The Use of International Human Rights Law in the Universal Periodic Review

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ABSTRACT

The Human Rights Council's Universal Periodic Review (UPR) provides a unique insight into states' perceptions of international human rights law. States issue recommendations to each other on fulfilling human rights obligations and commitments. The Council's Resolution 5/1 sets out that the bases of the reviews are the UN Charter, the Universal Declaration of Human Rights, human rights instruments to which the state is party, voluntary pledges and commitments and previously accepted UPR recommendations. The reviews also 'take into account' relevant international humanitarian law. Analysing the rationales for adopting these bases of review and the actual use of these bases, we demonstrate how broadly states understand the term 'human rights' and states' preferences for certain sources of human rights law. Our empirical analysis of the 57,685 recommendations made during the first two UPR cycles demonstrates that, where states refer to international legal materials they have not limited themselves to the bases of review in Resolution 5/1. Instead, they have interpreted the types of instruments and the notion of 'human rights' expansively. Regional human rights instruments have largely been ignored. States have rejected traditional distinctions between 'hard' and 'soft' law and recognised a body of generalized, non-specific international human rights law.

KEYWORDS: Universal Periodic Review, Human Rights Council, United Nations, human rights, international law, international human rights law

1. INTRODUCTION

The Universal Periodic Review (UPR) provides valuable insights into states' perceptions of international human rights law. Facilitated by the Human Rights Council, it is a regular review process by which every UN member state is assessed by other member states on the fulfilment of 'human rights obligations and commitments'.

When establishing the Human Rights Council in 2006, the General Assembly (GA) mandated the Council to undertake a 'universal periodic review, based on objective and reliable information, of the fulfilment by each state of its human rights obligations and commitments.'[1] What was meant by 'human

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[1] GA Res 60/251, 3 April 2006, A/RES/60/251 para 5(e).

rights obligations and commitments' was left undefined and the Council was left to debate its meaning when developing the modalities of the UPR process.[2] A product of compromise, Human Rights Council Resolution 5/1 (2007) provides that the basis of the review is to be: a) the UN Charter; b) the Universal Declaration of Human Rights (UDHR); c) 'human rights instruments to which a state is party'; and d) 'voluntary pledges and commitments made by States', including those presented by states when standing for election to the Council. The resolution also provides that 'the review shall take into account applicable international humanitarian law' and that 'subsequent review[s] should focus, *inter alia,* on the implementation of the preceding outcome', where 'outcome' includes the 'voluntary commitments' of the state under review – namely, accepted recommendations.[3]

The 'big data'[4] generated by UPR has been mined for various empirical studies. Most notable is the work by the non-governmental organisation UPR Info.[5] This organisation has created a comprehensive and fully searchable database of all UPR recommendations made to date,[6] which has served as the basis for various influential studies of the UPR process.[7] Another non-governmental organisation, the Universal Rights Group,[8] has also produced important studies and reports on UPR and the Human Rights Council more generally.[9] These policy studies have focussed on the quality of recommendations, especially the action required by the state under review, and the implementation of accepted recommendations. There have been numerous other studies of the practice of UPR, although many of these are not empirical. Some have focussed on particular issues, such as the rights of indigenous peoples,[10] international humanitarian

[2] See Summary of the Discussion on Universal Periodic Review Prepared by the Secretariat, 13 March 2007, A/HRC/4/CRP3, para 4. Records of these negotiations are available on the OHCHR Extranet: https://extranet.ohchr.org/sites/hrc [last accessed 1 November 2020].
[3] HRC Res 5/1, 18 June 2007, A/HRC/RES/5/1, Annex, paras 1 and 34. See also HRC Dec 17/119, 19 July 2011, A/HRC/DEC/17/119, para II.2 and HRC Res 16/21, 12 April 2011, A/HRC/RES/16/21, Annex, para I.C.1.6.
[4] McMahon, 'Understanding the UN Human Rights Council Universal Periodic Review: Methods of Assessing its Functioning' (June 2017), 5, available at: https://www.upr-info.org/en/analyses/Studies [last accessed 1 November 2020].
[5] See: https://www.upr-info.org/en [last accessed 1 November 2020].
[6] The database is available at: https://www.upr-info.org/database/ [last accessed 1 November 2020].
[7] See, UPR Info, *Beyond Promises. The Impact of UPR on the Ground* (2014), available at: https://www.upr-info.org/en/analyses/Studies [last accessed 1 November 2020]. See also the studies conducted by Edward McMahon who assisted in the development of the original database: eg, McMahon and Ascherio, 'A Step Ahead in Promoting Human Rights: the Universal Periodic Review of the UN Human Rights Council' (2012) 18 *Global Governance* 231; McMahon, *The Universal Periodic Review: A Work in Progress* (September 2012), available at: http://library.fes.de/pdf-files/bueros/genf/09297.pdf [last accessed 1 November 2020]; McMahon and Johnson, *Evolution not Revolution* (September 2016), available at: https://library.fes.de/pdf-files/iez/global/12806.pdf [last accessed 1 November 2020].
[8] See: https://www.universal-rights.org/ [last accessed 1 November 2020].
[9] eg Gujadhur and Limon, *Towards the Third Cycle of UPR: Stick or Twist* (URG, 2016), available at: https://www.universal-rights.org/wp-content/uploads/2016/07/URG_UPR_stick_or_twist.pdf [last accessed: 1 November 2020]. For a comparison of the methodologies used by UPR Info and URG when analysing UPR recommendations, see McMahon, supra n4.
[10] Higgins, 'Creating a Space for Indigenous Rights: the Universal Periodic Review as a Mechanism for Promoting the Rights of Indigenous Peoples' (2019) 23 *International Journal of Human Rights* 125.

law,[11] women's rights,[12] and the rights of LGBT persons.[13] Others have examined how particular states or regions have engaged with the UPR process.[14] However, there has been little engagement with the bases of review in the UPR.[15] This article seeks to fill this gap.

