Understanding the legal status of Universal Periodic Review recommendations

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Part of the Universal Periodic Review Process (UPR) at the UN Human Rights Council involves the states, who are conducting the review, issuing recommendations to the state that is under review. These recommendations can be on a range of issues surrounding the protection of human rights, from simple praise of a state to a recommendation that a state becomes party to a human rights treaty. States are free to reject or accept recommendations and each year several thousand recommendations are made as part of the UPR process. This paper examines what legal status (if any) recommendations could have and how they relate to existing sources of international law. The first and second sections examine the nature of recommendations and the legal status of the UPR process. The third and fourth sections examine how accepted patterns of recommendations could be used as a mechanism for interpreting and enforcing existing norms in international human rights law.

Keywords: UN Human Rights Council, Universal Periodic Review, obligations, sources of international law, human rights norms.

1 INTRODUCTION

This project began with me correcting the law on a social media post. The article that had gone viral was a report headlined 'Saudi Arabia criticises Norway over human rights record' with the article reporting that Norway was being scrutinised by Saudi Arabia over its protection of women's rights and Saudi Arabia was recommending that 'criticism of religion and of prophet Mohammed be made illegal'.[1] The misapprehension created by this article—which resulted in a flurry of shares on social media—was that Saudi Arabia was somehow putting Norway on trial at the UN over its human rights record. In fact, what was happening was that Norway was undergoing its second cycle of Universal Periodic Review (UPR) at the UN Human Rights Council (HRC). The Saudi recommendation was one of many that Norway had received during its review which Norway had 'noted' (UPR terminology for rejection). This was all part of the system that had successfully reviewed the human rights record of all countries at the UN, ensuring participation from countries traditionally hostile to international human rights organisations, such as Israel and Cuba, because it gave notional parity to all states. Recommendations are made to states under review by the states conducting the review.[2] They are meant to be political and are not akin to other aspects of international human rights law, such as comments by human rights treaty bodies, which are intended to have some form of legal status. This was what I explained at some length on social media, to debunk the assumptions surrounding the Saudi Arabia-Norway misunderstanding. Over 5,000 recommendations are issued through the UPR

[1] Felicity Morse, 'Saudi Arabia criticises Norway over human rights record' *The Independent* (29 April 2014) <http://www.independent.co.uk/news/saudi-arabia-criticises-norway-over-human-rights-record-9301796.html> accessed 13 March 2018.
[2] United Nations Human Rights: Office of the High Commissioner, 'Basic facts about the UPR', 24 May 2017 <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> accessed 13 March 2018.

process each year; many of them are relatively uncontroversial, whereas others try to make states alter their behaviour or comply with an existing legal obligation.[3]

This raises a broader question—can UPR recommendations have a legal status? This article is an attempt to provide an answer to that question. Several writers have already examined the UPR's work in shaping human rights norms through deliberation and the dialogic process of review—engaging in interactive dialogue with states to work towards improving their human rights record.[4] Yet, that does not necessarily mean that recommendations have a legal status. On its website, the Office of the High Commissioner on Human Rights makes no reference to recommendations having any sort of legal status.[5] Some of the literature on this issue treats recommendations as a series of political commitments rather than as indicative of any legal obligation or effect.[6] Yet, recommendations issued and accepted by states under review have overlapped with existing legal commitments. A series of recommendations have been issued on the interpretation of a particular set of rights, or in relation to particular practices, which could indicate the creation of an emerging international consensus on a particular issue. The UPR process has also encouraged compliance with existing obligations upon states.

The question of whether recommendations have a legal status relates to a broader discussion of what the exact role of the UPR process is within international law. Formalist accounts of the origins of international law rely heavily on the 'sources thesis'—the idea that a piece of law must originate from a recognised source of international law to be recognised as law.[7] Yet, this relies on a hard distinction being drawn between political and legal institutions and discounts the way that the authority of international organisations can evolve. Formalist accounts of the UPR process categorise it as a political process as it was created by a General Assembly Resolution and reviews are conducted by states acting as peers rather than human rights experts or judges examining cases.[8] For example, a Brookings Institute/Open Society Justice Initiative paper described the UPR as 'a valuable political process' and distinguished it from other processes at the HRC and the work of treaty bodies.[9] Another way of describing the UPR process is as a form of soft law in that it is not binding on states. In so far as it has an impact on state behaviour this is by virtue of its political function. However, drawing a strict distinction between soft and hard law is unhelpful because, as Kal Raustiala notes, there is little basis in 'state practice or legal theory' for such a sharp distinction.[10] As this paper notes, in some

[3] Statistics taken from UPR Info 'Statistics of Recomendations' (UPR Info 1 March 2018) <https://www.upr-info.org/database/index.php?limit=0&f_SUR=46&f_SMR=All&order=&orderDir=ASC&orderP=true&f_Issue=All&searchReco=&resultMax=25&response=&action_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=&pledges=RecoOnly> accessed 2 March 2018.

[4] See for example Karolina Milewicz and Robert Goodin, 'Deliberative Capacity Building through International Organizations: The Case of the Universal Periodic Review of Human Rights' (2016) 46 British Journal of Political Science 1; Rhona Smith, 'Pacific Island States: Themes Emerging from the United Nations Human Rights Council's Inaugural Universal Periodic Review' (2012) 13 Melbourne Journal of International Law 569; Edward McMahon and Marta Ascherio, 'A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council' (2012) 18 Global Governance 231.

[5] UNHRC website (n 2).

[6] See for example Alex Conte, 'Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism' (2011) 9 New Zealand Yearbook of International Law 187.

[7] Hugh Thirlway, *The Sources of International Law* (OUP, Oxford 2014) 10–11.

[8] See for example Purna Sen, Monica Vincent and Jade Cochran, *Universal Periodic Review: Lessons, Hopes and Expectations* (Commonwealth Secretariat 2011) 7.

[9] Brookings OSJI, 'Improving Implementation and Follow up Treaty Bodies, Special Procedures and Universal Periodic Review' Report of Proceedings 22–23 November 2010 <https://www.opensocietyfoundations.org/sites/default/files/improving-implementation-20110307.pdf> accessed 13 March 2018.

[10] Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99 American Journal of International Law 581, 582.

circumstances states alter their behaviour in response to soft law from international organisations. Constructivist theory maintains that the behaviour of actors within international organisations is shaped by past practices and the social climate created by those organisations.[11] Recent constructivist scholarship has highlighted how the socialisation of states can protect human rights and encourage compliance with international law.[12] UPR recommendations come in different forms and states under review are at liberty to accept or reject recommendations, yet there is a category of recommendations that, by their framing, are designed to influence state behaviour.

This article argues that in specific circumstances, these recommendations have a legal status. This occurs in two ways; firstly some recommendations by their subject matter are indicative of an emerging consensus in international human rights law in relation to the scope and application of a particular right. Secondly other accepted recommendations deal with rights already protected by existing human rights treaties with the recommendation complementing or even completing the process of enforcing the obligation on a state to protect that right. Whether this has an impact on the ground is beyond the scope of this article. However, by accepting particular recommendations states are demonstrating on the international plane that they are willing to alter their human rights practices and laws. The first section of this article examines the process of issuing UPR recommendations within the context of the review process. Although the UPR has a role in encouraging compliance with international human rights law, as the second section argues this does not mean that it is engaged in law-making. However, as outlined in the third and fourth section, a series of UPR recommendations could be evidence of emerging opinio juris and some individual UPR recommendations operate in a manner that enhances the organisational capacity of the UPR process to act as an enforcement mechanism. What has been happening is that the nature of the UPR has been evolving over successive review cycles leading in turn to the evolution of the status of recommendations.

