal Periodic Review

Abstract

This study is an exploration of peer reviews as a tool in international relations, and their effectiveness in actuating legislative reform. The two peer reviews chosen for the study are the Universal Periodic Review conducted by the UN Human Rights Council and the Anti-Bribery Convention conducted by the Organisation for Economic Co-operation and Development. To delve into greater depth in the subject, I chose case studies to analyse the workings of both peer reviews. A chapter on methodology explains the reasoning behind the choice of case studies, and also discusses the logic of the analysis which is to follow in the main body of the study. Three case studies are chosen to 'represent' each peer review: Japan, Korea and South Africa for the Universal Periodic Review, and Germany, Switzerland and the United Kingdom for the Anti-Bribery Convention. In a later chapter, these roles will be switched so that the performance of all case studies be analysed for the other peer review as well. By the end, the study will have demonstrated six case studies for each peer review. The main objective of the study is to find the factors that drive effectiveness in both peer reviews, and to consider which of these factors can be used to enhance the performance of the other peer review. The chapter on methodology discusses the use of the contentious word 'effectiveness' in this context. In conclusion, the study finds that the Anti-Bribery Convention has some advantages in its enforcement mechanisms, particularly by its use of questionnaires and highly specific recommendations, while the Universal Periodic Review functions more as a tool of diplomacy.

Abstract

Diese Studie untersucht die Rolle von peer reviews in internationalen Beziehungen und ihre Effizienz in der Ausführung von legislativen Reformen. Die zwei peer reviews die als Basis für diese Studie ausgewählt wurden, sind der Universal Periodic Review des UN Human Rights Council und die Anti-Bribery Convention der Organisation for Economic Co-operation and Development. Um das Thema tiefgründiger zu behandeln, wurden Fallstudien herangezogen, welche die Funktionsweise der peer reviews genauer beleuchten sollen. Im Kapitel „Methodologie“ wird die Entscheidung für Fallstudien begründet und die Basis der darauffolgenden Analyse präsentiert. Es wurden jeweils drei Fallstudien pro peer review ausgewählt, um diesen zu repräsentieren: Japan, Korea und Südafrika für den Universal Periodic Review und Deutschland, Schweiz und Großbritannien für die Anti-Bribery Convention. In einem der Kapitel werden die Rollen vertauscht, sodass die Performanz aller Fallstudien auch für den jeweils anderen peer review analysiert wird. Das Hauptaugenmerk dieser Studie liegt sowohl auf der Analyse jener Faktoren, die zur Effizienz der beiden peer reviews beitragen, als auch auf der Untersuchung welche dieser Faktoren zu einer Verbesserung der jeweils anderen peer reviews beitragen könnten. Das Kapitel „Methodologie“ bespricht dabei die umstrittene Rolle des Wortes „Effizienz“ in diesem Kontext. Zusammenfassend kann festgehalten werden, dass die Anti-Bribery Convention einige Vorteile in ihren Durchsetzungsmechanismen aufweist, was besonders durch ihre Verwendung von Fragebögen und die Formulierung von spezifischen Empfehlungen deutlich wird. Hingegen scheint der Universal Periodic Review eher eine diplomatische Rolle zu erfüllen.

Introduction

Peer reviewing, as a mechanism for quality control, is ubiquitous from academic journals to international organisations. It is the second with which this study concerns itself. For this thesis, the peer reviewing is the practice whereby states in an international organisation assess the performance of a state under review, and make recommendations with the aim of helping the reviewed state improve that performance or accede to established norms.¹ Crucial to this set-up is the principle that the reviewer and the reviewed stand on an equal footing: it is intended to be an assessment of peers, not of authority and subject. The positions of the reviewer and reviewed are fluid and will inevitably be exchanged at some point, a detail which adds some complexity to the intricacy already present in relations within international organisations. This study will compare the workings and effectiveness of two such peer reviews: the UN Human Rights Council's Universal Periodic Review and the Organisation for Economic Co-operation and Development's Anti-Bribery Convention.

Aside from the commonality in the basic concept, the two peer reviews differ in scope and intention. The Universal Periodic Review (UPR), conducted by the Human Rights Council, was created in 2006 by the same resolution of the United Nations General Assembly which created the Council itself.² As the resolution indicates, the purpose of the review is to inspect the fulfilment of human rights obligations by states, and all 193 member states of the UN General Assembly are subject to it.³ With a rather somewhat smaller membership of 34

1 Pagani, Fabricio (2002): Peer Review As a Tool for Co-operation and Change, *African Security Review*, 11:4, pp. 15.

2 OHCHR.org: Basic Facts About the UPR. URL: <<http://www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx>>

3 OHCHR.org: Resolution Adopted by the General Assembly. 60/251.

states, the Organisation for Economic Co-operation and Development (OECD) began a peer reviewing mechanism as part of its Anti-Bribery Convention in 1999. The Convention has been adopted by the 34 member states of the OECD as well as six non-members.⁴ The aim is that participating states should adopt national legislation to criminalise bribing foreign public officials.⁵ This means that the Anti-Bribery Convention has both a more specific purpose as well as a narrower outreach than the UPR. How does this impact their relative effectiveness?

Answering the question, which is the main concern of this thesis, requires an exploration of what constitutes effectiveness. The UPR and the ABC follow a structure that is broadly similar: the state under review is allowed to present its case in the form of a report, following which the report will be externally assessed by civil society organisations as well as other states, finally leading up to a list of recommendations to the reviewed state. The first cycle of the UPR took four years, reviewed all 193 member states of the UN General Assembly, and was completed in 2011. The second cycle, which began in May 2012, is now ongoing. The ABC is presently in its third cycle, which began in 2009 and is foreseen to continue up to 2014. In both reviews, each subsequent cycle is intended to scrutinise the progress made by the reviewed country on the recommendations provided during the previous cycle. While the intricacies in the two respective reviews – which are several – will be delved into in a later section, the basic structure of each is comparable. Since the conclusion of both reviews includes a list of specific recommendations, ‘effectiveness’ shall be taken to mean the

4 OECD.org: Anti-Bribery Convention. URL: <www.oecd.org/daf/anti-bribery/oecdantibriberyconvention.htm>

5 OECD.org: Entry into force of the [Anti-Bribery] Convention. URL: <www.oecd.org/daf/anti-bribery/anti-briberyconvention/oecdanti-briberyconventionentryintoforceoftheconvention.htm>

compliance to or fulfilment of those recommendations. For this, crucial primary sources include second and third cycle country reports, which address the state's responses to prior recommendations. It is an acknowledged idea that open availability of country reports provides an impetus to the country's implementation of the recommendations, as a form of peer pressure.⁶ As a result, primary resources on the subject are abundant: both the UPR and the ABC continually publish documents related to the country reviews on their respective websites. The central question that this thesis will seek to answer, then, is this: how effective are these two peer review mechanisms, the UPR and the ABC, in comparison with each other? To what can we attribute the differences in their effectiveness, if such differences are to be found?

In comparing two peer reviews with such a different scope – 193 countries as opposed to 40 – the central question of this thesis risks doing some injustice to the UPR, as its effectiveness in the non-OECD countries is not under consideration. For simplicity, it must be clarified at the outset that the outcome of the research in this thesis cannot be held as an indictment of the UPR as a whole: it is a study of the effectiveness of the mechanism, using its performance in six case studies – which are also party to the OECD Anti-Bribery Convention – as an indicator. In the next chapter, the scope of the study will be explained further.

The UPR and the ABC are two of the largest international peer reviewing mechanisms concerned with national policy-making and implementation.⁷ But they are not alone; the New Partnership for African Development (NEPAD) has conducted the African

6 Pagani 2002: 16

7 UNCSD2012.org: Lessons from the Peer Review Mechanism. URL: <<http://www.uncsd2012.org/content/documents/Issuesbrief.pdf>>

Peer Review Mechanism (APRM) since 2006. With its emphasis on human rights and development, and covering nearly as many states as the ABC, the APRM appears to be a prime candidate for analysis in a study such as this one. Yet it does not feature. The reason for this is twofold: a relative dearth of primary sources and the implied lack of engagement on the part of the involved states. As aforementioned, the outcome reports of the UPR and the ABC are publicly accessible on the websites of the Office for the High Commissioner for Human Rights (OHCHR) and the OECD respectively. In principle this should be true of the APRM as well, as it publishes some key documents on its website, but the country reports themselves are missing in most cases. The last document uploaded was published in 2011, and mentions that peer reviews were conducted for several members of the African Union, without providing specific data on the outcome of the reviews.⁸ This makes it difficult to establish the effectiveness of the mechanism with any certainty, as the specific recommendations made cannot be accessed, nor the state's response to them. As a result, this study relies on the two peer reviews that have both a broad international outreach as well as sustained engagement from participating countries.

This study will begin by introducing the two peer review mechanisms in brief, including their histories and their working process. The differences in their functioning, although not the focus of this section, will be seen shortly here. The second chapter, on methodology, will detail how a comparison is being conducted between these two mechanisms. Reciprocal comparison, the method chosen for this study, will be explored in

8 APRM-AU.org: African Peer Review Mechanism Annual Report 2011. URL: <http://aprm-au.org/sites/default/files/APRM_AnnualReport_ENG_LR.pdf>

detail in this chapter, along with case studies and the process by which they were chosen. Three case studies are chosen to 'represent' each of the two reviews, and their performances are discussed in the main body of the study through the examination of primary sources. In the fifth chapter, the case studies are 'reversed', to assess their performance in the review that they were not originally chosen as representatives of. Eventually, all six case studies will have been evaluated for their performance in both peer reviews. In conclusion, the strengths and weaknesses of the two peer reviews are discussed.

The Universal Periodic Review

The Human Rights Council (HRC), which conducts the UPR, is a relatively recent development in a history of United Nations initiatives surrounding human rights. Supported by the Office of the United Nations High Commissioner for Human Rights (OHCHR), the HRC was established in 2006. It replaced the former Commission on Human Rights (CHR), which stopped functioning in 2005. A significant criticism of the CHR was that it had become too politicised and too ineffective, as human rights violators were getting impunity by being elected to the Council.⁹ The HRC is smaller, with 47 members as against the CHR's 53, and all its members together act as the UPR Working Group. The Working Group's two-week sessions take place thrice per year; in the first cycle, 16 countries were reviewed in each session, but the number has been brought down to 14 in the present cycle. Reviews are conducted on the basis of three main sources: 1) a report compiled and submitted by the State itself, 2)

⁹ Smith, Karen E. (2011): *The European Union and the Review of the Human Rights Council*. Policies Department, European Parliament, pp. 4.

reports with information provided by independent organizations and individuals with human rights expertise, including other UN entities, and 3) information from NGOs and national human rights organisations.¹⁰ These supporting documents are made publicly available on the website of the Office of the High Commissioner for Human Rights (OHCHR.org). The final outcome of each state's review is the Working Group's report, including observations and recommendations by other states, and information on the reviewed state's response to these recommendations. The recommendations are often categorised under two or three headings: the first consists of those which enjoy the support of the reviewed country, the second of those to which the country is yet to respond, and the third (a category which is not always present) of recommendations which the country rejects or deems redundant. This report is also made available on the OHCHR website. Wherever possible, the Midterm Implementation Assessment is made available as well; this, however, is a voluntary report, and therefore is infrequently submitted by states. The Geneva-based NGO UPR Info also maintains a comprehensive database of all relevant public documents, on its website UPR-info.org. The website has also developed a remarkably user-friendly interface to search for recommendations from any specific reviewing country or bloc to any specific country under review, making it easier to track trends in international relations in the UPR. Other secondary sources include studies commissioned by the European Union, United Nations Development Programme, and various political foundations.¹¹

10 OHCHR.org: Basic Facts About the UPR.

11 Smith 2011

Karimova, Takhmina (2013): UPR in the CIS Countries – Regional Trends, Analytical Report. UNDP.