By studying UPR we are able to provide insight on states' views of international human rights law. Given that states remain the most influential actor in international human rights law, how they perceive and use this body of law is of considerable importance. The negotiations on the bases of the UPR are revealing in this regard. However, they only provide a part of the picture. This article goes further and presents an empirical analysis of the 57,685 recommendations made during the first two UPR cycles. We demonstrate how the bases of review set out in Resolution 5/1 have *actually been used*, providing evidence on how broadly states understand the term 'human rights' and states' preferences for certain sources of human rights law.

Our analysis focuses on the text of UPR recommendations and does not go behind this text. As such, it does not address *how* states make their recommendations, *why* they do so, or the political dynamics of making recommendations. Rather, our findings are based on the premise that the text of a

[11] Zhu, 'International Humanitarian Law in the Universal Periodic Review of the UN Human Rights Council: An Empirical Survey' (2014) 5 *Journal of International Humanitarian Legal Studies* 186; Chang, 'International Humanitarian Law in the Universal Periodic Review of the UN Human Rights Council: An Empirical Survey' (2015) 8 *Journal of East Asia and International Law* 549.

[12] Tufano, 'The "Holy Trinity" of the United Nations Universal Periodic Review: How to Make an Effective Recommendation Regarding Women's Rights' (2018) 21 *University of Pennsylvania Journal of Law and Social Change* 187.

[13] Cowell and Milon, 'Decriminalisation of Sexual Orientation through the Universal Periodic Review' (2012) 12 *Human Rights Law Review* 341; ILGA, *Sexual Orientation, Gender Identity and Expression, and Sex Characteristics at the Universal Periodic Review* (November 2016), available at: http://ilga.org/downloads/SOGIESC_at_UPR_report.pdf [last accessed: 1 November 2020].

[14] eg The various surveys in Charlesworth and Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (2015); Mao and Sheng, 'Strength of Review and Scale of Response: A Quantitative Analysis of Human Rights Council Universal Periodic Review on China' (2016-2017) 23 *Buffalo Human Rights Law Review* 1; Cofelice, 'Italy and the Universal Periodic Review of the United Nations Human Rights Council. Playing the Two-Level Game' (2017) 47 *Italian Political Science Review* 227; Cochrane and McNeilly, 'The United Kingdom, the United Nations Human Rights Council and the First Cycle of the Universal Periodic Review' (2013) 17 *International Journal of Human Rights* 152; Etone, 'The Effectiveness of South African's Engagement with the Universal Periodic Review (UPR): Potential for Ritualism' (2017) 33 *South African Journal of Human Rights* 258; Harrington, 'Canada, the United Nations Human Rights Council, and Universal Periodic Review (2009) 18 *Constitutional Forum* 79; Smith, 'To See Themselves as Others See Them: The Five Permanent Members of the Security Council and the Human Rights Council's Universal Periodic Review (2013) 35 *Human Rights Quarterly* 1; 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; Smith, 'A Review of African States in the First Cycle of the UN Human Rights Council's Universal Periodic Review' (2014) 14 *African Human Rights Law Journal* 346; Smith, 'The 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.

[15] Limited studies are provided by Kalin, 'Human Rights Treaties within the UPR Process: Opportunities and Limits of Inter-Governmental Monitoring of Human Rights' (2017) 60 *Japanese Yearbook of International Law* 243; Rodley, 'UN Treaty Bodies and the Human Rights Council' in Keller and Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012) 320. For an analysis of whether UPR recommendations may contribute to the formation of customary international law, see Cowell, 'Understanding the Legal Status of Universal Periodic Review Recommendations' (2018) 7 *Cambridge International Law Journal* 164.

recommendation is the product of a reflexive choice made by the recommending state,[16] so that 'every time a state makes a recommendation during a UPR review, the speaker implicitly asserts the validity, legitimacy and relevance of the invoked human rights guarantee.'[17] This is carried forward to the acceptance of recommendations.[18]

Several findings emerge from our study. First, states have not limited themselves to the bases of review in Resolution 5/1. Instead, they have broadened the review by referring to a variety of other international law material in their recommendations.[19] In doing so, states eschew the traditional distinctions between 'hard' and 'soft' human rights law. Second, states have interpreted the notion of *human rights* law expansively to include international criminal law, international refugee law, international law regarding statelessness and international labour law. The boundary between human rights law and related bodies is revealed to be porous. Third, UPR tends not to engage explicitly with regional human rights law. Finally, there is frequent reference to human rights 'obligations', 'standards' and 'instruments' in recommendations. The precise content of these is not identified. States appear to have identified a body of generalized, non-specific international human rights law.

The article proceeds along the following lines. Section 2 provides an account of the concerns that directed states' choices of the bases of review. This sets the backdrop for our empirical study. Section 3 sets out the methodology used to collate and analyse the use of the bases of review in UPR recommendations made during the first two cycles of review. Section 4 presents the extent to which the bases of review have been utilised in UPR recommendations and Section 5 discusses the principal findings from our study.

2. 'OBLIGATIONS' AND 'COMMITMENTS': THE BASES OF REVIEW

When establishing the Human Rights Council in 2006, the GA instructed the Council to 'develop the modalities' for a 'universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States'.[20] An inter-sessional, inter-governmental working

[16] The drafting of recommendations and decisions on their acceptance are often undertaken 'at a very high level: for instance at plenipotentiary and/or government level': see Bertotti, 'Separate or Inseparable? How Discourse Interpreting Law and Politics as Separable Categories Shaped the Formation of the UN Human Rights Council's Universal Periodic Review' (2019) 23 *International Journal of Human Rights* 1140, 1151

[17] Kalin, 'Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal' in Charlesworth and Larking (eds), supra n14, 33.

[18] See Kalin, supra n15, 257-258.

[19] On the range of international law material, see Baxter, 'International Law in Her Infinite Variety' (1980) 29 *International and Comparative Law Quarterly* 549.