2 AN OVERVIEW OF RECOMMENDATIONS IN THE UPR PROCESS

Recommendations are issued to the state under review during the interactive discussion stage of their review. This takes place after the state under review has had its documentary evidence reviewed and engaged in the interactive dialogue with the review panel.[13] By the time a state is offered a recommendation they have had their country report, stakeholder reports and any treaty body reports scrutinised. Because of the different nature of recommendations offered by states, some of which relate to serious human rights abuses others of which amount to little more than compliments of the state under review, Edward McMahon has developed a system for classifying recommendations based on their linguistic construction and the nature of the action they involve.[14] Recommendations classified as category one are aimed at requesting information from the state under review; whilst recommendations classified as category two are aimed at emphasising continuity or continuation of practice. It is the latter category where 'praise bargaining'—the issuing of recommendations unconditionally praising the state under review in the hope that process is reciprocated when they are under review—takes place.[15] Around a third of all recommendations require specific action, which are

[11] Ian Hurd, *International Organizations: Politics, Law, Practice* (3rd edn, CUP Cambridge 2017) 26–27.
[12] Elizabeth Stubbins Bates, 'Sophisticated Constructivism in Human Rights Compliance Theory' (2014) 25 European Journal of International Law 1169; Ryan Goodman and David Jinks, *Socializing States: Promoting Human Rights Through International Law* (OUP, Oxford 2013) 20–35.
[13] UNHRC website (n 2).
[14] Edward McMahon, 'Action Category' (*UPR Info*, October 2014) <https://www.upr-info.org/database/files/Database_Action_Category.pdf> accessed 1 June 2017.
[15] Ibid. The term 'praise bargaining' is used in Allehone Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council' (2009) 9 Human Rights Law Review 1, 22.

classed as category five. These recommendations involve legal verbs such as 'abolish, accede, adopt, amend, implement, enforce [and] ratify'.[16]

The final UPR report details the recommendations accepted by the state under review and records recommendations that the state party refuses to accept or makes no comment upon. There is a further option to give a general or a specific response to the recommendations received and to give a general response about how the state views the subject matter of any specific recommendation. A state cannot technically reject a recommendation. Instead recommendations are marked as 'noted' where a state has signalled that a recommendation 'does not enjoy its support' or that it 'does not accept' the recommendation.[17] In practice this still results in recommendations being rejected by states but allows such matters to come up again in subsequent review cycles. During the first review cycle, between 2008 and 2011, over 20,000 recommendations were made and nearly 70% were accepted.[18] Around 50% of all recommendations concerned the signature, ratification and implementation of international instruments; other recommendations often focused on specific practices such as torture or the country's justice system.[19] After the first year there was an increase in the number of states signing up to major human rights treaties. Whilst there was not a demonstrative causal link between the two, this phenomenon was a sign that there was a positive association between UPR recommendations and the improvement of human rights protection.[20] Yet it is also worth noting that the majority of rejected recommendations were category 5 recommendations – in the first cycle around 60% were rejected.[21] Data from the second review cycle shows that 47% of all category 5 recommendations were rejected.[22] This indicates a reasonably high correlation between rejection and legal language within the recommendation in question. Even though factors such as the region of the State under Review and the substantive human rights issue involved in the recommendation have an impact on whether or not a state accepts the reservation, there are far more rejections of category 5 recommendations than any other category of recommendation.[23] This article focuses principally on category 5 recommendations because that class of recommendation contains the majority of recommendations using language conveying a definitive obligation upon states to act in a particular way, linguistically resembling other provisions in international law containing legal obligations, such as the articles of a treaty.

The nature of the UPR and its role was the subject of many disagreements during the HRC's creation. Most states agreed on the idea of an objective, peer review mechanism along the lines of other peer review mechanisms such as the Development Assistance Committee peer review process of the

[16] Ibid.
[17] UPR Info, 'Methodology Responses to recommendations' (*UPR Info*, October 2014) <https://www.upr-info.org/database/files/Database_Methodology_Responses_to_recommendations.pdf> accessed 1 June 2017.
[18] UNDP Moldova and the Office of the High Commissioner for Human Rights, 'Draft Report, International Conference on Responding to the UPR Recommendations: Challenges, Innovation and Leadership, Chisinau' (*UN Development Program*, 4–5 November 2011) 4 <http://www.undp.org/content/dam/rbas/doc/DemGov/Draft_Responding%20to%20the%20UPR%20Recommendations_%20Challenges,%20Innovation%20and%20Leadership.pdf> accessed 1 June 2017.
[19] Ibid.
[20] Purna Sen, *Universal Periodic Review of Human Rights: Towards Best Practice* (Commonwealth Secretariat, 2009) 35–6.
[21] Edward McMahon, 'The Universal Periodic Review: A Work in Progress: An Evaluation of the First Cycle of the New UPR Mechanism of the United Nations Human Rights Council' (Friedrich Ebert Stiftung, Dialogue on Globalization, September 2012) 18.
[22] Unless stated otherwise all subsequent references to the number of recommendations made are drawn from the UPR Info Database of Recommendations <https://www.upr-info.org/database/index.php?limit=0&f_SUR=46&f_SMR=All&order=&orderDir=ASC&orderP=true&f_Issue=All&searchReco=&resultMax=25&response=&action_type=&session=&SuRRgrp=&SuROrg=&SMRRgrp=&SMROrg=&pledges=RecoOnly> accessed 2 March 2018.
[23] Ibid.

Organization for Economic Co-operation and Development (OECD).[24] Interestingly, the obligation of states to comply with the UPR process was never contested, even though regional peer-review mechanisms rely on state acceptance, and neither General Assembly Resolution 60/251 nor HRC Resolution 5/1—the constituent instruments of the Council—set out a procedure for states that refuse to engage in the UPR process.[25] The process of recommendations needs to be seen in the context of the UPR's dialogic approach. This approach is set out in Resolution 60/251 where the review is described as a 'cooperative mechanism based on an interactive dialogue.[26] Recommendations were envisaged as the conclusion of a dialogue between the state under review and the Council, rather than resolutions or declarations. HRC Resolution 5/1 instructs that a guiding principle of the UPR should be a 'cooperative mechanism based on objective and reliable information and on interactive dialogue' and it is in that context that the only reference to recommendations in Resolution 5/1 should be read.[27] There is also another dimension to recommendations: General Assembly Resolution 60/251 requires the UPR process to 'complement and not duplicate the work of treaty bodies'.[28] This can be read both as a prohibition on duplication, but also as a provision allowing the UPR to work in parallel with treaty bodies to enforce human rights obligations. Ibrahim Salama, the Director of Human Rights Treaties Division at the Office of the UN High Commissioner for Human Rights, argued in 2011 that in order to avoid duplication of UPR recommendations, we should focus on 'mutually reinforcing' the recommendations of treaty bodies rather than issuing fresh recommendations on the same subject matter.[29]