McMahon, Edward R. (2012): The Universal Periodic Review – A Work in Progress. Friedrich Ebert Stiftung.

The OECD Anti-Bribery Convention

The Organisation for Economic Co-operation and Development (OECD) was established in 1961, and has its headquarters in Paris, France. With its 34 member countries, of which a large majority are European, OECD is associated with many of the world's powerful economies. As the OECD website states, peer review has been used by the OECD since the organisation's beginning.¹² The Anti-Bribery Convention (ABC), more specifically, can be traced back to 1997 when it was adopted by the 34 member states of the OECD. Since then, it has been adopted by six non-member states as well – Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa.¹³ The purpose behind the convention is to establish legally binding standards in participating states, to criminalise bribery of public officials in international trade. The peer review is conducted by a Working Group on Bribery, comprising all the OECD member states. The review, which is currently in its third phase (or cycle), is facilitated by two countries acting as lead examiners in each cycle. These two countries are chosen in consultation with the country under review. Unlike the UPR, the ABC does not invite civil society organisations to participate formally in the review. The first phase of the ABC examines whether the legal framework of the country under review is in compliance with the standards of the Convention. The second phase examines the structures established by the country under review to the rules of the ABC, and assesses their practical application. The two countries acting as lead examiners undertake a week-long on-site visit to the country. The third phase, which is currently ongoing, also features an on-site visit, albeit a shorter one.

12 OECD.org: Peer Review. URL: <<http://www.oecd.org/site/peerreview/>>

13 OECD.org: Anti-Bribery Convention.

The country under review is expected to respond to an evaluation questionnaire, eliciting information on the implementation of prior recommendations. All these documents are available online, and are used as primary sources for this study. Like the UPR, the ABC also has a small pool of secondary sources. Notable among them is an annual progress report by Transparency International, in which the enforcement of the Convention in the participant states is evaluated. Other secondary sources include various academic papers on anti-corruption movements and international trade, which refer to the ABC and its influence in the field. Given that the ABC has been operational since 1999 in several states, the pool of secondary sources is also correspondingly wide.

With a view to laying a foundation for this study, the next chapter will provide an explication of the methodology used throughout the analysis. While the introduction has attempted to describe the scope of the study, the methodology chapter will discuss this in further detail, explaining how the scope was moulded and why the six case studies were chosen. Simply put, the aim behind the methodology chapter will be to form the 'lens' through which the rest of the study might be viewed.

Methodology and Case Studies

The aim of this chapter on methodology is to address the key question of methodology: how is the path drawn from observation to conclusion? In some respects, the contents of this chapter might appear premature, in the sense that they describe the reasoning behind the observations that have not yet been explained. At the same time, this is necessary in order to clarify what is being observed, and the reasons behind the chosen scope of study. As a result, the second and equally important aim of this chapter is to define the scope of this study, the process by which this scope was shaped, and the sources that underlie the observations made throughout the thesis.

At the risk of becoming tautological, it could be said that the scope of this study was dictated by the topic chosen for it. Of the two peer reviews, the Universal Periodic Review is the one with the larger purview: it involves 193 states. The Anti-Bribery Convention comprises the 34 member states of the OECD, as well as six others, making a total of 40. All 40 of these are also party to the UPR. As a result, the widest scope possible for this study would be the 40 states which overlap between the UPR and the ABC. Needless to say, 40 states is an impracticable number for a study of this modest scale. It became apparent that a case study would be the most feasible model for this study. Case studies, however, have an inherent set of flaws that cannot be avoided: the most obvious of these is that findings of a case study are true for the case study itself, and not necessarily extendible to other cases. In order to minimise this failing, this study formulated a system to track the UPR and ABC recommendations made to each state in its first cycle, and compared them against their

respective second cycle reviews. With this system, which is discussed in more detail later in this chapter, I was able to identify each participating country's level of engagement with each review. The aim of this exercise was to see if there were any cases with a significantly divergent level of engagement in each review, or with notably more effective implementation of the recommendations of one review rather than the other. This exercise also required a critical look at the recommendations themselves, especially in the case of the UPR: do all recommendations culminate in simple "yes/no" answers to implementation?

In 2012, Argentina received 118 recommendations in its second UPR cycle.¹⁴ A remarkable 34 of these begin with the verb 'continue': "Continue to strengthen laws and legislation which relate to human rights", for instance.¹⁵ For a study on effectiveness, recommendations like these are a real challenge. Evidence of their implementation is impossible to deduce with any certainty from subsequent UPR reviews. Consider, in sharp contrast, recommendations such as these: "Ratify the new optional protocol to the Convention on the Rights of the Child".¹⁶ Stipulations urging the ratification of conventions are an example of recommendations with clear outcomes: a repetition of the same recommendation in the next UPR cycle would conclusively indicate a failure to comply on the part of the reviewed state. In a study evaluating the first cycle of the UPR, Edward McMahon proposed a theoretical division of UPR recommendations into five categories:

14 UPR-info.org (2012): Argentina, Recommendations and Pledges. Second Review. URL: <http://www.upr-info.org/IMG/pdf/recommendations_and_pledges_argentina_2012.pdf>

15 UPR-info.org (2012): Argentina, 99.5

16 UPR-info.org (2012): Argentina, 99.1

1. Recommendations that call for seeking or sharing information on best practices, and recommendations which request assistance;
2. Recommendations urging a state to continue its present efforts;
3. Recommendations inviting a state to reconsider or review its actions;
4. Recommendations calling for general actions, such as to ‘take measures towards’, or to ‘promote’ a certain cause;
5. Recommendations suggesting the adoption of a specific measure.¹⁷

McMahon’s classification, published in 2012, has since been adopted by several studies on the UPR, including a 2013 study commissioned by the United Nations Development Programme.¹⁸

The ratification of treaty bodies, as seen in the example of “Ratify the new optional protocol to the Convention on the Rights of the Child”, fall squarely into the fifth action category. Of all five categories, this is the only one whose outcome is clearly indicated within the framework of the UPR review cycles: if a state fails to comply with a recommendation from this category, it is repeated in the state’s subsequent review, and thus indicates the state’s failure to comply with the recommendation.¹⁹ This makes ‘action category five’ the only group of recommendations whose success or failure can be gauged by UPR records alone. To check a state’s success in implementing other types of recommendations requires reference to a vast

¹⁷ McMahon 2012: 14-15

¹⁸ Karimova 2013: 24

¹⁹ This conclusion assumes that the failure of the state to ratify the treaty will be noted and pointed out by at least one reviewing state during the next cycle. The assumption, however, is a fairly safe one given that the Working Group is expected to prepare a ‘Compilation of UN Information’ document before each review, including information on which UN human rights treaties are yet to be ratified by the state under review.

body of secondary sources, ranging from country-specific news databases to academic studies. Given that the interest of this present study lies in the efficiency of peer reviews in pushing legislative reform, it is only ‘action category five’ recommendations from the UPR which are relevant. Recommendations in the Anti-Bribery Convention, by contrast, consist exclusively of specific measures. As discussed in the introduction, the aim of the Anti-Bribery Convention is far more specific – the introduction and implementation of anti-bribery legislation by participating states – than that of the UPR. By restricting the study to only those recommendations from the UPR which advocate concrete measures, we also automatically achieve a thematic equivalence between the two peer reviews under observation: now the recommendations observed in both cases are roughly parallel and therefore comparable.

Having identified a category of recommendations that would help to identify case studies, I had to go through the UPR recommendations of all 40 states that overlap between the UPR and the ABC, to note the relevant ‘action category five’ recommendations. It may be useful to explain the sources consulted at this stage. All documents related with the UPR process, as mentioned in the introduction, are uploaded on the public website of the OHCHR. Final reports of all states in each cycle, including recommendations made to them, are therefore publicly available. In addition to this primary source, the NGO UPR-Info also uploads reports for each state with recommendations listed and grouped by theme. Using a combination of these two sources, I formulated a database of the recommendations made to each country in the first cycle of its UPR. The states which – at the time of writing – had not had a second UPR review cycle had to be omitted from the exercise, as the previously

explained system of comparing second cycle reviews to first cycle reviews could not be applied to them. In the absence of a second cycle review, the only indications of implementation would be mid-term assessment reports or external sources. Mid-term reports, which can be prepared by a state to discuss its experience in implementing UPR recommendations, are voluntary. As a result, few states opt to submit these. External sources, on the other hand, are diverse and general – they might range from local media sources to international academic ones, or a combination of both. The difficulty that this would pose, by necessitating a verification of each source’s credibility, seemed to outweigh the benefits. By considering only states which had completed their second UPR review, the number of states under consideration was brought down to 17.

At this point, identifying the case studies required taking into account the countries’ ABC records. Country reports are published by the OECD on its public website, as are mid-term assessments and periodic evaluations of the state’s engagement with the Convention. A wealth of data is therefore available in the form of primary sources. An important secondary source can be found in studies conducted by NGO Transparency International, which has conducted research corruption and the ABC’s impact on it worldwide. In an annual report titled “Exporting Corruption?”, a 2012 progress report on country enforcement of the ABC, Transparency International classified participating countries into four categories of enforcement: Active, Moderate, Little and No enforcement. Transparency International’s definition of these categories is based on the number of ongoing cases or investigations against foreign bribery in the state, with substantial sanctions levelled in cases where guilt is proven.