[20] GA Res 60/251, para 5(e).

group agreed the modalities within one year, and in June 2007 the Council adopted Resolution 5/1, which sets out the objectives and mechanics of the UPR process.[21]

One of the areas for determination was what the basis of the review should be; that is, what did the GA's reference to 'human rights obligations and commitments' translate to? Some bases of review were easy to identify and attracted universal support from states, whilst others were the subject of significant debate.

A. The UN Charter

Using the UN Charter as a basis of review was not contentious.[22]

B. The Universal Declaration of Human Rights

Inclusion of the UDHR – a non-binding international instrument – attracted widespread support from states from all UN regional groups.[23] When discussing whether UPR would oversee compliance with treaties, states were keen to emphasise that UPR ought to focus on *accepted* treaty obligations. However, when it came to the UDHR, only one state expressed the concern that 'as the UDHR was merely a declaration containing general provisions…[it] would pose difficulties as a basis of review'.[24] Bernaz has suggested that the UDHR was included because its 'normative status is unquestionable', that it is an 'undeniable material source of international human rights law' and so '[i]ts absence from the list of standards would have damaged the periodic review process, even if, from a strict legal point of view, states are not bound to comply with it.'[25] During the negotiations, only one state - Liechtenstein - explained its value in the process: 'This will enable the UPR to address the whole set of internationally agreed human rights and fundamental freedoms, regardless of how many treaties the state under review is party to.'[26]

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[21] Small changes were made following the review of the Human Rights Council in 2011.

[22] States that spoke in support of inclusion of the UN Charter include: Algeria (on behalf of the African Group of states), Argentina, Australia, Azerbaijan, Bangladesh, Brazil, Canada, Chile, Costa Rica, Cuba, Ecuador, Egypt, Finland (on behalf of the European Union (EU)), Indonesia, Iran, Japan, Liechtenstein, Malaysia, Mexico, Pakistan (on behalf of the Organization of the Islamic Conference (OIC)), Panama, Peru, Romania, Singapore, Sri Lanka, Switzerland, Tunisia, Uruguay and Zambia,

[23] The five UN regional groups were established in 1963: African Group, Asia-Pacific Group, Eastern European Group (EEG), Latin American and Caribbean Group (GRULAC) and Western European and others Group (WEOG).
States that spoke in support of inclusion of the UDHR include: Algeria (on behalf of the African Group of states), Argentina, Australia, Azerbaijan, Bangladesh, Belgium, Bhutan, Brazil, Canada, Chile, China, Costa Rica, Cuba, Ecuador, Egypt, Finland (on behalf of the EU), Indonesia, Iran, Italy, Japan, Malaysia, Mexico, Pakistan (on behalf of the OIC), Panama, Peru, Philippines, Romania, Singapore, Sri Lanka, Switzerland, Thailand, Tunisia, the US, Uruguay, Venezuela, and Zambia.

[24] See 'Summary of the discussion prepared by the Secretariat' A/HRC/3/CRP.1 (30 November 2006) para 17.

[25] Bernaz, 'Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review Mechanism' in Boyle (ed.), *New Institutions for Human Rights Protection* (2009) 75, 81.

[26] Statement to Human Rights Council (4 December 2006), available on OHCHR extranet.

C. Human Rights Instruments to Which a State is Party

Basing UPR on human rights instruments to which a state is party was also relatively uncontentious.[27] The term 'instrument' is a broad one and may include declarations and resolutions. However, states tended to use the language of *treaties* when discussing this basis of review[28] and the use of 'party' in Resolution 5/1 confirms that it is confined to treaties. Indeed, the OHCHR defines human rights 'instruments' as 'treaties'[29] and this basis of review is often referred to in the literature as 'human rights *treaties*' to which the state is a party.[30]

States from all regional groups were adamant that UPR should only focus on *accepted* treaty obligations.[31] Singapore and the Russian Federation objected to basing UPR on treaty obligations because this would lead to a duplication of the work of the UN human rights treaty bodies,[32] and GA Resolution 60/251 explicitly provides that the UPR should 'complement and not duplicate the work of the treaty bodies'.[33] Other states acknowledged this duplication risk and suggested that UPR should focus on procedural obligations to cooperate with UN treaty bodies (including reporting obligations) and on follow-up to concluding observations of the treaty bodies.[34]

D. Voluntary Pledges and Commitments

The fourth basis of review set out in Resolution 5/1 - 'voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council' - reflects the GA requirement that UPR consider 'the fulfilment of each State of its human rights obligations *and commitments*'.[35] Precisely what is meant by pledges and commitments was left unspecified. States from all regional groups spoke in favour of including those pledges made by states when standing for election

[27] States that spoke in support of basing UPR on *accepted* treaty obligations include: Algeria (on behalf of the African Group), Australia, Bhutan, Brazil, Canada, Chile, Cuba, Finland (on behalf of the EU), Guatemala, India, Indonesia, Iran, Japan, Malaysia, Mexico, Nepal, Netherlands, Pakistan, Philippines, Romania, Switzerland, and the US.
[28] See 'Summary of the discussion' supra n24, paras 18-20.
[29] See OHCHR, 'Basic facts about the UPR': 'The UPR will assess the extent to which States respect their human rights obligations set out in:…human rights instruments to which the State is party (human rights treaties ratified by the State concerned)' (https://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx).
[30] See eg Bernaz, supra n25, 79; Smith, 'African States', supra n14, 350 (emphasis added). See also Etone, supra n14 259.
[31] Algeria (on behalf of the African Group), Australia, Bhutan, Brazil, Canada, Chile, Cuba, Finland (on behalf of the EU), Guatemala, India, Indonesia, Iran, Japan, Malaysia, Mexico, Nepal, Netherlands, Pakistan, Philippines, Romania, Switzerland, and the US spoke in favour of this view.
[32] See Compilation of Proposals and comments at November 2006 Working Group meeting, available on OHCHR extranet.
[33] GA Res 60/251, para 5(e).
[34] See, eg, statement by Finland on behalf of the EU (November 2006).
[35] GA Res 60/251, para 5(e) [emphasis added].

for the Human Rights Council.[36] Only Guatemala expressed a concern that using election pledges would create an unequal basis for review and undermine the basic principles of universality and equal treatment underpinning UPR because not all states would stand for election to the Council.[37] This concern was dismissed without discussion.