Early accounts of the UPR focused heavily on the dialogic nature of the process, with relatively little reference to the legal status of recommendations.[30] Christian Tomuschat observed that in the documents founding the UPR there was a clear difference between recommendations relating to the commitments that states had already made, which would be governed by *pacta sunt servanda*, and recommendations relating to novel or fresh commitments.[31] In the first cycle there was some evidence that states recognised this distinction, but this did not stop the issuing of recommendations that went beyond the state under review's existing commitments. For example, recommendations made in relation to LGBTQ+ rights often made reference to existing human rights commitments but occasionally referenced commitments that states had not made.[32] However the language used to describe the UPR in both the General Assembly resolution creating the HRC and the HRC's own institution-building resolution, involves terms such as 'technical assistance' and 'policy advice'.[33] This would seem to indicate that the process of issuing recommendations is not a source of law but is in fact similar to decrees or declarations issued by other international governmental bodies, such as the World Health Organisation, which may create legal effects but are not generally considered a

[24] Edward McMahon and Marta Ascherio, 'A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council' (2012) 18 Global Governance 231.
[25] Abebe (n 15), 3–4.
[26] UNGA Res 60/251 (13 April 2006) UN Doc A/RES/60/251 para 5(e).
[27] UNHRC Res 5/1 (18 June 2007).
[28] UNGA Res 60/251 (n 26).
[29] Ibrahim Salama, 'Proliferation of Treaty Bodies or Expansion of Protection?' (2011) 105 Proceedings of the Annual Meeting: American Society of International Law 515, 519.
[30] For examples see Elvira Dominguez-Redondo 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) 7 Chinese Journal of International Law 721.
[31] Christian Tomuschat, 'Universal Periodic Review: A New System of International Law with Specific Ground Rules?' in Ulrich Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP, Oxford 2011) 613.
[32] Frederick Cowell and Angelina Milon, 'Decriminalisation of Sexual Orientation Through the Universal Periodic Review' (2012) 12 Human Rights Law Review 341, 344.
[33] Phillip Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council' (2006) 7 Melbourne Journal of International Law 185, 207.

source of law *stricto sensu*, but instead soft law.[34] As Nadia Bernaz noted in an analysis of the legal status of the UPR in 2009—midway through the first review cycle—the different political considerations and sharp divergences of opinion among states over the role of treaty bodies and other existing human rights instruments, meant that it was difficult to appraise the process from a purely legal perspective.[35] Bernaz noted that the chief problem with ascertaining the UPR's legal status was that it treated binding and nonbinding norms equally for the purposes of conducting the review.[36]

Yet in spite of this ambiguity, states act as though recommendations matter and have clear and definite consequences. One indication of this is the manner in which states often act as blocs, mirroring existing regional and political alignments in the General Assembly and support members of their own bloc when they are under review. As Adrienne Komanovics notes, the large number of friendly recommendations from states in the same regional bloc, which require very little action or are simply pieces of praise, take 'time away from making valid criticism' of the state under review.[37] Tunisia and Bahrain for example were able to mount what Gareth Sweeny and Yuri Saito described as 'an exercise in filibustering' by only receiving questions praising their human rights records from the Africa and Asia blocs, despite both countries at the time of review being engaged in violent repression of their domestic political opponents.[38] This is at least evidence of a desire to avoid negative consequences on the part of a state under review, indicating that the process as a whole is recognised as conveying some form of power. Other states, however, saw recommendations as a positive feature to emphasise their compliance with human rights commitments and used their UPR mid-term reports to summarise their progress towards implementing recommendations.[39]

By the second cycle it was relatively clear that the UPR would play a quasi-scrutiny role in relation to previously issued recommendations. In 2011 the International Committee of Jurists issued calls for mechanisms to promote implementation of recommendations.[40] During a review of UPR functions a proposal was considered which would have required the outcome report of a review to contain a timeframe for the implementation of recommendations, which if adopted would have provided a mechanism for monitoring the implementation of recommendations by a state.[41] This would have created a normative expectation in favour of a recommendation's implementation. However, these proposals were considered too far reaching and were not adopted; later in 2011 the Council adopted a decision requiring states under review to detail any domestic law reforms and accession to international treaties they had made when implementing recommendations.[42] Although these reforms were described as 'modest' and chiefly resulting in 'minor fixes or adjustments' by some

[34] Paul Szasz, 'General Law Making Processes' in Christopher C. Joyner (ed), *The United Nations and International Law* (CUP, Cambridge 1997) 27, 40–43.
[35] Nadia Bernaz, 'Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review Mechanism' in Kevin Boyle (ed), *New Institutions for Human Rights Protection* (OUP, Oxford 2009) 75, 77.
[36] Ibid.
[37] Adrienne Komanovics, 'The Human Rights Council and the Universal Periodic Review: Is it More Than A Public Relations Exercise' (2012) 150 Studia Iuridica Auctoritate Universitatis Pecs Publicata 119, 142.
[38] Gareth Sweeny and Yuri Saito, 'An NGO Assessment of the New Mechanisms of the UN Human Rights Council' (2009) 9 Human Rights Law Review 203, 210.
[39] ISHR, 'Council debate on UPR: raising the bar for the second cycle' (*International Service for Human Rights* 26 March 2012) < http://www.ishr.ch/news/council-debate-upr-raising-bar-second-cycle > accessed 1 September 2017.
[40] International Committee of Jurists, 'Position Paper on the Review of the Human Rights Council' (3 February 2011) <http://www.icj.org/wp-content/uploads/2012/06/ICJ-humanrightscouncil-advocacy-2011.pdf > accessed 1 September 2017.
[41] Alex Conte, 'Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism'(2011) 9 New Zealand Yearbook of International Law 187.
[42] UNHRC Res 16/21 (12 April 2011) UN Doc HRC/RES/16/21; UNHRC Res 17/119 (19 July 2011) UN Doc HRC/DEC/17/119.

commentators,[43] they increased the dialogic capacity of the UPR process and the UPR's capacity for norm promotion by allowing some review of the implementation of recommendations. These institutional reforms were however all explained in terms of enhancing the capacity and effectiveness of the UPR process, rather than in legal terms. By the end of the second review cycle in 2016 some states clearly had changed their position in relation to the protection of human rights with the number of treaty ratifications increasing in part as a result of accepted recommendations. Almost 21,000 category five recommendations have been made to date, most countries have accepted at least one of the recommendations made to them and only a handful of countries have yet to make any recommendation to a state under review.[44] Recommendations are increasingly becoming a larger part of the overall review process with the number of recommendations increasing from the first to the second review cycle and likely to increase still further in the third. It is therefore reasonable to conclude that the UPR process was clearly designed to have some normative effect on state behaviour and recommendations are a crucial part of that function.

3 UPR RECOMMENDATIONS AND THE SHAPING OF STATE BEHAVIOUR – ASSESSING THE REVIEW PROCESS AS A LAWMAKING PROCESS

Having the capacity to shape state behaviour does not necessarily mean that an institution creates international law. There is some considerable scepticism amongst critics of 'soft law' that institutional declarations, commitments or recommendations can have any legal effect, with one critic describing them as 'informal standard setting'.[45] A rigidly formalist view such as this downplays the social way in which international actors react to recognised sources of authority and alter their behaviour.[46] Maintaining a sharp distinction between hard law, with the attendant qualities of its binding nature and precision, and soft law which is assumed to have none of those qualities, has come in for some criticism for engineering too binary a distinction between the two forms of law.[47] Most forms of international law are 'soft' in that they require high levels of voluntary state compliance and acquiescence in their implementation and 'hard' in the sense that there are reputational consequences for a state that fails to comply, leading some scholars to argue that rather than seeing hard and soft law as binary choices it is better to see them as choices along a continuum that at its extreme has fixed definitions of hard and soft law.[48] Constructivist scholarship has examined how socialising states within organisations makes them compliant with that organisation and can encourage a process of norm adherence generating a process of legalism where the organisation itself can be seen as a source of law.[49] An interactional account of international law, advanced by Jutta Brunnée and Stephen Toope, looks at how legal commitments 'arise in the context of social norms based on shared understandings' and argues that commitment to norms is maintained through continuing practices.[50] The interaction created by a state-state peer review mechanism, such as the UPR, over time builds up the authority of the process and results in states progressively complying with recommendations. The issue of whether an organisation produces soft law or hard law is not particularly important under an