The argument is that a number of ongoing cases and investigations acts as a deterrent against foreign bribery, as against states with no present investigation, which have no deterrent against the act. The premise is problematic in that it does not allow for the (unlikely but possible) scenario of there not being any foreign bribery to investigate or sanction. Hypothetically, a state which had no cases of foreign bribery and therefore no investigations or cases would be categorised as a state with 'No enforcement' on Transparency International's scale. The study acknowledges this, but adds that the likelihood is limited.²⁰ The Working Group which conducts the Anti-Bribery Convention peer review has also expressed scepticism in the hypothetical utopian situation. A report on Japan includes the Working Group's criticism that Japan had no ongoing cases on investigations in foreign bribery, despite widespread allegations of such cases in the press, and despite Japan's economic activity in "some countries believed to be at high risk for soliciting bribes".²¹ There is certainly some positive value to the categorisation: states with 'Active enforcement' can indisputably be said to have a high level of engagement with the ABC, as the legislation recommended by the ABC can be seen implemented in practice. According to Transparency International's findings, seven states accounting for 28% of world exports can be categorised under 'Active enforcement'. These are Denmark, Germany, Italy, Norway, Switzerland, United Kingdom and United States.²²

For the present study, comparing the ABC with the UPR and vice versa, the most relevant of these seven states are Germany, Switzerland, and the United Kingdom, as these

20 Heimann, Fritz and Dell, Gillian (2012): *Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention Progress Report 2012*. Transparency International. pp. 5.

21 OECD Anti-Bribery Convention (2005): *Japan, Phase 2*. pp. 5.

22 Heimann & Dell 2012: 6

three states have all undergone two cycles of the UPR. We can therefore reliably compare their levels of engagement with the two peer reviews, without the risk of significantly unequal data on either one. Basing the study on only these, however, would make the study heavily inclined to consider the ABC as the 'norm' against which to compare the UPR. Effectively, it would consider the states' engagement with the ABC as a positive standard and measure their performance with the UPR against their 'active enforcement' of ABC recommendations. This is theoretically flawed, and unjustifiable, as indeed the converse would be. The only solution, therefore, would be to identify a converse case with a high level of implementation of the UPR recommendations, and incorporate it as a case study regardless of its level of engagement with the ABC. Three examples of this type of case are found in Japan, South Korea and South Africa. Notably, six of the seven states with 'Active enforcement' of the ABC are from Europe. The three chosen as relevant to this study – Germany, Switzerland and the United Kingdom – are all from Europe. The decision to choose a balancing set of cases from outside Europe to represent UPR engagement was not only born out of a desire for geographical diversity, but also to acknowledge that geographical location is significant in the UPR. The 47 states of the Working Group in the UPR are chosen according to geographical regions, and most studies on the UPR have commented on geographical dynamics in the review. In a study published by the Friedrich Ebert Stiftung, Edward McMahon noted that acceptance rates of recommendations are much higher for countries of Africa and Asia, compared to 'Western European and Others Group' (WEOG), 'Eastern European Group' (EEG) or the 'Latin American and Caribbean Group' (GRULAC).²³ With this consideration in mind, Japan, South Korea and South Africa

23 McMahon 2012: 21

become interesting case studies to compare against Germany, Switzerland and the United Kingdom.

As demonstrated, the choice of these six case studies comes at the end of a long deliberation process, which included the formulation of my own analytical model based on a few existing studies. Like any model, it is representative but partial: it cannot pretend to be the whole reality. It would be fair to point out the limitations of this model at the outset. The UPR is a review encompassing 193 participant states, but only 40 of those overlap with the OECD Anti-Bribery Convention, and as a result the UPR records of 153 states were not taken into account at any point in this study. Doing so would have meant removing the ABC from the equation, as it is not applicable to those states, and that might still have resulted in some form of study on the UPR, but it would nevertheless be a different subject. The central premise of this study is that the two peer reviews, the UPR and the ABC, have lessons to learn from each other. Therefore, while the UPR involvement of 153 states is missing from this study, it is crucial to see how the UPR performs in comparison to another peer review with states that participate in both. Another limitation in the UPR representation is the fact that only 'action category five' recommendations, which advocate specific measures, are considered. Studies show that these are only around 35% of all recommendations,²⁴ as opposed to the ABC, where all recommendations fit this description. This, however, is a criticism not only of this study but of the UPR itself. It would be highly optimistic to expect the fruition of recommendations with no explicit outcome – and this will be discussed in subsequent chapters, as the line between 'specific measures' and other types of recommendations is not

²⁴ McMahon 2012: 15

always distinct. The most 'specific' of measures in the UPR recommendations typically constitute the signing or ratification of international legal instruments, such as the Convention Against Torture (CAT) or the International Covenant for Economic, Social and Cultural Rights (ICESCR). In some cases, however, these treaty bodies coincide with the interests of the ABC – for instance, the UN Convention Against Corruption (UNCAC). The first review of the ABC urged the ratification of UNCAC by all participant states. In a hypothetical situation where a state were recommended to ratify the UNCAC in both its UPR as well as ABC review, how are we to decide which review – or indeed, a combination or neither – was 'successful'? This is a quandary that will come into discussion later in this study as well.

The final limitation of the study is in its shifts between ratification and implementation, as a test of the peer review's effectiveness. The difference between ratification and implementation is great, and the choice made for this study was one of practicability. For both peer reviews, this study takes as the unit of effectiveness that which can be observed within its own reports. In the Universal Periodic Review, that is ratification: recommendations refer ratification of various treaties more often than enforcement, and it is not possible to judge the extent of enforcement of a treaty from a state's second cycle review. In the Anti-Bribery Convention, by contrast, the emphasis is very much on enforcement. Ratification of the Convention has ordinarily been achieved by the end of Phase 1, and subsequent phases are aimed solely at increasing implementation and enforcement of the Convention, in the form of cases and investigations. As a result, this study concentrates on ratification as a measure of

effectiveness in the UPR, but on enforcement as a measure of effectiveness in the ABC.

Despite the limitations, I believe that this study will continue to have value as a comparison of best practices between two well-established peer reviews. The objective will be to identify effectiveness-maximising factors in either peer review, which could realistically be of benefit to the other. The fact that both peer reviews are so different in scope and theme suggests that their methods are also correspondingly dissimilar; rather than taking this as only an 'alienating' factor, it could also be taken to suggest that each peer review may have something to learn from the other. The two following chapters will discuss the two peer reviews in detail, individually, using the case studies to illustrate their workings. For the purpose of clarifying the context in which each review operates, the two following chapters will concentrate on only one peer review at a time, rather than discussing both simultaneously.

Universal Periodic Review

The Universal Periodic Review is quite a young peer review, having begun in 2008. In March 2006, the UN General Assembly – with 191 member states at the time – passed resolution 60/251, which created the Human Rights Council. The same resolution also created the Universal Periodic Review, as a platform for states to share their own experiences and challenges, and offer suggestions for the improvement of human right situations in other states. The UN General Assembly’s membership has since risen by two – with the entry of Montenegro in June 2006 and of South Sudan in July 2011 – and the UPR is now applicable to 193 states in all. The Human Rights Council, consisting of 47 member states, performs the role of the Working Group for the UPR.

The Human Rights Council is a replacement for the Commission on Human Rights, which was discontinued in 2006. The membership of the Council is secured by elections in the UN General Assembly, with members serving three years and no more than two consecutive terms. Allocation of the membership is geographical in basis: African and Asian states command 13 seats each, while the ‘Latin American and Caribbean’ group has 8, ‘Western Europe and others’ have 7, and Eastern Europe has 6.²⁵ This regional group system is similar to that of the HRC’s predecessor, the CHR. Elections to the HRC, however, being held in the UN General Assembly are far wider in scope than those of the CHR: members of the CHR were elected by members of the UN Economic and Social Council (ECOSOC). ECOSOC itself has 54 member states, elected from the UN General Assembly for three year

25 OHCHR.org: Membership of the Human Rights Council. URL:
<<http://www.ohchr.org/EN/HRBodies/HRC/Pages/Membership.aspx>>

terms. This convoluted process has been simplified somewhat by the structure of the HRC, which is a subsidiary of the UN General Assembly directly. The discontinuation of the CHR came after multiple parties expressed dissatisfaction with the body: developed countries objected to the fact that countries with human rights violations could nevertheless secure election to the Commission, while developing countries considered the Commission “too politicised”.²⁶ Pragmatically, it must be noted that the Human Rights Council is not entirely exempt from either of these issues. Karen Smith points out that Council members including Azerbaijan, China, Cuba, Pakistan, Russian Federation and Saudi Arabia have attached criticism against their human rights records, although other states with criticised human rights records like Iran, Venezuela and Belarus have failed in their bids to attain membership of the Council.²⁷ As for the second charge, that of politicisation, Smith’s paper sheds an interesting light on that too. A study of the European Union and its relations with the Human Rights Council, Smith’s paper briefly discusses bloc politics in the Universal Periodic Review, and seems to criticise the EU for being ineffective as a bloc in comparison to GRULAC or the OIC.²⁸

Despairing against the politicisation of the HRC or the UPR would be ineffectual at best. Instead, it is fruitful to observe how the politicisation reflects upon the workings of the UPR process. Smith’s study, which was published by the European Parliament, shows that influence in the HRC is a matter of some concern to the EU. In cases where the EU is unsure of garnering enough votes in the Council to pass a resolution, the general tendency is to ‘save

26 Smith 2011: 4

27 Ibid: 34

28 Ibid: 14

face' by not proposing the resolution formally at all.²⁹ If the existence of bloc pressures is so visible in the workings of the HRC, it cannot fail to have an impact upon the EU's engagement with the UPR process. McMahon's research shows that states in the Western Europe and Others Group (WEOG) made by far the most recommendations during the first cycle of the UPR – over 40% of all recommendations made – and that it made relatively more recommendations to states outside its region than other regional groups did.³⁰ Africa and Asia in particular made over 40% of their recommendations to states within their regions. Not only the quantity but also the type of recommendations is significant: McMahon points out that the WEOG, Eastern European Group (EEG), and Group of Latin American and Caribbean Countries (GRULAC) emphasised action categories 4 and 5. To refresh the terminology introduced in the chapter on Methodology, category 4 refers to recommendations that advocate general measures (such as 'promote' a certain issue or 'take measures towards' some end), while category 5 refers to specific actions (such as the ratification of a treaty). In an interesting insight, McMahon shows that recommendations from Asia and Africa incline predominantly towards categories 2 and 4, where category 2 refers to recommendations urging a state to continue its present efforts. The premise and outlined purpose of this thesis incline towards observing states as receivers of recommendations, rather than making them – at the same time, insights like McMahon's are a useful reminder of the regional dynamics that shape a state's role in the UPR, both as a state under review and as a state making recommendations. Japan and South Korea, for instance – which are two of the case studies to be considered in

29 Smith 2011: 13

30 McMahon 2012: 16-17

this chapter – are both from the Asian group, and McMahon’s findings may elucidate their respective UPR experiences in that light.