Including explicit reference to '[c]ommitments undertaken in relevant United Nations conferences and summits',[38] or specific conference outcomes such as the Vienna Declaration and Programme of Action[39] and the 2005 World Summit Outcome, was considered.[40] However, this was met with opposition on various grounds, including the 'aspirational' and non-binding nature of such documents.[41] In the end, no reference was made to commitments arising from conference outcomes in Resolution 5/1.

E. Applicable International Humanitarian Law

The most controversial basis of review was international humanitarian law (IHL).[42] From the outset of negotiations, several Latin American states suggested that UPR should consider implementation of IHL.[43] States in support of this view stressed the overlaps between the content and applicability of the other bases of review and IHL.[44] Pakistan, on behalf of the OIC, suggested that, 'international humanitarian law will be directly relevant to…situations of armed conflict.'[45] Malaysia also confirmed that international humanitarian law was relevant, but was keen to restrict the inclusion of IHL instruments to those ratified by the state under review.[46] With reference to the 'latest case-law of the ICJ', Azerbaijan stated that 'human rights need

[36] Including: Algeria (on behalf of the African Group), Australia, Bangladesh, Canada, Chile, Ecuador, Finland (on behalf of the EU), India, Indonesia, Japan, Malaysia, Maldives, Mexico, Netherlands, Philippines, Romania, Singapore, Sri Lanka, and the US.
[37] International Service for Human Rights, 'Council Monitor. Working Group to Develop the Modalities of the UPR. 12-15 February 2007', available at: http://olddoc.ishr.ch/hrm/council/wg/wg_reports/wg_upr_feb_07.pdf.
[38] This was compromise text proposed by the Facilitator of the UPR Working Group, see A/HRC/4/117 (20 March 2007).
[39] Proposed by Germany. Algeria (on behalf of the African Group), Argentina, Brazil, Chile, Colombia, Mexico, and the Russian Federation also supported this idea.
[40] Suggested by Argentina.
[41] 'Summary of the discussion prepared by the Secretariat' A/HRC/4/CRP.1, 13 March 2007, para 17.
[42] For detailed discussion see Zhu, supra n11.
[43] Argentina, Chile, Costa Rica, Cuba, Ecuador, Panama, Paraguay, Peru, and Uruguay. See OHCHR, Updated Compilation of Proposals and Relevant Information on the Universal Periodic Review, 5 April 2007, 12 and 26. Although Ecuador appeared to change position – see ISHR, 'Council Monitor', supra n37, 4, n9. Belgium, Canada, Egypt and Switzerland are also reported as supporting the (qualified) inclusion of international humanitarian law at some point during the institution-building phase of the Council, see Zhu, supra n11.
[44] Finland, on behalf of the EU, suggested, 'international humanitarian law could form part of the review where specific obligations are replicated, inter alia, the UN Charter, the UDHR, human rights treaty obligations undertaken by the state or a state's voluntary commitments.' Statement by Finnish Presidency on behalf of the European Union, 4 December 2006.
[45] Statement by Pakistan's Permanent Representative on behalf of the Organisation of the Islamic Conference, 4 December 2006.
[46] Statement by Malaysia, 12 February 2007.

to be respected both in times of peace and armed conflict' and suggested that IHL may be regarded as 'protecting human rights only when it is the *lex specialis* to human rights in times of armed conflict'.[47]

Opposition came from a wide variety of states, including Australia, China, Guatemala, India, Norway, Turkey and the US.[48] Concerns were articulated on two main grounds. First, the view was put forward that the GA had called for a review of fulfilment of *human rights* obligations and commitments.[49] Second, it was suggested that the Council was not competent to consider IHL for reasons of lack of expertise[50] and lack of mandate.[51]

Resolution 5/1 sets out a compromise formula in a separate paragraph to the other bases of review, which recognises 'the complementary and mutually interrelated nature of international human rights law and international humanitarian law'.[52]

F. UPR Recommendations

Finally, mention should be made of UPR recommendations as a basis of review. Whilst other methods of follow-up and oversight were disputed,[53] there was a convergence of opinion that successive cycles of UPR should focus on the implementation of accepted recommendations from preceding reviews. Once again there was a focus on what states have consented to. Resolution 5/1 provides that 'subsequent review[s] should focus, inter alia, on the implementation of the preceding outcome', where the 'outcome' includes the 'voluntary commitments' of the state under review – namely, accepted recommendations.[54]

G. Key Themes in the Identification of the Bases of Review

Two main themes can be observed from the discussions regarding identification of the bases of review. First, the debates tended to ignore the traditional distinctions between hard and soft international human

[47] Azerbaijan speech to Working Group, February 2007.
[48] 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, 727, also suggests that the UK was 'systematically opposed' to using IHL as a basis for review.
[49] India speech to Working Group, February 2007. The US maintained its traditional position on the non-applicability of human rights to armed conflict situations. US Statement to Human Rights Council, 15 November 2006.
[50] Turkey speech to Working Group, February 2007.
[51] Australia Statement to UPR Working Group, 12 February 2007. Norway made similar comments.
[52] This language was inserted by the President of the Human Rights Council. See Zhu, supra n11.
[53] Eg, there was some debate on whether other human rights bodies – such as special procedure mandate holders and treaty bodies – should have a role in overseeing implementation of accepted UPR recommendations. This recommendation was not taken up. See ISHR, 'Council Monitor', supra n37; and Summary of Discussion, supra n24, paras 63-66.
[54] HRC Res 5/1, para 34. See also HRC Dec 17/119, para 11.2: further cycles of UPR 'should focus on, inter alia, the implementation of the accepted recommendations and the development of the human rights situation in the State under review'; and HRC Res 16/21, para I.C.1.6.