[43] Edward McMahon, Kojo Busia and Marta Ascherio, 'Comparing Peer Reviews: The Universal Periodic Review of the UN Human Rights Council and the African Peer Review Mechanism' (2013) 12 African and Asian Studies 266, 268.
[44] UPR Info (n 22).
[45] Jan Klabbers, *An Introduction to International Organizations Law* (3rd edn, CUP Cambridge 2015) 157.
[46] Jean d'Aspremont, *Formalism and the Sources of International Law: a theory of the ascertainment of legal rules* (OUP, Oxford 2011) ch 8.
[47] Gregory C. Shaffer and Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2009) 94 Minnesota Law Review 706, 713–714.
[48] Ibid 715, see also Kenneth Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organisation 421, 423.
[49] Bates (n 12).
[50] Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP, Cambridge 2010) 15.

interactional account of the law because what matters is the legitimising or delegitimising effect that an organisation's practice or declarations has on a state's actions.[51] As Brunnée and Toope argue an international account shows how international law creates 'a feedback loop …whereby actors within global society can learn collectively to value the rule of law more highly' but that this requires institutions and constant institutional practices.[52]

Some international relations literature has discussed this in terms of institutional practices which can become authoritative as they define the parameters of state action leading to states altering their behaviour.[53] For example, states sometimes follow initiatives and recommendations of the technical arm of the OECD and are prepared to accept interpretations of international law from debates in the UN Security Council, which are not binding on states but are considered authoritative.[54] What is particularly important in these cases is the institutional setting within which recommendations are made.[55] The dialogic nature of the review process is often commented upon in literature on the UPR when distinguishing it from the practices of the Council's predecessor, the UN Commission on Human Rights.[56] Jane Cowan's description of the UPR process as an 'audit ritual' utilising overt pressure through 'naming and shaming' alongside other more co-operative mechanisms, such as offering technical support, captures how the UPR process attempts to have a normative effect on state behaviour.[57] Ambassador Blaise Godet, former vice president of the Commission on Human Rights, believed that cooperation within the Council, or otherwise speaking about human rights abuses during UPR sessions, would help lead to changes that would assist human rights protection.[58] An empirical analysis of recommendations showed that there is some evidence that states have been encouraged to accept resolutions relating to new human rights commitments.[59] Another study of UPR recommendations made to the UK and India showed that there was evidence by the second cycle that both states were commenting on the implementation, or lack of implementation of particular recommendations made to them.[60]

While this is evidence of state behaviour changing there is less evidence that states perceive recommendations to be part of a legal process creating obligations. A study of state behaviour at the end of the first cycle by Jane Cowan and Julie Billaud observed a number of comments about 'good students setting an example' and 'bad kids playing games at the back of the class' which they argued demonstrated that the UPR process was something akin to a 'school exam' for states.[61] The importance of the performative nature of the UPR process is a key part of Cowan's analysis of the

[51] Ibid.
[52] Brunnée and Toope 'Interactional Legal Theory, the International Rule of Law and Global Constitutionalism' in Anthony F. Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar, Cheltenham 2017) 174.
[53] Ian Johnston, 'The Power Interpretive Communities' in Barnett and Duvall (eds) *Power in Global Governance* (4th edn, CUP, Cambridge 2008) 185; Friedrich Kratochwil, 'Making Sense of "International Practices"' in Adler and Pouliot (eds) *International Practices* (CUP, Cambridge 2011) 36.
[54] Johnston (n 52) 36. Andrew Hurrell, 'Power, Institutions, and the Production of Inequality' in Barnett and Duvall (n 52).
[55] More broadly outside the realm of UPR Recommendations, see Brunnée and Toope (n 49) 64–65.
[56] See Jarvis Matiya, 'Repositioning the International Human Rights Protection System: The UN Human Rights Council' (2010) 36 Commonwealth Law Bulletin 313, 313, 319; Matthew Davies, 'Rhetorical Inaction? Compliance and the Human Rights Council of the United Nations' (2010) 35 Alternatives 449, 457.
[57] Jane Cowan, 'The Universal Periodic Review as Public Audit Ritual: An Anthropological Perspective on Emerging Practices in the Global Governance of Human Rights' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP, Cambridge 2015) 42–44.
[58] Blaise Godet, 'Reforming Human Rights' (2008) 29 Harvard International Review 74, 74–75.
[59] Milewicz and Goodin (n 3).
[60] Emma Hickey, 'The UN's Universal Periodic Review: Is it Adding Value and Improving the Human Rights Situation on the Ground?' (2013) 7 International Constitutional Law Journal 1.
[61] Jane Cowan and Julie Billaud, 'Between Learning and Schooling: The Politics of Human Rights Monitoring at the Universal Periodic Review' (2015) 36 Third World Quarterly 1175, 1177.

UPR as an 'audit ritual' and she notes that the repetitiveness and publicity of the process underpinned its effectiveness.[62] The high numbers of 'friendly' recommendations, with some states being issued a multiplicity of recommendations and others receiving recommendations echoing political praise, seems to further support the process of this being a ritualised or a performative process.[63] Thus whilst the institutional framework of the UPR has normative effects in the way it encourages states to adopt new political and legal commitments, it is unclear that states perceive this process as an international law-making process in the same way that they would when voting in an international body. By way of illustration, theories on the legality of General Assembly resolutions have pointed to the role resolutions have in articulating an international legal consensus or representing the interests of a group of states, which is all indicative of the distillation and harmonisation of international opinion.[64] However recommendations are offered and accepted on an individual basis and it is not at all clear that this resembles the sort of consensus established by votes for a General Assembly resolution.

It is also not clear that accepting a recommendation has any formal status. Although consent is a crucial feature for the creation of obligations in international treaty law, consent by itself is too narrow a metric to establish whether a state party has accepted the creation of legal obligations.[65] As Basak Çali argues it makes sense to see consent in the context of the content of the obligation that an instrument seeks to impose upon states.[66] In both the General Assembly resolution creating the HRC and the HRC resolution creating the UPR process, recommendations are treated alongside formal pledges and other declarations that a state under review may make.[67] This context makes it unlikely that acceptance of an individual recommendation would carry any legal consequences, beyond an expression of a state's individual intention. The acceptance of a recommendation to alter a state's position in relation to a treaty obligation would be unlikely to be regarded as an individual declaration under the treaty as the acceptance of the recommendation creates a commitment from the state to the UPR process itself. Acceptance of a recommendation allows the UPR process to scrutinise a state's adherence to that recommendation in the next review cycle, so the status of a resolution is chiefly relevant to the administration of the UPR process in relation to the state under review.[68]

Yet this is where a state's acceptance of a recommendation may be significant as the capacity of the UPR in subsequent review cycles to follow up the implementation of that recommendation means that its acceptance leads to future scrutiny of the state on the subject matter of that recommendation. Where the recommendation in question relates to an existing legal obligation this effectively means that the state is committing to a scrutiny regime of that obligation. An accepted recommendation may also be similar to other recommendations accepted by other states. In this context they may be indicative of an emerging consensus on a matter of human rights protection. For the aforementioned reasons, it is difficult to conclude that recommendations have a legal status simply by virtue of being accepted by a state. Yet the impact they can have on altering state behaviour can relate to existing processes of law creation and enforcement in international law meaning that recommendations could,