Since the UPR began in 2008, all 193 members of the UN General Assembly have been reviewed at least once. As noted earlier, the first cycle took four and a half years, and ended in 2012. For each state under review, three HRC members are assigned as facilitators – after being chosen by drawing lots – and these are called the troika. The UPR Working Group – comprising all members of the HRC – conducts the reviews in two-week sessions, thrice a year. A review is based on three reports: one made by the state under review (a national report), one by independent human rights groups or UN agencies, and one by other ‘stakeholders’ such as national human rights institutions and NGOs. Any UN member state – not necessarily a member of the HRC – may submit questions for the state under review, in advance, to the troika. The troika act as facilitators, by grouping questions and issues to make the discussions more concise, and submit the questions to the state under review at least ten working days prior to the review. The troika is also responsible for drafting a summary of the state’s adherence to human rights treaties, before the review. The review itself – which takes three hours for each state – is in the form of an interactive dialogue between the state under review and the Working Group. The state under review is expected to present its national report, and to answer questions posed by other states. After the three hour session, the troika prepares a report on the behalf of the Working Group, with the participation of the state under review as well as the HRC Secretariat. This report, which is called the Working Group Report, includes a summary of the review session and the dialogue within it, recommendations

made to the state and voluntary commitments (if any) made by the state. The state under review then responds to the recommendations, indicating which ones it accepts and which ones it does not. It is also possible to make a general response, and in any case it is not binding to provide a response at all.

Japan

Japan had its first UPR cycle in May 2008. 27 recommendations were made, to which Japan made no response in the Working Group report in terms of acceptance or rejection; an addendum, however, notes that Japan accepted 14 of these recommendations, rejected two, and had no clear position on 11.³¹ Considering that McMahon's research showed around 35% of all recommendations made in the first cycle to be of category 5,³² Japan has a surprisingly high proportion of category 5 recommendations with 19 out of 27, of which it accepted 8. A major part of the category 5 recommendations comprised suggestions to sign or ratify various treaties and their protocols. The first recommendation, for instance, refers to multiple UN human rights treaties:

“Consider ratifying/Ratify the First Optional Protocol to the International Covenant on Civil and Political Rights and the Second Optional Protocol to the International Covenant on Civil and Political Rights (Albania), the Optional Protocol to the Convention against Torture (United Kingdom, Albania, Mexico, Brazil) the Optional Protocol to the Convention on the Elimination of Discrimination against Women (Portugal, Albania, Mexico, Brazil), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Peru), the Convention on the Rights of Persons with Disabilities (Mexico), the International

31 UPR-info.org (2008): Japan. Responses to Recommendations, First Review. URL: <http://www.upr-info.org/IMG/pdf/Recommendations_Japan_2008.pdf>

32 McMahon 2012: 15

Convention on the Protection of All Persons from Enforced Disappearance (Albania), the Hague Convention on Civil Aspects of International Child Abduction, 1980 (Canada, Netherlands); as well as to recognize the competence of the Committee on the Elimination of Racial Discrimination to receive and consider individual complaints (Mexico, Brazil); Sign the Second Optional Protocol to the International Covenant on Civil and Political Rights (Portugal).”³³

Recommendations in Japan’s subsequent UPR cycle, in 2012, makes it clear that some of these recommendations failed. Incidentally, this recommendation was accepted by Japan in the addendum. But in the 2012 cycle, recommendations 147.6, 147.7 and 147.11 again ask Japan to ratify the two optional protocols to the International Covenant on Civil and Political Rights; 147.8 to 147.10 urge Japan to ratify the Optional Protocol to the Convention Against Torture; 147.12 refers again to ratifying the Optional Protocol to the Convention on the Elimination of Discrimination Against Women; 147.19 to 147.23 recommend the ratification of the International Convention on the Protection of the Rights of All Migrant Workers.³⁴

Observing the follow-up of this recommendation, the first of Japan’s 2008 UPR cycle, is enough to demonstrate that the concept of numbered recommendations is flawed in the UPR. Officially represented as a single recommendation, this one refers to not one but nine specific actions. In the context of the UPR, it would therefore be misleading to state how many recommendations (as per the official numbering in the UPR Final Report) were successfully followed through. It may happen that one of these recommendations encompassed nine specific actions, while another called for only one. Instead, it may be more helpful to think of recommendations in terms of the individual specific actions that they urge:

33 OHCHR (2008): Japan, UPR Final Report, First Review. 16.1, pp. 16.

34 OHCHR (2012): Japan, UPR Final Report, Second Review, pp. 16.

to think of the specific actions themselves, and how successful or unsuccessful they prove. With this method, we would consider each separate treaty as a separate recommendation, rather than following the numbering on the report itself. It is then possible to see that the first recommendation of Japan's 2008 UPR cycle is, for all practical purposes, nine recommendations, of which five failed.

At times, recommendations which seem to be very similar in nature are still not grouped together in the Working Group report. For instance, we might look at recommendations 2 and 3 in Japan's 2008 cycle. Recommendation 2 calls upon Japan to establish a national human rights institution, in compliance with the Paris Principles. The following recommendation suggests for Japan to "Set up an independent mechanism for investigating complaints of violations of human rights".³⁵ Although the terminology is different, and the exact term 'national human rights institution' is absent, the recommendation is essentially describing the same concept. The major difference is the absence of compliance with the Paris Principles in the latter recommendation. To see the outcome of the two recommendations, we turn to Japan's 2012 review: recommendations 147.47 to 147.59 in 2012 all refer to national human rights institution. With the sole exception of 147.47, all of these also refer to the Paris Principles. But crucially, none of the recommendations in this bracket are action category 5 – they call for "continuing", "accelerating", and "speeding up" the process of establishing a national human rights institution in compliance with the Paris Principles.³⁶ As a result, we might conclude that recommendations 2 and 3 in Japan's 2008

35 OHCHR (2008): Japan, UPR Final Report, First Review. pp. 16.

36 OHCHR (2012): Japan, UPR Final Report, Second Review. pp. 17-18.

cycle succeeded partially.

We see then that even category 5 recommendations do not necessarily result in a clear outcome, in terms of success or failure. Recommendation 5 in 2008 urges Japan to “Respond sincerely to the recommendations of the United Nations mechanisms (Special Rapporteur on violence against women, the Committee on the Elimination of Discrimination against Women and the Committee against Torture) on the issue of “comfort women” during the Second World War”.³⁷ In the 2012 review, Japan acknowledged the issue of ‘comfort women,’ and expressed remorse on the subject during the interactive dialogue. Japan also referred to some measures taken in the light of the issue. In the list of recommendations that follow, three recommendations mention ‘comfort women.’ None of the three recommendations were ‘accepted’ by Japan in an addendum, although the recommendations referring to “comfort women” in the 2008 review had been ‘accepted’. A similarly ambiguous status of success is shared by recommendations in the 2008 review which refer to ‘reviewing,’ ‘reconsidering’ or ‘abolishing’ the death penalty in Japan; the subsequent review in 2012 features 21 mentions of the death penalty, in loosely worded repetitions of the same recommendation from the previous cycle. This recommendation, however, had been rejected by Japan in 2008.

Korea

Like Japan, ratification of the ICRMW was also a recommendation in the first UPR cycle of Korea. In its first UPR cycle in May 2008, Korea received 33 recommendations. Like Japan, Korea made no response in the Working Group report, but an addendum notes that

³⁷ OHCHR (2008): Japan, UPR Final Report, First Review. pp. 17.

Korea accepted 15 recommendations, rejected none, had no clear position on 16, and left two pending. Also like Japan, the proportion of category 5 recommendations is high, with 25 out of 33: Korea had ‘no clear position’ on 15 of these 25, and one was left pending. A total of 9 recommendations were ‘accepted’ in the addendum. The ratification of the ICRMW, which was among the recommendations that received no clear response, failed to be completed in time for Korea’s second UPR cycle in 2012. Two more treaty-based recommendations, which called for the ratification of the Optional Protocol to the Convention Against Torture and signature of the International Convention for the Protection of All Persons Against Enforced Disappearance, also failed.³⁸ A fourth treaty-based recommendation, however, was successful: this one called for the ratification of the Convention of the Rights of Persons with Disabilities.

To summarise, the recommendations which can be conclusively seen to have failed are as follows: 1) that the guarantee for freedom of association and assembly be enshrined into law, 2) that the State should sign the ICPED, and 3) ratify the OP-CAT, and 4) ratify the ICRMW, 4) that the State should amend legislation to expressly prohibit corporal punishment in schools and at home. More subtly unsuccessful recommendations are those calling for ‘abolishing’ and ‘amending’ the Security Law, as well as those calling for legislative change on the subject of torture: the Security Law features in eight similar recommendations in the 2012 review, and torture is similarly repeated in seven recommendations.

³⁸ OHCHR (2008): Korea, UPR Final Report, First Review.
OHCHR (2012): Korea, UPR Final Report, Second Review.

South Africa

Incidentally, the recommendation of prohibiting corporal punishment is also echoed in the UPR review of South Africa. At its first UPR cycle in April 2008, South Africa received 22 recommendations. The state did not respond to these in either in the Working Report nor in an addendum; the South African response to all 22 recommendations is officially ‘pending’. Nine of these recommendations fall into category 5. Four of these can be conclusively seen to have failed: South Africa’s 2012 review repeats the suggestion to criminalise corporal punishment (124.88), to ratify the ICESCR and the OP-CAT (124.2 and 124.9), to ratify the ICPED (124.10 and 124.11) and to enact legislation to eliminate torture in line with Act 1 of the CAT (124.55).³⁹

The case of South Africa highlights a peculiar feature of the Universal Periodic Review: that it does not insist on clear responses to recommendations. Since South Africa left all responses ‘pending’, in effect, that means a commitment was never made. Not only does this reflect poorly on the state’s engagement with the review, but also indicates an avoidable lack of potency on the part of the review. The flaw may also have arisen simply from the newness of the process at the time when South Africa underwent its first review; one observation to support this argument is that South Africa did respond to recommendations (in terms of ‘accepted’ and ‘rejected’) in its second cycle in 2012. There are some indicators that states are beginning to consider responses to recommendations as ‘commitments’, at least to a somewhat greater extent than during the first cycle. For instance, Japan had expressed no clear position on recommendations referring to “comfort women” in its first cycle; but when similar

³⁹ OHCHR (2012): South Africa, UPR Final Report, Second Review.

recommendations were repeated during the second, Japan responded with rejections.⁴⁰ Significantly, states are not required to give reasons behind rejections of recommendations. A requirement for detailed responses, especially in case of rejections, might help to avoid high-handed dismissals.