rights law.[55] In light of the instruction in GA Resolution 60/251, soft law instruments were included alongside those containing binding obligations. In fact, one source of binding obligations was explicitly excluded. A proposal to include customary international law in the bases of review[56] attracted significant opposition and was rejected due to the difficulties with its identification.[57] Only outcomes from conferences were dismissed on the basis that they were aspirational. What is apparent is that the idea of 'consent' was a key consideration for determining the bases of review. States were keen to emphasise that only accepted obligations and commitments voluntarily entered into should be used as standards for review. This explains the inclusion of human rights instruments 'to which a state is party' and 'voluntary pledges and commitments', as well as accepted recommendations from previous UPR cycles as bases of review. Even the justification provided by Liechtenstein for including the non-binding UDHR suggested that it contains 'internationally agreed' rights and freedoms. Second, the debate regarding the inclusion of IHL reflects states' preoccupation with ensuring that the scope of UPR remained within the mandate of the Council, that is: 'protection and promotion of human rights'.[58] It also reveals an uncertainty as to the precise scope of 'human rights'.

3. METHODOLOGY

UPR recommendations have been the subject of various studies: some empirical, some not. Many of these studies have retrieved data from the comprehensive database of UPR recommendations created by UPR Info.[59] The web-hosted, searchable database contains records of every UPR recommendation.[60] Each record contains, *inter alia*, the text of the recommendation, the state under review (and their regional group and organisational affiliation[61]), the recommending state (and their regional group and organisational

[55] By 'soft law', we are referring to 'any international instrument other than a treaty containing principles, norms, standards, or other statements of expected behaviour.' Shelton, 'International Law and "Relative Normativity"', in Evans (ed.), *International Law*, 1st edn (2003) 166.

[56] See statement by Uruguay (on behalf of Argentina, Chile, Costa Rica, Ecuador, Panama, Paraguay, Peru) to UPR WG, 16 November 2006. Finland (on behalf of the EU) supported the inclusion of custom but only where the norm was replicated in other bases of review; whilst Switzerland expressed regret that customary international law would not be included as basis for review.

[57] A view promoted by Indonesia, Iran, Japan, Pakistan (on behalf of the OIC) and Singapore.

[58] This concern regarding mandate was also reflected in a further refrain which echoed throughout the institution-building period: namely, that the UPR should 'complement and not duplicate the work of treaty bodies', GA Res 60/251, para 5(e). See also HRC Res 5/1, Annex, para 3(f).

[59] eg Mao and Sheng, supra n14; Higgins, supra n10.

[60] See supra n6.
There are some issues with the database: eg, France was recorded as having 'noted' all recommendations made during its first round of UPR. However, a review of the responses provided by France suggests that some recommendations were in fact accepted. In our version of the database, identified discrepancies were rectified. Other authors have undertaken similar corrections, see Baird, 'The Universal Periodic Review: Building a Bridge between the Pacific and Geneva' in Charlesworth and Larking, supra n14, 187, 195.

[61] eg, Saudi Arabia is listed as a member of the OIC and the Arab League. Some states – eg, Japan and Georgia – are not members of such organisations.

affiliation), the thematic issues raised,[62] categorisation of the action required,[63] the response (ie whether the recommendation was accepted or 'noted'), as well as the session and cycle of UPR in which the recommendation was made.

In the UPR Info database, a recommendations is coded as raising issues regarding 'international instruments' or 'treaty bodies' when it refers to a treaty or the outputs of a treaty body. However, a random check of the database found that these categorisations were not comprehensive and some recommendations that ought to have been captured were not. In addition, given our interest is broader and more specific than references to treaties, we reviewed *all* the recommendations in the UPR Info database[64] to identify those that refer to one or more of the bases of review and created our own database. When examining the recommendations, it soon became apparent that states were not limiting themselves to the bases of review set out in Resolution 5/1. They were also referring to a range of other international law material. Accordingly, references to this other material were also recorded.

Our interest lies in *explicit* references to the bases of review or other international law material.[65] Therefore, our database contains all recommendations made during the first two cycles of UPR that explicitly refer to one or more of the bases of review identified in Resolution 5/1 or other international law material. Each record includes the data captured by UPR Info as well as information on the material(s) referred to in the recommendation and action called for in respect thereof. Many recommendations refer to more than one international instrument and each reference and associated action is logged in our database. For example, each of the three treaties referred to in the recommendation to 'Ratify CAT, ICRMW and the Optional Protocol to CAT',[66] as well as the call for ratification, were included in the record for this recommendation. The total number of references to each of the bases of review and other international law material is therefore higher than the number of recommendations in the database.

Whilst references to the UDHR, the UN Charter and other treaties can be identified with relative ease, some explanation of our process of identifying the other bases of review is required. 'Voluntary

[62] UPR Info has identified 56 categories of 'issues' covered in recommendations. A recommendation may relate to more than one issue; eg, recommendations regarding the use of child soldiers are 'tagged' as 'rights of the child' and 'international humanitarian law'.
[63] UPR Info has created a unique ranking scale of the action required. Recommendations are ranked on a scale from 1 (minimal action) to 5 (specific action). An explanation is available at: https://www.upr-info.org/database/files/Database_Action_Category.pdf [last accessed 1 November 2020].
[64] A .xls file of the UPR Info database downloaded from the UPR Info website was used as the basis for our database. Since the creation of our database, UPR Info have created a new web-hosted database in partnership with HURIDOCs. See: https://upr-info-database.uwazi.io/en/page/bdcsi0m0n8f [last accessed 1 November 2020].
[65] This is likely to undercount the use of international law as a basis for recommendations. Treaty obligations may be the basis of a recommendation even if there is no clear reference to the treaty. Rodley attempted to trace the provenance of recommendations to their treaty body source (Rodley, supra n15, 328-330). However, this was a very limited and, by his own admission, 'evidently unscientific' study.
[66] HRC, Report of the Working Group on the Universal Periodic Review: Grenada (9 April 2015) A/HRC/29/14, Rec 72.18. Hereinafter, only the state, date and UN document reference will be provided for these reports.

pledges and commitments' were identified where the language of 'voluntary pledge', 'pledge' or 'commitment' was used in the recommendation. For example, recommendations such as 'Fully enforce the commitment to abolishing female genital mutilation',[67] 'Honour its pledge to look into abolishing the death penalty',[68] and 'Continue its efforts to complete the implementation of the voluntary pledges'[69] were identified as referring to voluntary pledges and commitments. In addition to clear references to the implementation of UPR recommendations, phrases such as 'as previously recommended' and 'as accepted previously' (and variations thereof) were considered to reflect UPR recommendations and categorised accordingly.