[62] Cowan (n 57) 45.
[63] The US, for example, received a high number of recommendations, whereas China received mostly praise-bargained recommendations. Rhona Smith, 'The Five Permanent Members of the Security Council and the Human Rights Council's Universal Periodic Review' (2013) 35 Human Rights Quarterly 1.
[64] Rosalyn Higgins, 'The United Nations at 70 Years: The Impact Upon International Law' (2016) 65 International and Comparative Law Quarterly 1.
[65] This view is set out by Fernando Tesón, 'International Obligation and the Theory of Hypothetical Consent' (1990) 15 Yale International Law Journal 84.
[66] Başak Çali, *The Authority of International Law* (OUP, Oxford 2015) 24 and 70.
[67] Higgins (n 63); see generally Richard Falk, 'On the Quasi-Legislative Competence of the General Assembly' (1966) 60 American Journal of International Law 782, 788.
[68] Redondo (n 30).

in certain circumstances, have legal status. As the next two sections argue with reference to specific recommendations or a series of recommendations on a particular issue, there is a case for recommendations either being evidence of the expansion of existing legal norms or instrumental in enforcing existing norms. This means that recommendations whilst not emerging from a legal process can in certain circumstances have a legal status.

4 RECOMMENDATIONS AS EVIDENCE OF OPINIO JURIS

A pattern of accepted recommendations can in some circumstances highlight the emergence of a consensus on the scope or application of an already widely acknowledged right. Article 31 of the Vienna Convention on the Law of Treaties contains a number of different factors, such as subsequent practice and subsequent agreements between state parties, which can be used for the interpretation of a treaty provision.[69] The meaning and scope of rights can evolve over time and recommendations being offered and accepted by states on a particular right, is evidence of what states collectively may think of the scope of a particular right and what practices it prohibits or encompasses. For example the corporal punishment of children by state officials or teachers has been held by some international human rights bodies to be a form of inhuman and degrading treatment, although this is far from universal and some states continue to use corporal punishment.[70] In the first UPR cycle, the recommendations referencing inhuman and degrading treatment, and recommendations concerning corporal punishment amounted to 11% of all accepted recommendations and 14% of all rejected recommendations. In the second cycle, such recommendations amounted to 13% of all accepted recommendations and just over 10% of all rejected recommendations, showing a slight increase in acceptance of recommendations concerning corporal punishment of children. Of all the recommendations across both cycles on the prohibition of the corporal punishment of children, 54% have been accepted.[71] This does not mean that a new right is being created by the recommendations or that recommendations are the sole source of the prohibition on this practice. Rather, what is happening here is that an emerging trend of accepted recommendations can be viewed as evidence of a new interpretive norm that the prohibition of inhuman and degrading treatment should encompass the prohibition on corporal punishment.

In generally considered necessary, as a matter of customary international law, to show both the emergence of a state practice and also the presence of *opinio juris*, establishing the existence of an obligation, which makes that practice, have legal consequences.[72] Oscar Schachter attempted to formulate a theory of the origins of international legal obligations without focusing on their source or the consent of states to the norm.[73] Schachter noted that some ICJ judgments inferred the existence of legal obligations using terms such as the 'will of the community' or 'humanitarian duty'.[74] From this he identified five processes for the establishment of obligatory norms: designation of state behaviour by a norm, the actor issuing the norm is viewed as competent, willingness to make a norm effective, transmittal of norms and the designation of a target audience for said norms.[75] Critics have noted that while this theory explains how norms can be generated it does not explain how compliance with the

[69] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(3).
[70] See for example the judgment of the European Court of Human Rights in *Tyrer v UK* (1982) 4 EHRR 232.
[71] Data taken from UPR Info (n 22).
[72] Anthony D'Amato, 'Trashing Customary International Law' (1987) 81 American Journal of International Law 101.
[73] Oscar Schachter 'Towards a Theory of International Obligation' (1968) 8 Virginia Journal of International Law 300.
[74] Ibid 304. Illustrative cases on this point cited by Schachter include *Advisory Opinion on Certain Expenses of the United Nations* [1962] ICJ Rep 151; *Columbian-Peruvian Asylum Case* [1950] ICJ Rep 266.
[75] Schachter (n 73) 312.

subsequent obligation within those norms is achieved.[76] Yet the existence of an obligation should be distinguished from compliance with that obligation, as an obligation's existence is the reason for compliance in the first place,[77] so the latter logically precedes the former. Given that the HRC created the UPR as a mechanism for promoting human rights, the process of states issuing recommendations is suggestive that a particular practice ought to be adopted by the state under review. Patterns of accepted UPR recommendations, of the sort described above, would be broadly compatible with Schachter's criterion.

The next element in establishing the existence of a new norm would be to see if there is a discernible pattern within the framing of accepted recommendations. The ICJ in its Advisory Opinion on Nuclear Weapons noted that General Assembly Resolutions may have normative value when a 'series of resolutions may show the gradual evolution of the opinio juris required for the establishment of a new rule'.[78] An obvious example of this is the norm of anti-colonial self-determination contained in General Assembly Resolution 1514 of December 1960 which in the decade after its adoption was cited 95 times in other resolutions.[79] By the 1980s, it was clear that there was a recognised right to anti-colonial self-determination in international law.[80] Whilst UPR recommendations are considerably different to General Assembly Resolutions, it is conceivable that a line of accepted recommendations could be indicative of a new norm if one takes Michael Byers' view that '*opinio juris* itself represents a diffuse consensus a general set of shared understandings among states as to the "legal relevance" of particular kinds of behaviour'.[81] Other scholarship on the origins of customary international norms has focused on the existence of a pattern or type of behaviour being observable as being the crucial determinate as to whether a norm might obtain the status of customary law.[82]

The study of the International Law Commission (ILC) on the Identification of Customary International Law adopted a set of draft conclusions on the identification of customary international law in 2016 that was meant to provide a set of guidelines for practitioners to ensure the proper identification of customary rules.[83] Draft Conclusion 4 refers specifically to 'the practice of States' as the primary factor for the 'formation, or expression, of rules of customary international law'.[84] The meaning of practice is clarified in Draft Conclusion 6 which states that practice includes a 'wide range of forms' including, but crucially not limited to, 'resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct'.[85] Although the status of recommendations is unclear, the open-ended nature of practice in Draft Conclusion 6 and other elements of the Draft Conclusions would seem to indicate that they are

[76] See Oona Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' (2005) 72 University of Chicago Law Review 469, 487.
[77] Christian Reus-Smit, 'Politics and International Legal Obligation' (2003) 4 European Journal of International Relations 591, 595.
[78] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226 [70].
[79] Declaration on the Granting of Independence to Colonial Countries and Peoples GA Res 1514 (XV) 15th Session (14 December 1960). See also Samuel Bleicher, 'The Legal Significance of Re-Citation of General Assembly Resolutions' (1969) 63 American Journal of International Law 444.
[80] Christopher Joyner, 'UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation' (1981) 11 California Western International Law Journal 445, 465.
[81] Michael Byers, *Custom Power and the Power of Rules: International Relations and Customary International Law* (CUP, Cambridge 1999) 18.
[82] For indicative examples of this literature see Niels Petersen, 'Customary Law without Custom-Rules, Principles, and the Role of State Practice in International Norm Creation' (2007) 23 American University International Law Review 275. For a more sceptical discussion see Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 European Journal of International Law 523.
[83] International Law Commission, 'Identification of Customary International Law' (30 May 2016) UN doc A/CN.4/L.872.
[84] Ibid. Draft Conclusion 4.
[85] Ibid. Draft Conclusion 6.