From the perspective of the reviewing states, the UPR process requires a fair amount of investment in times of time and preparation. Recommendations that call for specific measures require knowledge of the state's political, social, cultural and economic affairs. For some subjects, such as ratification of the various UN human rights treaties, a list is prepared by the Working Group beforehand for each state, as a 'Compilation of UN Information'. But for recommendations not involving treaties, reviewing states have to take the initiative of researching the state's circumstances in order to make effective and pertinent suggestions. Instead, at times, it can be observed that reviewing states fall into a pattern of 'championing' a certain issue and repeating the same recommendation in all reviews. For instance, Slovenia consistently makes the recommendation – including in all three case studies – of 'systematically and continually integrating a gender perspective in the follow-up process to the review'.⁴¹ The wording of the recommendation makes it seem like action category 5, as it calls for a specific measure. But it also fails to explain what it means in terms of a gender perspective, and how it is to be integrated into the follow-up process. This sort of vagueness is a hindrance to the effectiveness of UPR recommendations as it does not clarify what is

40 OHCHR (2008): Japan, UPR Final Report, First Review.

OHCHR (2012): Japan, UPR Final Report, Second Review.

41 OHCHR (2008): Japan, UPR Final Report, First Review. 60.26, pp. 19.

OHCHR (2008): Korea, UPR Final Report, First Review. 64.18, pp. 15.

OHCHR (2008): South Africa, UPR Final Report, First Review. 67.3, pp.20.

expected, leaving too much room for interpretation, and allowing the state under review to claim implementation without necessarily having achieved it. This problem may also be far more pronounced in recommendations from action categories 1 to 4, which are not within the purview of this study.

Does the Anti-Bribery Convention face similar difficulties? The next chapter will explore the workings of this other peer review, and detail the experiences of the three case studies: Germany, Switzerland and the UK.

Anti-Bribery Convention

Where the Universal Periodic Review seems to have so broad a focus, the Anti-Bribery Convention is certainly far more specific by contrast. The names themselves hint at some difference: the *Universal* Periodic Review aims at an all-round development, with respect to the wide field of human rights, while the Anti-Bribery Convention aims simply and singularly at the objective of introducing domestic legislation in participating states which will outlaw the payment of bribes to foreign public officials. The Organisation for Economic Cooperation and Development (OECD), which conducts the Anti-Bribery Convention, comprises many of the world's largest economies. According to a study by Transparency International, the signatory states if the Convention collectively account for two-thirds of world exports and three-quarters of foreign investment.⁴² The ABC is not the OECD's first peer review, but it may well be one of the most well-known. This would be indicated, in part, by the fact that six states who are not OECD members also take part in the ABC. The global significance of the ABC is also manifest in the attention it receives from other anti-corruption initiatives. Transparency International, among the most well-known anti-corruption international NGOs, conducts an annual study on the progress of the ABC. This chapter will also refer to the findings of Transparency International's studies of the ABC.

Before assessing the performance of the Convention, it might be useful to have a look at the objectives behind its establishment as set out by the OECD. In a somewhat idealistic tone, the OECD describes the peer review as a "tool for cooperation and change", saying that

⁴² Heimann & Dell 2012: 4

the objective behind the mechanism is not only to identify problems and failures but also to discuss experiences and share successful practices.⁴³ Not exclusive to the ABC, this is a statement that may be applied to any of the OECD's peer reviews. A description of the ABC, its workings and procedures, may help to clarify the extent to which this is managed by the Convention.

The origins of this peer review date back to 1997, when the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was adopted. The Convention refers to the "serious and moral political concerns" raised by widespread bribery in international business, and calls upon governments to acknowledge their role in the possible prevention of the phenomenon.⁴⁴ The terms of the Convention are that participating States will take the necessary measures to establish the bribery of foreign public officials as a crime in its domestic legislation, equal in criminality to the bribery of a domestic public official.⁴⁵ Accession to the Convention is open for signature by OECD members as well as non-members who have been invited to become participants of the Working Group on Bribery in International Business Transactions. At the time of adoption, the OECD included in its ranks all 10 of the world's ten largest exporters, a point which the Convention notes. In 1998, OECD members accounted for 75% of world exports; by 2013, that number had declined to 58.5%.⁴⁶ This statistic indicates the economic rise of several non-OECD states, six

43 OECD.org: Peer Review, a Tool for Cooperation and Change. URL: <<http://www.oecd.org/eco/37922614.pdf>>

44 OECD.org: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. URL: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/ConvCombatBribery_ENG.pdf>

45 Ibid: Article 1

46 OECD.org: Economic Outlook, Analysis and Forecasts. Annex table 45. URL: <<http://www.oecd.org/eco/outlook/economicoutlookannextables.htm>>

of which have opted to become parties to the Anti-Bribery Convention. These six are Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa. Conspicuously absent from the list are the two other components of the BRICS: China and India. Nevertheless, the weight of OECD states in world trade transactions cannot be underestimated: the OECD, which commands 58.5% of world exports, consists of 34 states out of 193, or 17.6% of UN-recognised states.

The Anti-Bribery Convention peer review is conducted by the OECD Working Group on Bribery, which comprises representatives of the participating states. The review is conducted in three phases. Phase 1 is called Evaluation, where the main objective is to inspect the state's legislation into which the Convention has been introduced, and to determine whether it is compliant with the standards of the Convention. Two states are appointed as 'lead examiners' to facilitate the process, which includes elements of self-evaluation as well as mutual review. The state under review is first expected to answer a standard questionnaire, which will help in gauging the extent to which the Convention has been enshrined in national law.⁴⁷ All questions are subjective and open-ended, allowing for detailed responses: for instance, one asks the state to describe criminal penalties for offenders caught bribing domestic public officials. The next question asks a similar question in cases where the bribe was paid to foreign public officials. The questionnaire thus establishes whether the basic objective of the Convention – to criminalise bribery of foreign public officials – has been enshrined in domestic legislation. The state's replies to the questionnaire are circulated amongst all

⁴⁷ OECD.org: Phase 1 Questionnaire. Anti-Bribery Convention. URL: <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2089984.pdf>>

members of the Working Group. The two lead examiners are authorised to inspect replies for adequacy, and to request further information if necessary. The state under review may make a voluntary presentation. Unlike the Universal Periodic Review, civil society is not formally invited to participate in Phase 1 of the Anti-Bribery Convention.⁴⁸

Phase 2 of the review also begins with a questionnaire which the state is expected to respond to. Unlike the questionnaire from Phase 1, the second is not entirely standardised; in addition to a standard set of questions, it includes country-specific queries based on the state's responses to the previous questionnaire.⁴⁹ The standard questions refer to the state's implementation of the 1997 Revised Recommendation of the Council on Bribery in International Business Transactions, which is not a part of the Convention itself but has become an important 'annexe' thereto. Phase 2 also includes on-site visits, conducted by the two lead examiners and the OECD Secretariat, lasting about one week. The objective behind this practice is to gain information on domestic enforcement of the Convention and prosecutions based on it, as it provides the lead examiners with an opportunity to speak with domestic law-enforcement authorities. The on-site visit is also an opportunity for civil society to take indirect part in the review, as it is not formally included in the review process; the OECD states that such contributions by civil society during visits occur "very often".⁵⁰ Based on findings from the on-site visit, as well as the state's responses to the questionnaire, a

48 OECD.org: Phase 1 Country Monitoring. Anti-Bribery Convention. URL: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase1countrymonitoringoftheoecdanti-briberyconvention.htm>

49 OECD.org: Phase 2 Country Monitoring. Anti-Bribery Convention. URL: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase2countrymonitoringoftheoecdanti-briberyconvention.htm>

50 Ibid

preliminary report is drafted by the lead examiners and the state under review has the opportunity of commenting on it. In an interactive evaluation conducted by the Working Group, the state may discuss hurdles, describe its legal system, and is given recommendations by the Working Group. These recommendations, as well as the responses, views and comments on them by the state under review, are compiled by the Working Group into an evaluation report.

Like the first two phases, Phase 3 also begins with a questionnaire for the state under review. The aim of this phase is to assess the workings of the structures established by the Convention, to evaluate progress on weaknesses identified during Phase 2, and to assess enforcement efforts on the part of the state. The questionnaire, which focuses on implementation of the Convention and the 2009 Recommendations, also contains supplementary questions that take into account the state's performance during the Phase 2 evaluation. This is followed by an on-site visit, shorter than the one during Phase 2 as it is normally only three days. The rest of the process is similar to that during the previous phase, with a preliminary assessment report, followed by interactive evaluation conducted by the Working Group, during which the state may bring domestic experts to respond to questions on enforcement by the Working Group. The Working Group then formulates a report, incorporating recommendations by other states as well as the reviewed state's views and comments regarding the recommendations. Following both Phase 2 and Phase 3, the state under review is asked to provide a follow-up report on the implementation of the Working Group's recommendations. A written report is required to be submitted within 24 months of

the adoption of the evaluation report. This written follow-up report is supposed to detail all steps taken by the state towards implementing Phase 3 recommendations. Phase 3, which was adopted by the Working Group in December 2009 as a follow-up to the previous phase, is envisaged as a permanent cycle of the peer review.⁵¹

While legislative change is a successful and continuing feature of the Anti-Bribery Convention, enforcement remains the true test of its effectiveness. In 2006, a study by John Hatchard on combating transnational crime referred to the United Kingdom's then-recent OECD report, where the state was subtly criticised for having had no indictments or trials for bribing foreign public officials since the ratification of the Convention.⁵² That criticism came in 2005. More recently, Transparency International's 2012 progress report on the Anti-Bribery Convention rates the UK as a country with "active enforcement" of the Convention, with 23 cases and 29 investigations to date.⁵³ Is the UK's dramatic progress indicative of wider developments in the Anti-Bribery Convention?

Both Germany and Switzerland, like the UK, show increasing enforcement in the period between Phase 2 and Phase 3. This is noted by the OECD Working Group's Phase 3 reports for both states in 2011.⁵⁴ As of 2012, Germany had had 176 cases and 43 ongoing investigations on the bribery of foreign public officials, while Switzerland had 52 cases.⁵⁵ The

51 OECD.org: Phase 3 Country Monitoring, Anti-Bribery Convention. URL: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase3countrymonitoringoftheoecdanti-briberyconvention.htm>

52 Hatchard, John (2006): Combating Transnational Crime in Africa – Problems and perspectives. *Journal of African Law*, 50, pp. 147.

53 Heimann & Dell 2012: 36

54 OECD.org (2011): Germany, Phase 3
OECD.org (2011): Switzerland, Phase 3

55 Heimann & Dell 2012: 21 and 35

increase in enforcement after Phase 2 and prior to Phase 3 suggests that a closer look at the workings of Phase 2 might be useful to deduce how this effectiveness is achieved. The methodology of the review itself changes significantly between Phases 1 and 2, as Phase 1 follows an entirely standardised questionnaire based solely on the evaluating the state's implementation of the Convention. In other words, its only concern is legislative change; enforcement on the ground is not yet a factor. This is the most significant difference in Phase 2, where the questionnaire takes into account the state's performance in the previous phase, and an on-site visit is conducted for the purpose of evaluating the state's actual enforcement of the Convention. The recommendations of the Working Group in this phase are also focused on evaluating enforcement. The previously mentioned study by Hatchard, which raised concerns on the effectiveness of enforcing the Convention, was published in 2006; if Phase 2 is taken to be the pivotal point for enforcement of the Convention, it is somewhat unsettling to that hypothesis to note that most of the participant states underwent Phase 2 in 2003. Therefore, apparently the effectiveness of the Phase 2 methodology did not begin for at least the first two years (since Hatchard's research relies upon 2005 data) after the review. The search for the catalyst that drove the surge in enforcement, between 2006 and 2013, therefore continues.