As noted above, other international law material that is not listed in the bases of review in Resolution 5/1 is also explicitly referenced in UPR recommendations. Judgments from international courts, outputs from UN bodies – including the OHCHR, Special Procedure mandate holders, the Security Council, the GA, the United Nations High Commissioner for Refugees (UNHCR), human rights treaty bodies and various specialised agencies –, outputs from regional organisations such as the African Union and Council of Europe, and other regulatory regimes adopted at the inter-state level are all explicitly referred to in UPR recommendations. These recommendations are included in our database.

Finally, what might be termed 'general' references to international law material are frequently made in UPR recommendations. For example, Mexico recommended that Micronesia 'Adopt a law on access to information in accordance with international standards on the issue'.[70] Similarly, in a recommendation to Turkey, the UK suggested the state 'take steps to ensure she upholds her international obligations on freedom of expression and freedom of association'.[71] These recommendations also indicate engagement with international human rights law and so are taken into account in our study. Recommendations that make general, non-specific references to international 'obligations', 'law', 'standards', 'norms' or 'instruments' are therefore included in our database. Such references are labelled 'general human rights law'.[72] Similarly, if it is clear that the reference was to IHL standards then it is coded 'general IHL'. So, for example, the recommendation to Syria to '[a]bide by the laws of war, especially by immediately ending all

[67] Eritrea (4 January 2010) A/HRC/13/2, Rec 42.
[68] Iraq (12 December 2014) A/HRC/28/14, Rec 127.116.
[69] Sri Lanka (18 December 2012) A/HRC/22/16, Rec 127.53.
[70] Federated States of Micronesia (23 December 2015) A/HRC/31/4, Rec 62.77.
[71] Turkey (13 April 2015) A/HRC/29/15, Rec 148.121.
[72] In some instances, whilst there was a lack of specificity in terms of which international instrument was being referred to there was a high level of certainty regarding which instruments were being referred to. In such cases the specific instruments referred to were identified through further research: eg, Senegal recommended to Côte D'Ivoire that it should 'Spare no effort to complete as soon as possible the ratification process for the international human rights instruments listed in pages 23 and 24 of the national report in its French version', Côte D'Ivoire (4 January 2010) A/HRC/13/9, Rec 18. The national report prepared by Côte D'Ivoire was consulted to identify that the instruments being referred to were: the Convention on the Reduction of Statelessness, CPED, ICMW, CEDAW, CRC-OP-AC, CRC-OP-SC, ICESCR-OP, ICCPR-OP2, and OPCAT.

deliberate, indiscriminate and disproportionate attacks against civilians'[73] is included in our database as a reference to 'general IHL'.

4. THE BASES OF REVIEW IN UPR RECOMMENDATIONS

Of the 57,685 recommendations in the UPR Info database, only 31% (18,129) explicitly refer to one or more of the bases of review listed in Resolution 5/1 or other international law material. The majority (69%) do not include any explicit reference to any of the bases of review. Examples of such recommendations include 'completely abolish the death penalty'[74] and 'combat violence against women and trafficking of child victims of prostitution'.[75] Our database is comprised of the 18,129 recommendations that explicitly engage with the bases of review and/ or other international law material.