reflective of the sort of state practice that could constitute custom.[86] As Jordan Paust argues, the use of custom in the protection of human rights can help establish which practices fall within the scope of particular rights and help with the interconnection of 'international law more generally and…domestic legal processes throughout the globe'.[87] A pattern of accepted recommendations would represent the acceptance of a particular practice by states in the interpretation of a particular right. This would resolve one of the problems in the construction of customary human rights norms identified by Paust, namely that it is difficult to objectively measure patterns of the spread of a particular norm and how 'intensely held or demanded a particular norm is … among the international community'.[88] Across both the first and second UPR review cycles a majority of category five recommendations requiring a prohibition of corporal punishment, on the grounds that it represents a form of inhuman and degrading treatment, have been accepted. It is therefore arguable that this line of accepted recommendations on corporal punishment is an example of norm evolution at work as an increasing number of states are willing to accept that corporal punishment can be considered inhuman and degrading treatment. Although no tribunal has yet referred to UPR recommendations in the process of interpreting rights, accepted patterns of recommendations could, as argued above, fall within the scope of materials used by tribunals to interpret rights as they are directly analogous to other interpretative or indicative material.

Yet recommendations on this issue show some signs of divergence in their development. For instance, some recommendations, such as Latvia's recommendation to the Maldives, which was rejected and focused on judicially administered punishment such as 'flogging' alongside 'all forms of corporal punishment' with an emphasis on controlling the role of state or public actors in the criminal justice system or in schools.[89] Other rejected recommendations aimed to tackle corporal punishment in the home, or required the state to criminalise parents for administering physical chastisement to their children. For example Spain's recommendation to Italy stated that corporal punishment was 'not a legitimate method of discipline in the home' and called for the Italian government to 'criminalize corporal punishment in all cases, including in education'.[90] This goes much further in scope that the recommendation directed at the Maldives as in order for its contents to be realised it would require the imposition of far reaching positive obligations on the state, such as the introduction of potentially complex legal frameworks criminalising parents in private spaces. In fact Barbados, Belgium and Canada have all rejected recommendations that convey some form of requirement to adopt far reaching laws on the criminalisation of corporal punishment that could involve criminal legislation of the private sphere.[91] This would make the scope of any such prohibition quite limited and even then not all recommendations are specific about what exact actions a state is required to take. For example,

[86] Whilst indicative of the sort of practice that would constitute custom, it is noteworthy that the ILC's Draft Recommendations have come in for some criticism for the relatively broad scope of practice covered in the Draft Recommendations. See Rossana Deplano, 'Assessing the Role of Resolutions in the ILC Draft Conclusions on Identification of Customary International Law' (2017) 14 International Organizations Law Review 227.

[87] Jordan Paust, 'The Complex Nature, Sources and Evidences of Customary Human Rights' (1995) 25 Georgia Journal of International and Comparative Law 147, 147.

[88] Ibid 151.

[89] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Maldives' (13 July 2015) UN Doc A/HRC/30/8 at 144.37.

[90] This recommendation was rejected by Italy. UNHRC, 'Report of the Working Group on the Universal Periodic Review: Italy' (18 March 2010) UN Doc A/HRC/14/4 at 84.38.

[91] See for example Iceland's recommendation to Canada required it to 'Explicitly criminalize corporal punishment of children'. UNHRC, 'Report of the Working Group on the Universal Periodic Review: Canada' (28 June 2013) UN Doc A/HRC/24/11 at 128.118. For Belgium UNHCR 'Report of the Working Group on the Universal Periodic Review: Belgium' For Barbados UNHCR 'Report of the Working Group on the Universal Periodic Review: Barbados' (12 March 2013) UN Doc A/HRC/23/11 at 102.82. For Belgium UNHCR 'Report of the Working Group on the Universal Periodic Review: Belgium'(11 July 2011) UN Doc A/HRC/18/3 at 103.10.

Portugal's recommendation to Ghana in the second cycle, which was accepted, stated that Ghana should 'prohibit all forms of corporal punishment' without specifying what exactly it ought to do.[92]

This can also be seen in the parallel trend of recommendations aimed at harmonising international standards. By way of example, the legal age of consent for marriage is not defined in the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) although there has been a concerted attempt by some activists and state parties to try to set an international minimum standard, which has led to General Recommendations on the issue from the CEDAW Committee and the Committee on the Rights of the Child.[93] Across both the first and second UPR review cycles there were 70 accepted recommendations on increasing the age of marriage or calling for the prohibition of early marriage. However, many of these were framed in ambiguous terms and were unclear about the expected scope of state action, with less than a third of them actually specifying a minimum age for marriage or referring to existing international standards. Due to the divergent ways in which recommendations are framed—in part a consequence of their formulation individually by states – any norm arising from an accepted series of recommendations is likely to be limited in nature. For example it is reasonable to conclude from the pattern of accepted and rejected recommendations that whilst there is an emerging consensus that the state administration of punitive corporal punishment on children is inhuman and degrading treatment, it is far from clear that the same applies to corporal punishment administered by parents to infants or other forms of punishment in the home.

This discussion also highlights one important difference between General Assembly Resolutions and UPR recommendations as a potential source of *opinio juris*. General Assembly Resolutions are communally drafted, amended and voted upon so that when a Resolution is passed its final text is a reflection of an authoritative international consensus on a particular issue. Recommendations are drafted and issued by states acting individually, rather than in concert, and are issued by representatives when it reflects the interests of the issuing state. Given the wide variance of wording it is difficult to identify any one recommendation as the definitive source of a norm, in the way that it is with General Assembly Resolutions, such as was the case with Resolution 1514 on decolonisation. Instead it is only possible to identify a series of recommendations with a strongly similar subject matter as indicative of a general trend that could constitute *opinio juris*. Realist critics have argued that rather than heralding the emergence of any special rule in international law, *opinio juris* is simply a reflection of confluence of various state interests, with each individual state having its own reasons for acting in that way independent of any specific legal obligation.[94] This could well apply to the acceptance of recommendations as the motivations for states accepting and rejecting them has varied considerably. However, the argument advanced here is slightly different – the acceptance of recommendations could be indicative of how a particular right ought to be interpreted in relation to specific practices and rather than creating a right, custom shapes the scope of a widely acknowledged existing commitment.[95] This is similar to the recommendations issued about the decriminalisation of homosexuality, which drew on states' existing commitments to the protection of privacy and equality

[92] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Ghana' (13 December 2012) A/HRC/22/6 at 125.50.
[93] See Equality Now, 'UN CEDAW and CRC Recommendations on Minimum age of Marriage Laws around the World as of November 2013' (*Equality Now*, 30 November 2013) <https://www.equalitynow.org/sites/default/files/UN_Committee_Recommendations_on_Minimum_Age_of_Marriage_Laws.pdf> accessed 1 September 2017.
[94] See Jack Goldsmith and Eric Posner, 'Understanding the Resemblance between Modern and Traditional Customary International Law' (2000) 40 Virginia Journal of International Law 639, 661.
[95] See Paust (n 86); see also Detlev Vagts, 'International Relations Looks at Customary International Law: A Traditionalist's Defence' (2004) 15 European Journal of International Law 1031.