The second possibility lies in the peer review's follow-up reports. As mentioned previously, states are expected to submit follow-up reports within 24 months of adoption of the evaluation report, after both Phases 2 and 3. For most participant states, the follow-up report after Phase 2 came between 2005 (Germany) and 2007 (Switzerland and the UK). At

this stage, Germany's report states that it was in the process of investigating 21 cases, a number which the Working Group considered "impressive and commendable".⁵⁶ The UK's follow-up report in 2007 also finds that the UK has "satisfactorily implemented a number of the Working Group's recommendations", and notes "a number of significant foreign bribery investigations", including six new ones since March 2005.⁵⁷ For Switzerland, however, such encouragement comes only in its 2011 Phase 3 report, which states that Switzerland "has made progress in its enforcement actions since the Phase 2 evaluation", with two relevant cases that both culminated in convictions.⁵⁸

Follow-up reports after Phase 2 consist of two parts: the first part contains the Working Group's observations and assessment of the state's efforts towards implementing prior recommendations, and the second part contains the state's written report describing its experience. The latter part of the report is not freestyle, but clearly subdivided into a question-and-answer format: each recommendation from Phase 2 is copied out, and the state's efforts towards implementing it are described underneath. The format leaves little scope for evasion, as the state is compelled to respond to each recommendation individually and in detail. As a result, difficulties and challenges in implementation, if any, are brought to the fore before the subsequent review of Phase 3. For the state under review, the follow-up report could be an opportunity to request suggestions and guidance for difficulties it has faced; it is also simultaneously an incentive to respond to prior recommendations thoroughly, with the knowledge that it cannot 'dodge' questions about any specific recommendation.

56 OECD.org (2005): Germany, Phase 2 Follow-up, pp. 3.

57 OECD.org (2007): UK, Phase 2 Follow-up, pp. 3 and 4.

58 OECD.org (2011): Switzerland, Phase 3, pp. 5.

Germany

Of the three case studies, Germany is the most prolific in terms of cases and investigations on bribery of foreign public officials. The state had 15 cases initiated in 2011 alone, and 20 cases were concluded the same year. Five of those ended in convictions.⁵⁹ By 2011, Germany had prosecuted and sanctioned nearly 70 individuals and six companies, as reported by the OECD. The Working Group raised concerns, however, that the sanctions imposed by Germany might not be dissuasive enough.⁶⁰ While praising Germany's pragmatic approach, strong cooperation with other states party to the Convention, and the effectiveness of using tax audits to detect foreign bribery, the Working Group recommended that Germany ensure sanctions for offenders should "go well beyond confiscation of profits", increase criminal sanctions against individuals, and strengthen protection for whistle-blowers in the private sector.⁶¹ Between 2011 and 2013, when Germany submitted its follow-up report to Phase 3, the state had had 21 cases which culminated in sanctions, and 33 which had to be terminated for lack of grounds.⁶² It had also introduced a bill in the parliament to increase tenfold the administrative sanctions for legal persons, in accordance with one of the recommendations by the Working Group in Phase 3. As for whistle-blowers' protection, the follow-up report suggests that the topic was under discussion at the German parliament, but that the Government had not yet introduced a concrete bill in this regard.⁶³ Although this

59 Heimann & Dell 2012: 21

60 OECD.org (2011): Germany's Strong Foreign Bribery Enforcement Should Be Matched with Tougher Sanctions. URL:

<<http://www.oecd.org/corruption/germanysstrongforeignbriberyenforcementshouldbematchedwithtoughersanctions.htm>>

61 Ibid

62 OECD.org (2011): Germany, Phase 3 Follow-up, pp. 3.

63 Ibid: 4

recommendation was thus far only partially successful, it is safe to say that Germany is among the states with the highest involvement with the Anti-Bribery Convention.

United Kingdom

The UK has thus far witnessed 23 cases, of which 18 have been concluded, and 29 investigations.⁶⁴ Although it is currently listed as a state of ‘active enforcement’ by Transparency International, the state’s record with the Anti-Bribery Convention is not as uniformly successful as Germany’s: a cursory look at the UK page on the Convention’s website shows a higher number of documents than usual. In addition to the common reports (Phase 1, Phase 2, Follow-up to Phase 2, Phase 3 and Follow-up to Phase 3), the UK’s page includes documents titled ‘Phase 1 *bis*’, ‘Phase 2 *bis*’, ‘Follow-up to Phase 2 *bis*’, and ‘Phase 1 *ter*’. *Bis*, Latin for ‘twice’, is used here in the sense of ‘second’; *ter*, similarly, is Latin for ‘thrice’. The *bis* reports are not to be seen as replacements for the eponymous originals, but as supplementary to those.⁶⁵ The reasons behind having these supplementary reports are varied; in the case of Phase 1 *bis* (2003), the report was made because the Working Group revised its opinion – expressed during UK’s Phase 1 review – that the UK’s existing legislation was sufficient for the purpose of the Convention. The legislation itself underwent a change following the events of September 11, 2001, which incited the enactment of the UK’s Anti-Terrorism, Crime and Security Act 2001.⁶⁶ Finding the change significant enough to necessitate a further review, the Working Group called for the Phase 1 *bis* report. Phase 2 *bis*, however, is necessitated by a

⁶⁴ Heimann & Dell 2012: 36

⁶⁵ OECD.org (2003): UK, Phase 1 *bis*, pp. 2.

⁶⁶ Ibid: 1

different reasoning. The 2008 document begins by stating that the Working Group was “disappointed and seriously concerned with the unsatisfactory lack of implementation of the Convention by the UK”.⁶⁷ This is a major downturn from Phase 2 follow-up report of 2007, which was largely positive. The follow-up report to Phase 2 *bis* (2011) notes that many of the recommendations in the preceding report had been implemented, and that the level of enforcement had risen.⁶⁸ Thus, the developments that led to the UK’s being categorised under ‘active enforcement’ by Transparency International in 2012 came mostly after 2008.

Switzerland

Switzerland’s follow-up report to Phase 2, like that of the UK, is less than enthusiastically worded. The Working Group notes in this 2007 document that Switzerland had not yet implemented all the recommendations made during its Phase 2 review, two years previously. By 2011, Switzerland’s engagement with the review had improved: the Phase 3 report remarks upon two convictions in the previous year, notes Switzerland’s cooperative stance towards requests for mutual legal assistance, and “welcomes improvements” in domestic legislation.⁶⁹ It also brings up two points of concern: that the sanctions specified may not be dissuasive enough (similar to the case of Germany as mentioned earlier), and that the rate of conviction is too low. Following this report, which is the last formal document available on Switzerland’s Anti-Bribery Convention record, Switzerland is expected to produce a follow-up report on the implementation of recommendations within two years.

67 OECD (2008): UK, Phase 2 bis. pp. 4.

68 OECD (2011): UK, Phase 2 bis Follow-up. pp. 3.

69 OECD.org (2011): Switzerland, Phase 3. pp. 5.

A Reciprocal Comparison

The two previous chapters were intended at exploring in detail the workings of the two peer reviews, the Universal Periodic Review and the Anti-Bribery Convention, and the performance of the chosen case studies in each. This chapter aims to compare the two reciprocally, each against the other, to identify the factors underlying the successes of both. The two previous chapters discussed the case studies with regard to only one of the two peer reviews; they will now be analysed for their performance in the second as well. At this stage we have some knowledge of the individual states' levels of engagement with one peer review, which may be useful while analysing their involvement with the other.

As a method, reciprocal comparison has been used notably in historiography. For instance, Kenneth Pomeranz used the concept in his work 'The Great Divergence', published in 2000. For Pomeranz, the use of reciprocal comparison meant that England and China – the two spaces he was studying, at and before the industrial revolution – would both be compared to each other, reciprocally, rather than having one upheld as the norm and the other a deviation.⁷⁰ Hence, instead of asking only, 'Why did China not follow the same path as England to an industrial revolution?', Pomeranz chooses to ask that as well as, 'Why did England not follow the same path as China and why did it have an industrial revolution?' Conceptually, Pomeranz's method is a critique of 'Eurocentric' and 'Sinocentric' approaches to the question. Other historians, including R. Bin Wong and Gareth Austin, have also used the method of reciprocal comparison. However, the concept is valuable not only in historiography.

⁷⁰ Pomeranz, Kenneth (2000): *The Great Divergence*. pp. 10.

For my study, distanced as it is from any historiography, reciprocal comparison is nevertheless a clear choice of method. Upholding either one of the peer reviews as an ideal or norm and the other as a deviation would be not only conceptually problematic, but also an exercise in futility. The two peer reviews are different enough in scope, theme and approach that it is entirely inadvisable to have them ‘compete’ in order for one to be named the winner, or the better peer review; in essence, that would be the process by which one could be named the ‘ideal’ or ‘norm’. Instead, it might be more productive to seek solutions to the problems of one peer review in the experiences of the other, reciprocally.