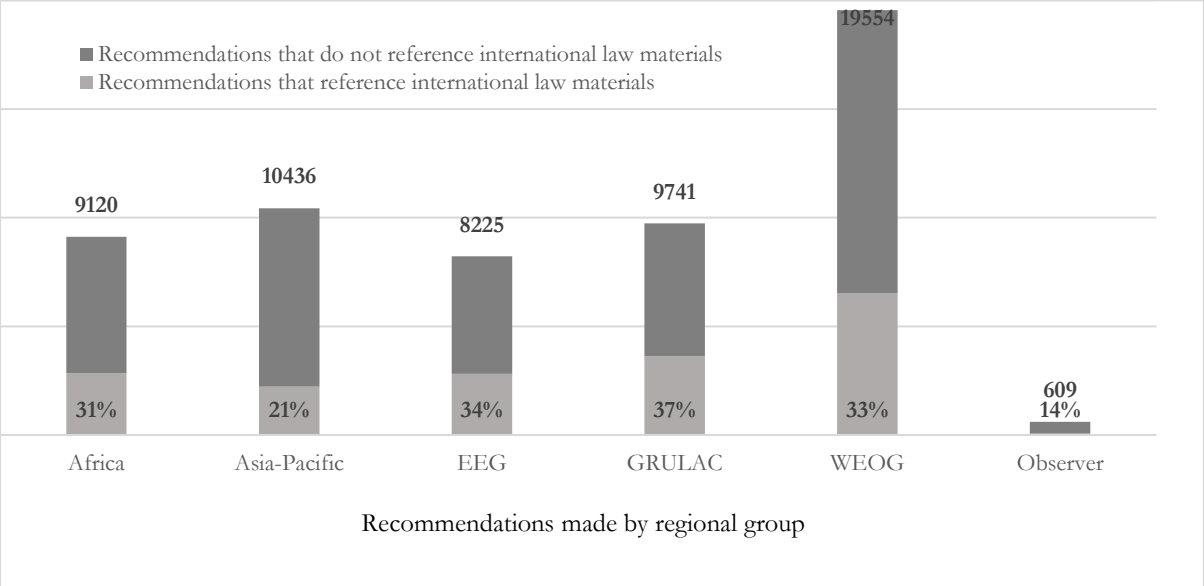

Figure 1: UPR recommendations made by regional group

Figure 1 sets out the number of recommendations made by each regional group as well as observers to the Human Rights Council. Although the Western European and Others Group (WEOG) states make the most recommendations (19,554 recommendations in the first two cycles of UPR),[76] they do not make the most recommendations that explicitly refer to the bases of review or other international law material. States from the Latin American and Caribbean Group (GRULAC) are most likely to make such recommendations (37%), while recommendations from Asia-Pacific Group states are least likely to contain such references (21%). The other regional groups make explicit references to the bases of review or other international law material in 31% to 34% of recommendations. The much lower rate of reference to

[73] Syrian Arab Republic (27 December 2016) A/HRC/34/5, Rec 109.105.
[74] Tajikistan (14 July 2016) A/HRC/33/11, Rec 115.48.
[75] Austria (22 December 2015) A/HRC/31/12, Rec 139.91.
[76] See also, eg, Kalin, supra n15, 257.

international law by Asia-Pacific states likely reflects what has been described as Asia's 'ambivalence' towards international law.[77]

The overall acceptance rate for recommendations during the first two cycles of UPR is 73%. Whilst the acceptance rate for recommendations that do not mention the bases of review or other international law material is 80%, only 59% of recommendations that do mention these were accepted. There appears to be some hesitancy on the part of states to commit to recommendations that explicitly refer to the bases of review or other international law material. Both Eastern European Group (EEG) and African Group states accepted a much higher proportion of such recommendations than states from other groups. EEG states accepted 71% of recommendations that explicitly refer to international law, whilst African states accepted 66%. By comparison, GRULAC states accepted 56% of such recommendations, whilst Asia-Pacific and WEOG states accepted 54%.

The extent to which the different bases of review are referred to varies considerably.

A. The UN Charter

Only 2 recommendations mention the UN Charter. Despite being an uncontroversial inclusion in the list of bases of review, it is barely used in the practice of UPR.

The rare citation of the UN Charter is understandable given that the references to human rights therein are general in nature. For example, Article 55 provides that 'the UN shall promote…universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language, or religion' and Article 56 calls for state action in support of this UN goal. Given these general references to human rights, any recommendation based on the UN Charter is unlikely to be precise enough to require deliberate action. Furthermore, as there are many more specific UN human rights treaties, it is appropriate that they are referenced far more frequently instead.[78] When the Charter has been referenced, it does not appear to have been invoked for its human rights provisions. Rather, in one

[77] Chesterman, 'Asia's Ambivalence about International Law and Institutions: Past, Present and Futures' (2017) 27 *European Journal of International Law* 945. Cf Quane, 'The Significance of an Evolving Relationship: ASEAN States and the Global Human Rights Mechanisms' (2015) 15 *Human Rights Law Review* 283.
[78] See Section 4.C.

recommendation, it was invoked to support the principle of state sovereignty;[79] and, in the other, the specific provision of the UN Charter to which the recommendation relates is unclear.[80]

B. The Universal Declaration of Human Rights

As with the UN Charter, there are very few references to the UDHR. Only 31 recommendations reference the Universal Declaration. Thus, two of the bases of review that were uncontroversial during the negotiations of Resolution 5/1 are rarely referred to in the practice of UPR.

Using the UN Charter and the UDHR as bases of review allows for states to be assessed against a broader range of internationally accepted human rights standards than human rights treaty obligations alone. It has been argued that this is particularly important where a state has not ratified one or more of the core UN human rights treaties. In such circumstances, a recommendation can be made calling upon the state to respect a right set out in the UDHR even though there is no treaty obligation to do so. Acceptance of such a recommendation 'confirm[s] its validity and contribute[s] to a universal consensus' on the meaning and content of human rights obligations.[81] Chauville has called this 'rhetorical entrapment'.[82]

However, this theoretical promise has not been realised in practice. Of the 31 recommendations invoking the UDHR less than a quarter (8) were accepted. Over one third (12) of recommendations cite the UDHR alongside an explicit reference to a treaty obligation. For example, Malaysia recommended to Belgium that it should 'Rescind the decision to prohibit the peaceful expression of religious beliefs, including the wearing of religious symbols in schools, in line with the freedom of religion or belief guaranteed by the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and the European Union Guidelines on the promotion and protection of freedom of religion or belief'.[83] In these cases, reference to the UDHR only adds emphasis to existing treaty obligations. Furthermore, 60% of recommendations invoking the UDHR in relation to civil and political rights do so when the state under review was a party to the ICCPR (12 out of 20), whilst all such recommendations relating to economic, social and cultural rights (5) were issued to states that are party to the ICESCR.

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[79] Cuba recommended to the US to 'Suspend the interception, holding and use of communications, including the surveillance and extraterritorial interception and the scope of surveillance operations against citizens, institutions and representatives of other countries, which violate the right to privacy, international laws and the principle of State sovereignty recognized in the Charter of the United Nations.' United States of America (20 July 2015) A/HRC/30/12, Rec 176.302.

[80] China recommended that the US 'Quickly close down Guantanamo prison and follow the provision of the United Nations Charter and the Security Council Resolution by expatriating the terrorist suspect to their country of origin.' United States of America (4 January 2011) A/HRC/16/11, Rec 92.157.

[81] See Kalin, supra n17, 33-34. See also Mao and Sheng, supra n14, 8; Kalin, supra n15, 258-259.

[82] Chauville, 'The Universal Periodic Review's First Cycle: Successes and Failures' in Charlesworth and Larking, supra n14, 87, 89.

[83] Belgium (11 April 2016) A/HRC/32/8, Rec 141.29.