before the law to recommend the inclusion of a particular practice within their scope.[96] As Bernaz noted, the targeted use of recommendations in the UPR process could assist with the 'crystallization' of customary international rules and, as the third review cycle progresses, it may well be possible to see further evidence of interpretive trends emerging in accepted recommendations.[97]

5 RECOMMENDATIONS AS A COLLATERAL ENFORCEMENT MEASURE

Some recommendations aim at enforcing an existing obligation, which the state under review is not complying with or not fulfilling. This potentially reinforces or duplicates an obligation contained in another legal instrument. A clear example of this principle are the reservations entered by state parties to CEDAW which has had a number of impermissible reservations entered by state parties, most notably to article 2 which requires state parties to condemn discrimination and adopt legislative and policy measures to combat discrimination. For example, Bangladesh entered a reservation stating that it 'does not consider as binding upon itself the provisions of article 2, as they conflict with sharia law based on [the] Holy Koran and Sunna', which is so far-reaching as to potentially invalidate the entire treaty.[98] The CEDAW committee has decided that overly broad reservations are impermissible and has repeatedly asked states to withdraw reservations such as these with varying degrees of success.[99] The inadequacy of the reservations regime under the Vienna Convention on the Law of Treaties as it currently exists in relation to multilateral human rights treaties has been extensively highlighted in the literature as a weakness of the entire system of multilateral human rights treaties.[100] One key problem is that beyond treaty bodies there is no regime or process for responding to impermissible reservations which has encouraged the issuing of reservations undermining the purpose of human rights treaties.[101]

UPR recommendations have been issued to some states with impermissible reservations recommending the reservation be withdrawn. In the first UPR cycle the UK, Brazil, Italy and Sweden all issued recommendations stating that Oman should remove its reservations to CEDAW.[102] Oman rejected this recommendation and the report of the working group for the second cycle noted that all its reservations were still in place. However, a similar recommendation was accepted by Mauritania in respect of its own impermissible reservations and by the second cycle Mauritania's country report noted that they had withdrawn their impermissible reservations, replacing them with more focused reservations.[103] Article 28(2) of CEDAW clearly states that a reservation considered 'incompatible with the object and purpose of the present Convention shall not be permitted'.[104] Therefore a recommendation requesting a state withdraw an impermissible reservation refers to an existing legal obligation upon the state under review that it is not fulfilling. The CEDAW Committee, which is responsible for enforcing the Convention, is the body with the legal responsible for enforcing the provisions of the treaty so resolutions on impermissible reservations are in effect duplicating its work.

[96] Cowell and Milon (n 32).
[97] Bernaz (n 35) 91.
[98] CEDAW Committee, 'Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women' (10 April 2006) CEDAW/SP/2006/2 10.
[99] Linda Keller, 'The Impact of States Parties Reservations to the Convention on the Elimination of All forms of Discrimination Against Women' (2014) Michigan State Law Review 309.
[100] See Ryan Goodman, 'Human Rights Treaties, Invalid Reservations, and State Consent' (2002) 96 American Journal of International Law 531, 537-538.
[101] Catherine Redgwell, 'Reservations to Treaties and Human Rights Committee General Comment No.24(52)' (1997) 46 International and Comparative Law Quarterly 390, 391–392.
[102] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Oman' (24 March 2011) UN Doc A/HRC/17/7/Add.1 at 90.7, 90.15,90.16, and 90.30.
[103] UNHRC, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21 Mauritania' (6 August 2015) UN Doc A/HRC/WG.6/23/MRT/1 at 1.52.
[104] Convention on the Elimination of All Forms of Discrimination against Women (opened for signature 17 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 28(2).

Another example of this type of recommendation can be seen in Mexico's recommendation to the Gambia to 'decriminalize offences related to freedom of expression and guarantee that human rights defenders and journalists can carry out their work in an atmosphere of freedom and security'.[105] This would require not only the repeal of laws constricting free speech but an ancillary obligation to provide specific protection for human rights defenders who would be more at risk from the general legal and political environment in the country. As Gambia is a state party to the International Covenant on Civil and Political Rights (ICCPR) and its far-reaching laws constricting freedom of expression are not compatible with its obligations under article 19, part of this recommendation engages the fulfilment of its obligation under the ICCPR.[106]

As noted, the HRC and General Assembly resolutions establishing the UPR described it as complementing the work of treaty bodies, not competing with them or duplicating their work as these recommendations appear to do. This type of recommendation is not interpreting an existing obligation or even creating a new obligation, rather it is attempting to elicit compliance with an existing obligation. Recommendations of this type are unlikely to be considered subsequent practice, which has a legal status in relation to treaty interpretation, as recommendations are offered bilaterally and their acceptance is decided on a case by cases basis by the state under review.[107] The HRC is also not technically in the position of becoming a party to the treaty and is effectively enforcing it as a third party as human rights treaties reserve their membership to states.[108] It is also not clear that the HRC or indeed any other UN body is bound by human rights treaties, or bound to enforce the rights contained within them.[109] It is therefore difficult to give a comprehensive explanation of the relationship of these recommendations to treaty bodies.

What the recommendations are doing, is acting as an enforcement mechanism for the obligation utilising the naming and shaming function of the UPR process to try and pressure the state under review to alter its behaviour. UPR recommendations on existing obligations are a mechanism for what Wiener calls 'contestation'—the discursive practice of norm validation between states.[110] By making a recommendation within the framework of the review process the lack of compliance with an existing obligation by the state under review is highlighted, forcing it to account for its non-compliance. Sometimes this can be of a procedural nature; for example Sierra Leone and Norway both made a recommendation in the first review cycle to Papua New Guinea that it should submit its overdue reports to a number of human rights treaty bodies including the Human Rights Committee and the CEDAW Committee.[111] Lack of reporting is a form of non-compliance with human rights treaties that rely on state co-operation with country reporting to enhance the promotion and protection of human rights.[112]

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[105] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Gambia' (24 December 2014) UN Doc A/HRC/28/6 at 109.146.

[106] On Gambia's laws see Article 19, 'Gambia: Article 19 individual submission to the UN Universal Periodic Review' (*Article 19*, 15 March 2014) <https://www.article19.org/resources/gambia-article-19-individual-submission-un-universal-periodic-review/> accessed 9 March 2018.

[107] This voluntary aspect of recommendations is crucial to the UPR process – see Sen (n 18) and Kevin Boyle 'The United Nations Human Rights Council: Politics, Power and Human Rights' (2009) 60 Northern Ireland Legal Quarterly 121.

[108] Christian Tomuschat, 'International Organizations as Third Parties under the Law of International Treaties' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP, Oxford 2011) 206, 223.

[109] Ibid.

[110] Antje Wiener, 'A Theory of Contestation – A Concise Summary of Its Argument and Concepts' (2017) 49 Polity 109, 112.

[111] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Papua New Guinea' (11 July 2011) UN Doc A/HRC/18/18 at 78.9.

[112] This has the effect of functionally weakening treaty bodies see Niall Jayawickrama, *The Judicial Application of Human Rights Law: National Regional and International Jurisprudence* (CUP, Cambridge 2002) 132–133.