Anti-Bribery Convention and the UPR case studies

Japan

Japan, like the UK, has a Phase 2 *bis* report – and like the UK, it is because of apparently unsatisfactory implementation of Phase 2 recommendations.⁷¹ The Working Group criticises Japan for failing to make efforts in implementing Phase 2 recommendations, despite knowing of the impending on-site visit by the two lead examiners for Phase 2 *bis*. The report also expresses the Working Group’s dissatisfaction with Japan’s level of cooperation during Phase 2, especially in terms of disclosing necessary information. Phase 2 had already elucidated the Working Group’s dissatisfaction on the lack of cases and investigations into foreign bribery, in the light of varied press reports that alleged Japanese companies to have been found bribing foreign public officials. The lead examiners were incredulous that Japan had not found any

⁷¹ OECD.org (2006): Japan, Phase 2 bis, pp. 3.

incidences worthy of investigation, “given the size of Japan’s economy and its level of exports and outward foreign direct investment, including economic activity in some countries believed to be at high risk for soliciting bribes”.⁷² In 2007, Japan submitted its follow-up report to Phase 2, a year after Phase 2 *bis* and two years after Phase 2. This follow-up report contains some of the first recognitions of positive developments in Japan’s engagement with the Convention, by the Working Group. It acknowledges that Japan had made “significant progress” since Phase 2, including having implemented a majority of the recommendations, although a few important ones – such as a satisfactory number of investigations – remained.⁷³ By 2011, in Japan’s Phase 3 report, the Working Group noted that Japan had indeed managed to procure two convictions on cases involving foreign bribery, but that the number was still inadequate.⁷⁴

Korea

The Working Group’s reports on Korea take an altogether more positive tone. The follow-up report to Phase 2, in 2007, is fairly encouraging; the Working Group notes that there have been six convictions in cases of foreign bribery since Korea’s Phase 2 review in 2004.⁷⁵ It also lists the recommendations from Phase 2 which Korea had either not implemented or only partially implemented, acknowledging that the remaining recommendations had been fulfilled. Transparency International, however, ranks Korea as a state of ‘moderate enforcement’, on par with Japan.⁷⁶ To some extent, this may be because

72 OECD (2005): Japan, Phase 2. pp. 5.

73 OECD (2007): Japan, Phase 2 Follow-up. pp. 4-5.

74 OECD (2011): Japan, Phase 3. pp. 5.

75 OECD (2007): Korea, Phase 2 Follow-up. pp. 4.

76 Heimann & Dell 2012: 26-27

Korea had no ongoing investigations as of 2011 and only one prosecution. Whether the state's enforcement of the Convention has slowed down is difficult to ascertain, as the available data is only from 2011, which is the same year that Korea underwent its Phase 3 review.

South Africa

South Africa is somewhat different from the previous two cases, as it joined the Convention relatively late: the Convention entered into force in 2007, as against 1999 for both Japan and Korea. As a result, South Africa has not yet undergone a Phase 3 review. The Phase 2 report, from 2010, notes that the domestic legislation for combating bribery is of a high standard, but that prosecution for the crime has not yet taken place.⁷⁷ The subsequent review in 2012, the follow-up to Phase 2, shows that prosecution had still not occurred for any case involving bribery of a foreign public official. The Working Group states that South Africa, by this point, had implemented 13 out of the 28 recommendations from its previous review; eight had been partially recommended, five had not been implemented, and two were considered no longer relevant.⁷⁸ Transparency International's 2012 report also categorises South Africa as a state with 'no enforcement'. Following our observations from the previous chapter, however, we might recall that the studied cases underwent a significant rise in enforcement between after the follow-up report to Phase 2 and before Phase 3. It may be significant to note that South Africa is in precisely this stage at present, having completed a follow-up to Phase 2 recently, in 2012.

⁷⁷ OECD.org (2010): South Africa, Phase 2. pp. 4.

⁷⁸ OECD.org (2012): South Africa, Phase 2 Follow-up. pp. 2.

Universal Periodic Review and the ABC case studies

Germany

Germany's record in the Anti-Bribery Convention, as we have already noted, has been exemplary. In the Universal Periodic Review, Germany underwent its first cycle in 2009 and second in 2013. In its first review, Germany received 45 recommendations; of these, it accepted 35, rejected nine, and left one pending for response. 27 of the recommendations, a fairly high number, constitute action category 5 recommendations. Of the nine rejected recommendations, eight are from action category 5, which call for a specific action; the single pending one is also from this category. Since the Working Group's final report from Germany's second cycle review has not yet been uploaded on the OHCHR website,⁷⁹ it is not possible to conduct a thorough assessment of the results as was done for the other case studies. However, the outcomes of some recommendations can be seen in the Compilation of UN Information report, which contains a list of the treaties that Germany has acceded to and which are not yet ratified. From this list, we see that the recommendation calling for ratification of the ICRMW has failed.⁸⁰ Incidentally, the recommendation had been rejected by Germany. The recommendation to which Germany had not responded was one suggesting the ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: this also did not materialise, as shown by the Compilation of UN Information report. On the other hand, recommendations which succeeded were the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance,

⁷⁹ As of July 2013

⁸⁰ OHCHR.org (2009): Germany, UPR Final Report, First Review. 81.1, 81.2. pp. 16.

OHCHR.org (2012): Germany, Compilation of UN information, Second Review. pp. 2.

withdrawal of reservations to the Convention on the Rights of the Child and the ratification of its optional protocol.⁸¹

Switzerland

Switzerland had its first cycle of the Universal Periodic Review in 2008, and the second in 2012. In its first cycle, the state received 32 recommendations; in the addendum, it accepted 20, rejected nine, and expressed no clear position on 3. Of the total recommendations, 15 qualify as action category 5. Seven of the rejected recommendations are from this group, showing once again the high rate of rejection among recommendations that call for a specific action rather than a general measure. The recommendations which failed conclusively are all pertaining to treaties: ratification of the OP-CAT, accession to the OP-ICCPR, signature of the CPED, accession to the CRPD, withdrawal of reservations to CEDAW, ratification of OP-CEDAW, withdrawal of a specific reservation to ICERD, and ratification of the ICRMW.⁸² These recommendations are all reiterated in Switzerland's second UPR cycle. In addition, a recommendation calling for the establishment of a national human rights institution compliant with the Paris Principles is also repeated in the second cycle, indicating that an institution exists but is not in accordance with the Paris Principles.⁸³ A recommendation on making economic, social and cultural rights justiciable under domestic law is also repeated as recommendation 124.4 of the second cycle, indicating that the

81 OHCHR.org (2009): Germany, UPR Final Report, First Review. 81.3, 81.4.

OHCHR.org (2012): Germany, Compilation of UN information, Second Review. pp. 2

82 OHCHR.org (2012): Switzerland, Compilation of UN information, Second Review. Compilation UN Information.

83 OHCHR.org (2012): Switzerland, UPR Final Report, Second Review. 123.18. pp. 19.

implementation failed. Similarly, a call for federal legislation to protect against discrimination on grounds of sexual orientation and gender identity is repeated in recommendation 123.76 of the second cycle. In total, this means that 11 recommendations from Switzerland's first cycle failed. Considering that the total number of action category 5 recommendations was 15, 11 is a high number.

United Kingdom

Like Switzerland, the UK completed its first cycle of the review in 2008 and the second in 2012. In its first review, the state received 30 recommendations: it accepted 19, rejected 10, and left a response to one pending. Of the total recommendations, 16 qualify as action category 5; seven of these were rejected and one had no response. Of the recommendations which failed, six refer to treaties: accession to the ICRMW, signature of the CPED, withdrawal of a reservation to CERD, withdrawal of a reservation to the CRC and an OP-CRC, acceptance of CAT and ICCPR for overseas territories under the state's control. Two other recommendations which do not refer to treaties also failed, making a total of eight failed recommendations out of 16.

Ensuring effectiveness

By now, we have seen the Anti-Bribery Convention performance of six states. Three of those were especially chosen for being exemplary in terms of their active enforcement of the Convention, while three were chosen on terms external to the Convention. The common

factor seen in all six cases is a rising level of enforcement: the Phase 3 reports of all studied states indicate that a majority of recommendations from the previous cycle have been fulfilled.⁸⁴ Now, in comparing the performance of the Anti-Bribery Convention to the Universal Periodic Review, it is important to point out again the differences in the respective measures of effectiveness: the Anti-Bribery Convention refers to ‘enforcement’ as an indicator of effectiveness, while the Universal Periodic Review – in its ‘action category 5’ recommendations – rarely refers to enforcement. Instead, for the latter, ratification of various UN human rights treaties is the main indicator of the review’s success. This is also demonstrated by the preparatory documents drawn up by the respective Working Groups: the UPR Working Group’s “Compilation of UN Information” is a list of which the UN human rights treaties have been ratified by the state under review and which have not, while the Working Group of the Anti-Bribery Convention prepares a report on which recommendations from the previous review have been implemented and to what extent the Convention is being enforced in the state under review.

On that basis alone, it might seem that the Anti-Bribery Convention is ‘more effective’ in the sense that it insists on actual enforcement on the ground. This assumption would be flawed, however, given the vast differences in the very basis of the two reviews. Ratification is the very basis of the Convention: if recommendations do not emphasise on ratification of treaties, it is only because the Convention itself is a treaty, and accession has been achieved by all participant states. The next goal of the Convention is legislative reform, followed by enforcement of the new legislation. In this respect, the two peer reviews should theoretically

⁸⁴ All studied states with the exception of South Africa, which has not had a Phase 3 review yet.

be parallel: the UPR also aims at legislative reform wherever necessary for the improvement of human rights situations, followed by implementation on the ground. Yet, why do recommendations rarely if ever refer to enforcement of ratified treaties?

A few of the methods that the Anti-Bribery Convention relies on are inaccessible to the UPR. A major factor in the effectiveness of the ABC is the use of on-site visits, conducted during Phase 2 and Phase 3, where the two lead examiners visit the state under review and actively seek out evidence of the Convention's enforcement (or lack thereof). The on-site visit allows lead examiners to seek information which the state under review might not be willing or able to disclose; it also allows civil society within the state under review to express their opinions to the lead examiners and thereby indirectly contribute to the review. Direct contact with law enforcement authorities also provides a measure of clarity that might not be available in a state's own account of its progress. It is clear that the exercise is fruitful; much of the information contained in the Working Group's report comes from the lead examiners' observations during the on-site visit. But the ABC has only 40 member states, as against the UPR's 193; it is difficult to imagine such a resource-draining exercise being carried out by the UPR. The follow-up reports system followed by the ABC is also clearly effective, as seen from the noticeable rise in enforcement after the follow-up report to Phase 2. The UPR also provides for the possibility of mid-term assessments, but these are voluntary and therefore rare. The voluntary nature takes away from much of what makes them effective in the case of the ABC. Far from making follow-up reports voluntary, the ABC is also known to conduct off-schedule reports wherever the Working Group finds the performance of a state unsatisfactory,

as seen in the case of UK's and Japan's Phase 2 *bis* reports. Moreover, the ABC insists on responses to recommendations, while the UPR allows for flexibility – in the first cycle, states typically made no response in the Working Group report, but responded to recommendations (as 'accepted' or 'rejected') in an addendum during the plenary session. Significantly, states are not required to provide a reason for rejecting recommendations, nor are they required to respond to all recommendations in detail at all. As a result, some states including France and South Africa had responses pending for all their first cycle recommendations. This practice gives a state a harmful sort of immunity, whereby failure to fulfil recommendations cannot be seen as a lapse of commitment, since the commitment was not explicitly made. This criticism of the UPR has been raised by several studies, including McMahon.⁸⁵ By contrast, the ABC requires not only responses to the recommendations during the review itself, but also a detailed description in the follow-up report of how the state has addressed each recommendation. This latter part, which follows Phase 2, requires the state to respond to each individual recommendation made to it during Phase 2, and describe what measures have been taken to implement it. The ABC also makes use of a questionnaire, which contains a standardised set of questions that are common for all states as well as a few that are specific and based on the state's previous review. This practice reduces the onus on other states to bring up salient questions for each review, in cases where they are more or less standard. As a saving of time and therefore resources, the questionnaire may be a helpful tool if adapted for the UPR, especially in the light of the strict time-constraints that the UPR faces.