Recommendations in these cases allow the UPR process to review a state over their adherence to a particular obligation and if accepted would allow subsequent review cycles to review the implementation of this recommendation. Elvira Domínguez Redondo's explanation of what rejecting a recommendation entails implicitly supports this view on acceptance, arguing that rejection means that a state under review 'is asserting its reluctance to be monitored by the UPR on the implementation of such a recommendation during its next review'.[113] The obverse of this is that acceptance is recognition that the UPR has a role in monitoring the adherence of that obligation. This would notionally apply to any category five recommendation but, what differentiates these recommendations is that they directly refer to an existing legal obligation on the state, so what the state is consenting to is a form of enforcement mechanism. This is not entirely dissimilar to mechanisms in private international law that allow individuals to choose which mechanism of enforcement they wish to adopt or potentially chose multiple different mechanisms for the enforcement of an obligation.[114] In these situations the legal obligation is not created by the enforcement mechanism but rather the enforcement mechanism has a legal role in enforcing the existing obligation. The model of enforcement used by the UPR is what Andrew Guzman terms a 'reputation cost' model in that it tries to disincentive states from retreating from their obligations by highlighting non-norm compliant states as unsuitable or unreliable in the context of future international acts.[115] Oona Hathaway notes in relation to human rights treaties that a major incentive behind states joining treaties were collateral consequences which lie outside the legal structure of the treaty and arise from interactions with other states in relation to that treaty. One of these collateral consequences, Hathaway argues, is the desire to signal an 'intention to become good international citizens' by committing to a human rights treaty which can act as a spur to subsequent compliance.[116] The very public and ritualised process of a UPR review not only highlights states which are complying with their international obligations—and therefore enhances the positive collateral consequences for them–but also highlights those that are not complying with their obligations, with the review process intensifying negative collateral consequences.

The consent doctrine is relevant here as what the state is consenting to is having the UPR act as an enforcement mechanism for their existing legal obligations. However, this means that significant power is placed in the hands of the state under review to decide which obligations are subject to additional levels of enforcement. As Heather Collister notes, states are already able to amend the content of recommendations within the working group, leading to some issues not coming up in the review process and some states rejecting recommendations relating to instruments to which they are a party.[117] For example Chile rejected Sweden's recommendation that its 'abortion laws are brought into line with Chile's human rights obligations' under the ICCPR.[118] As Collister concludes this is a consequence of the 'central role given state under review'[119] in order to encourage co-operation with

[113] Elvira Domínguez-Redondo, 'The Universal Periodic Review–Is There Life Beyond Naming and Shaming in Human Rights Implementation?' (2012) 4 New Zealand Law Review 673, 703.
[114] For a background see Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (CUP, Cambridge 2005) chs 8 and 13; Cedric Ryngaert, *Jurisdiction in International Law* (OUP, Oxford 2008) 16–20.
[115] Andrew Guzman, 'A Compliance-Based Theory of International Law' (202) 90 California Law Review 1823.
[116] Oona Hathaway, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51 Journal of Conflict Resolution 588, 597.
[117] Heather Collister, 'Rituals and Implementation in the Universal Periodic Review and the Human Rights Treaty Bodies' in Charlesworth and Larking (n 52) 109.
[118] UNHRC, 'Report of the Working Group on the Universal Periodic Review: Chile' (4 June 2009) UN Doc A/HRC/12/10 para 24.
[119] Collister (n 117) 116.

the [review] process. Yet this comes at the cost of 'a very mixed bag of recommendations' some of which are openly 'contradictory to a [state under review's] obligations under international human rights law'.[120] Accepted recommendations whilst allowing the UPR process to act as a parallel enforcement mechanism also have their limitations, as they are heavily controlled by states.

6 CONCLUSION

While it is premature to think of the UPR as a law-making process, and states did not intend it to perform such a function when it was created, it is not entirely adequate to think of recommendations as simple declaratory statements with only political importance. The interactional account of international obligation, as presented by Brunnée and Toope, shows how legal obligations can emerge from international practices. UPR recommendations are having some impact on the protection of international human rights. By facilitating a process of contestation through the review process, the UPR provides a mechanism to alter state behaviour. Therefore, whilst it is incorrect to describe the UPR as a law-making process, some recommendations can have a legal status as a result of the interactional nature of the review process. As outlined in the third and fourth sections of this article, an individual recommendation can have a role in acting as an enforcement mechanism for existing legal obligations, or a series of recommendations can show the emergence of new interpretations of existing human rights norms. In practice, this means that those recommendations have a legal status as they play a role in the broader protection of human rights in international law.

Scholars of international organisations have argued that the potential of organisations to evolve and define their powers means that they can create new sources of obligation.[121] International organisations are inherently political and seek to use frameworks of legality to pursue their aims, framing a variety of decisions in legal language.[122] Over time such declarations or decisions can evolve into a set of obligations in a way that the distinction between soft and hard law often fails to capture. The UPR was not designed to issue recommendations containing or creating legal obligations, but the way that the HRC's predecessor—the UN Commission on Human Rights—evolved institutionally, to encompass what effectively amounted to a system of individual petition, provides an example of how organisational competences are not fixed and are subject to a process of evolution.[123] One merit of the UPR is that the process of issuing recommendations remains inherently political; states choose the subject area and the form of recommendations and are not subject to bloc voting or any other feature of international organisations that magnifies existing power imbalances within international law. Thus, if new norms emerge through the process of issuing recommendations, it represents a genuine and observable consensus among states as to the importance and status of a particular norm. This represents a significant democratisation of the process of norm creation in international human rights law, enhancing the UPR's stated mission of promoting equality between states. It should be noted however that this raises some broader questions—such as how many accepted recommendations might be considered evidence of *opinio juris*—to which it is difficult to provide a concrete answer.

[120] Ibid.
[121] See for example Jose Alvarez, 'International Organizations: Then and Now' (2006) American Journal of International Law 324, 328.
[122] For this argument see Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, 'The concept of legalization' (2000) 54 International Organization 401.
[123] See Howard Tolley, 'The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications' (1984) 6 Human Right Quarterly 420.

This also poses problems, since the more legalised the process of recommendations becomes, the more a state might alter its behaviour during the process, potentially affecting other elements of the review. This might manifest itself in their responses in the interactive dialogue. The capacity to follow up on the implementation of previous accepted recommendations was intended to enhance the overall power of the UPR process, but may also encourage states to indulge in various tactics to impede the process. This could include forming alliances with other states to offer friendly or praise-bargained recommendations, which as Roger Blackman notes is already a feature of some states' behaviour.[124] Whether this pattern of state behaviour emerges over the third or fourth review cycle is yet to be seen.

It is a general demonstration of the way that the UPR process has evolved and been shaped by a multitude of different factors that it now has a framework for engaging in what effectively amounts to scrutiny of a state's human rights commitments made in previous reviews. The operation of this function of the UPR in relation to human rights treaty commitments as described in section four creates a legalistic role for the UPR process, going significantly beyond the role its founders intended. The UPR was intended to be guided by interactional dialogue between states under review and their prospective peers, a process that was in essence political rather than legal. But the practice of the UPR and the HRC's understandable desire to ensure that human rights are better enforced means that it has evolved beyond what was originally envisaged in its creation. Similarly, the legal status of certain recommendations is in many ways another manifestation of the broader evolution of the UPR.

[124] Roger Blackburn, 'Cultural Relativism in the Universal Periodic Review of the Human Rights Council', ICIP Working Papers 2011/03 (30 September 2011) <http://www.upr-info.org/IMG/pdf/blackburn_upr_cultural_relativism.09.2011.pdf> accessed 1 September 2017.