While finding 'exemplary' case studies for the ABC is easy enough, even with

85 McMahon 2012: 4

secondary sources like Transparency International's annual progress report, it is considerably more difficult for the UPR. There are two possible explanations: either there simply are no states which have managed to engage remarkably well with the UPR, or for some reason the UPR does not make it easy to detect how well a state is performing as against another. While the former argument may have its proponents, the latter is also certainly true: UPR reports have no scores, or clear statements of approval and criticism regarding a state's performance. Secondary sources like McMahon's evaluation of the first cycle, or Karimova's regional study of UPR in the Commonwealth of Independent States, all refer to the success of recommendations in terms of *acceptance*, rather than fulfilment or enforcement.⁸⁶ Acceptance of recommendations, as we have seen earlier, carries little weight since responses to recommendations are neither mandatory nor binding. There may be some binding power in the informal sense of peer pressure, but it can be seen from the case studies that high acceptance rates do not always translate to high implementation rates.

Considering that peer reviews typically have no 'enforcement' mechanism in the sense of sanctioning under-performers, it is difficult to induce the implementation of recommendations. In the final chapter of conclusion, the role of peer pressure as an effective deterrent is discussed.

86 McMahon 2012
Karimova 2013

Conclusion

Peer reviews are an interesting manifestation of the dynamic reality that is international relations. The concept itself, with its promise of egalitarianism and a level platform, makes for an unusual situation where countries with widely differing influence on world politics are made to interact as peers. At the same time, the difference in their influence can never become insignificant: but it is required to express itself in ways more subtle and suited to the framework of a review where all parties are expected to behave as equals. An added layer of unpredictability is represented by the lack of concrete repercussions: a peer review by definition is a mechanism without a superior authority figure, and as such there is no body designated to punish perceived offenders. Enforcement is indirect, and the driving factor is expected to be peer pressure. Other states may, of their own accord, threaten an offending state with sanctions; but a more discreet pressure is also wielded by that nebulous concept known as 'soft power', which causes states to be conscious of how they are perceived globally. The belligerent practice of 'naming and shaming' is successful at causing acrimony, but its effectiveness in leading to any sort of co-operation is debatable at best. Instead, the more discreet leverage of peer pressure is what peer reviews rely on. For this reason, it is vital that the peer review be transparent at all major stages, and that its outcome be made publicly available. As Pagani has pointed out, the public availability of information creates a sense of accountability, especially with media involvement, as that is the most effective means to attract public scrutiny.⁸⁷

⁸⁷ Pagani 2002: 16

The two peer reviews studied here have both mentioned co-operation as an important aspect of their existence. In a paper written in 2005 – a year before the establishment of the Human Rights Council and the Universal Periodic Review – an academic from Columbia University and an economist from the United Nations Development Programme argued strongly for such a peer or partner review, on the grounds that it would be the strongest means to achieve the Millennium Development Goals set out by the UN in 2000. Reddy and Heuty refer to this hypothetical peer review as an “institutionalized financing and learning mechanism”, whereby states could learn from each others’ experiences as they all work towards the Millennium Development Goals.⁸⁸ Their reasoning is that knowledge on the ‘best’ strategies to achieve the Millennium Development Goals is still very imperfect, and states know their own needs better than any entity in a ‘top-down’ approach would be likely to; a peer review should therefore enhance states’ opportunities for sharing experiences, learning alongside one another, and most importantly, on a periodic basis to ensure progress. As an example of a successful peer review, Reddy and Heuty refer to the OECD’s Anti-Bribery Convention. Notably, the OECD has also referred to the peer review as a “tool for co-operation and change”.⁸⁹ How far have these ideals materialised?

As platforms for dialogue, both the UPR and the ABC have conducted themselves in a carefully multilateral manner, with space for Working Groups to make recommendations as well as for the state under review to share its experiences. The UPR, in particular, is a diplomatic exercise; 16% of all recommendations are aimed at requesting the state to share its

88 Reddy, Sanjay and Heuty, Antoine (2005): Peer and Partner Review – A Practical Approach to Achieving the Millennium Development Goals. *Journal of Human Development*, 6:3. pp. 401.

89 OECD.org: Peer Review, a Tool for Cooperation and Change

experiences, or commending the state's current work and asking it to 'continue' the same.⁹⁰ While this might make for good diplomatic interchange, by way of encouraging a state's efforts, it also makes it more difficult to quantify a success rate in implementation of recommendations. If such a quantified success rate were possible, and integrated into the UPR process, it might make it possible to hold states accountable to their performance. At present, second cycle reviews do not refer explicitly to the state's success or failure in implementing first cycle recommendations. The only indication of failure is the repetition of recommendations that were made during the previous review. Subtle as this is, the sense of accountability is impaired. By contrast, the ABC's Working Group report includes a concise segment at the beginning which notes the state's effort towards implementation of previous recommendations, and does not hesitate to make clear negative observations if the implementation is found lacking. The ABC has also conducted off-schedule reviews when a state was found to have made unsatisfactory progress, as in the case of Japan and the UK. But is this sort of flexibility possible for the UPR?

With 193 states, the UPR is a mammoth project. A cycle duration, in which all states are reviewed once, is four years. The ABC, with only 40 members, has taken six and seven years between subsequent cycles. In the middle, the ABC also takes mandatory follow-up reports, making the gap between cycles smaller than it appears. On the whole, the ABC is characterised by an attention to detail that is afforded to it by its relatively small scope of 40 states. For instance, the ABC conducts on-site visits as part of its Phase 2 and Phase 3, the first lasting about a week and the latter about three days. Although it is clear that the practice has

⁹⁰ McMahon 2012: 14-15. See action categories 1 and 2.

shown results, it is also clear that it would be impracticable for a peer review on the scale of the UPR. The length of even the shorter on-site visit itself is several times longer than the time the UPR allots to each individual state's review – three hours and thirty minutes.⁹¹ Increasing the time given to each review, and creating a longer cycle duration, might result in decreased pressure on states to fulfil obligations with the classic difficulty of 'out of sight, out of mind'.

For a peer review, with no 'higher authority' structures, the greatest challenge is to foster a sense of accountability. The ABC attempts this through the on-site visits, the use of the questionnaire, regular follow-up reports and by making all documentation publicly available. Does it work? The three 'exemplary' case studies all show increasing rates of enforcement of the Convention, especially after the follow-up to Phase 2. The number of countries with 'active enforcement', however, has remained constant at seven since 2009.⁹² At the same time, it may be worthy of note that these seven countries account for 28% of world exports; countries with 'moderate enforcement' together account for 25%, those with 'little enforcement' for 6%, and those with 'no enforcement' for 4%.⁹³ Therefore, on the one hand it seems as though the states with the highest stakes in international business transactions are the ones with most vigorous enforcement of the Convention. It may also be that these countries, being in a more economically privileged position by definition, are better able to prioritise the enforcement of anti-bribery legislation. But if the objective of the Convention is to combat bribery in international business transactions, then its objective is greater than its present scope. An interesting study by Anna D'Souza shows that the Anti-Bribery Convention has

91 Karimova 2013: 10

92 Heimann & Dell 2012: 4

93 Ibid: 6

resulted in a decrease of bilateral trade between Convention members and countries of high corruption risk, and simultaneously in an increase of bilateral trade between non-OECD members and countries of high corruption risk.⁹⁴ Thus, although we have seen that the relatively narrow scope of the ABC has been beneficial to the success of the Convention, it is also against the basic interest of the Convention. Transparency International's 2012 Annual Progress Report on the ABC also recommends increasing the number of countries with adherence to the Convention, especially those with a "growing role in international business", such as China, India, Indonesia and Saudi Arabia.⁹⁵

Would this, on the whole, serve better the objectives of the ABC? As the comparative experience of the UPR shows, a wider scope has several disadvantages. It would make increasingly infeasible the attention to detail which has characterised the work of the ABC so far. For the UPR, increased accountability might be achieved through some practices that have been used successfully by the ABC, such as the pre-review questionnaire. While the current format requires reviewing states to study the circumstances of the state under review, at their own initiative, it is a time-consuming and resource-draining exercise. For example, implementation of laws on sexual orientation discrimination in South Africa may not be common knowledge to representatives from Japan and Korea. But if the issue was already raised during South Africa's first review, then the onus should not fall on the reviewing states to list and reiterate the subject; time could be saved by having all previous recommendations incorporated in the form of a questionnaire, to which the state under review must respond in

94 D'Souza, Anna (2012): The OECD Anti-Bribery Convention – Changing the currents of trade. *Journal of Development Economics*, 97. pp. 73.

95 Heimann & Dell 2012: 7

detail with descriptions of how each recommendation has been addressed.

On the other hand, the sheer number of documents that come from each state's UPR cycle is indicative of how inclusive and perspective-conscious the review is. For the ABC, each review appears to be, loosely speaking, bilateral – the Working Group's recommendations and observations are listed together, followed by comments and views of the state under review. The Working Group here is taken as a cohesive entity. The UPR, in strong contrast, is based on information by three sources: a report by the state under review, information from UN entities, and a report from stakeholders within the state under review. The final report compiled by the Working Group also does not attempt to represent the Working Group as a unit; all recommendations are followed by the name of the individual state who proposed it. The approach is far more suited to the delicate intricacies of international relations, considering that not all states are on equally good diplomatic terms with one another, than that of the ABC. The active involvement of civil society organisations, which is encouraged by the UPR, is also an important feature of the review. It tacitly acknowledges that civil society in each state is more acquainted with human rights situations on the ground than the Working Group can be, and may provide information that the state itself in an official capacity may be reluctant to. This important role of civil society organisations is somewhat lost on the ABC, which does not have any formal involvement of civil society in the review itself. The Working Group does engage with civil society organisations during on-site visits, but the views expressed by civil society in that context are brought to the review only in the light of the Working Group's report, and as such may be 'lost in translation'. The ABC review might,

therefore, benefit from some direct involvement of civil society organisations which may be better equipped to report on the enforcement of the Convention on the ground.

Despite their differences in scope, history, and thematic expertise, the two peer reviews each have facets to their approach which the other might benefit from. This is made somewhat clearer by having chosen case studies that are parties to both peer reviews, and by noting the differences in their performance in each. As mutual monitoring continues to be an important tool in international relations, it is interesting to observe how peer reviews match up to the golden standard of 'co-operation and change'. In the constantly evolving world of diplomatic relations, peer reviews also cannot remain static. The UPR is a relatively young institution, while the ABC has had the experience of mutual monitoring for longer; but the fact that their experiences are evolving concurrently and overlapping in some cases, may give each the opportunity to learn from the other.

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Appendix

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