During the negotiations on the bases of review, one delegation raised a concern that the UDHR lacked specificity in terms of human rights *obligations*.[84] This view may explain the reticence to refer to the UDHR where there are no human rights treaty obligations, as well as its (limited) use to buttress calls for compliance with existing treaty obligations.

C. Human Rights Instruments to Which the State is Party

A significant number – 11,054 – of recommendations explicitly refer to one or more treaties.[85] That is, 61% of the recommendations in our database explicitly call for action in relation to treaties. A further 744 recommendations (4%) make general references to treaties and treaty norms and obligations without specifying which treaty. This latter group includes recommendations such as 'Accede to international human rights instruments'[86] and 'Incorporate international human rights treaties into national law'.[87]

Treaties are by far the most relied upon basis of review. As Tables 2 and 3 show, various treaties are invoked.

(i) 'Core' UN Human Rights Treaties

Treaty	**Number of References**	**Consider/ Become a Party to the Treaty (% of references)**
ICERD	309	74%
ICCPR	1047	62%
ICCPR-OP1	212	98%
ICCPR-OP2	1030	97%
ICESCR	697	93%
ICESCR-OP	472	99%
CEDAW	739	33%
OP-CEDAW	413	98%
CAT	1114	77%
OP-CAT	1414	92%
CRC	503	19%
OP-CRC-AC	330	91%
OP-CRC-SC	360	90%

[84] See Section 2.B.
[85] References to international humanitarian law treaties are not included. See Section 4.E.
[86] Marshall Islands (20 July 2015) A/HRC/30/13, Rec 75.21.
[87] Montenegro (6 January 2009) A/HRC/10/74, Rec 66.5.

OP-CRC-IC	274	97%
ICMW	1188	98%
CPED	1095	99%
CRPD	879	85%
OP-CRPD	253	98%

Table 2: References to 'Core' UN Human Rights Treaties and their Optional Protocols[88]

Table 2 refers to the 'core'[89] UN human rights treaties and their optional protocols. There is considerable variation in the number of times each of the treaties is referred to. There are significantly more references to the ICCPR than the ICESCR. Optional protocols that establish individual complaints mechanisms are referenced fewer times than their 'parent' treaty.[90] Of the 1,188 references to the ICMW, 36% were made by African states, 22% by Asian states and 34% by GRULAC states. WEOG and EEG states only made 88 recommendations that referred to the ICMW, amounting to 7% of all such recommendations. Of these 88 recommendations, Turkey made 33 and Azerbaijan 24; both states are parties to the ICMW unlike most EEG and WEOG members. At the other end of the spectrum, WEOG and EEG states made 69% of the recommendations referring to the ICCPR-OP2 regarding the abolition of the death penalty. This can be explained by the fact that Europe is a death penalty free zone and most of the states that retain the death penalty are members of GRULAC or the African and Asia-Pacific groups.[91]

There are three main types of recommendations made to states regarding 'human rights instruments to which a state is party': 1) those that call for a state to become a party to the treaty; 2) those that call for a state to remove its reservations to the treaty; and 3) those that call for the state to implement the treaty obligations substantively or call for the incorporation of the treaty into domestic law. As Table 2 shows, a significant proportion of recommendations regarding UN human rights treaties call for the state under review to become a 'party' to the relevant treaty or to 'consider' doing so. Whilst the vast majority of recommendations in our database call for such action, there are two treaties for which this is not the case: CEDAW and the CRC. Both treaties were widely ratified prior to the commencement of the UPR process and so only 33% of recommendations referring to CEDAW call for the state under review to become a party to the treaty, and 19% of recommendations referring to the CRC call for the same action.[92]

[88] Many recommendations call for action in relation to more than one treaty. Therefore, the total number of references to *treaties* is greater than the number of *recommendations*.
[89] There are 9 'core' UN human rights treaties: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx [last accessed 1 November 2020].
[90] Namely, ICCPR-OP1, ICESCR-OP, OP-CEDAW, OP-CRC-IC and OP-CRPD.
[91] See Amnesty International, 'Abolitionist and Retentionist Countries as of July 2018', available at: https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf [last accessed 1 November 2020].
[92] A few of the recommendations regarding the CRC were issued erroneously to states that were already party to the treaty (eg Brunei Darussalam, India, Iraq, Maldives, Micronesia, the Seychelles, Singapore and Tanzania). The

Conversely, over 90% of the recommendations referring to an optional protocol to one of the core UN human rights treaties called for the state under review to become a party to the treaty. In the case of the ICESCR-OP, the figure is as high as 99%. Similarly, 99% of recommendations referring to CPED – which was adopted in December 2006 – call for the state under review to become a party.

This practice of calling for states to become a party to a treaty is notable given that UPR is concerned with assessing a state's human rights record against those 'human rights instruments to which a state is party'. The phrasing in Resolution 5/1 necessarily means that a state has already signed and ratified, or acceded to, a treaty. This interpretation accords with the views expressed when the UPR process was being developed. States were keen to emphasise that the UPR should focus on *accepted* treaty obligations.[93] Recommendations calling for the state under review to *become* a party to a treaty, however, relate to treaties to which a state is *not* already party. Such recommendations have been described as 'non-confrontational' and 'politically neutral'.[94] To call on a state to ratify a treaty does not engage in criticism of a state's action on the domestic plane and this may explain the dominance of such recommendations in the practice of UPR. Despite such recommendations going beyond the intended purview of the UPR process, states have routinely accepted them. Forty-eight percent of recommendations calling for specific action to become a party to a core UN human rights treaty or its optional protocol were accepted, whilst 53% of softer recommendations calling for the state under review to 'consider' becoming a party to the treaty were accepted.[95]

(ii) Regional human rights treaties

Although regional human rights treaties are captured under 'human rights instruments to which a state is party', there were only 6 references to the African Charter on Human and Peoples' Rights, 11 references to the European Convention on Human Rights, 1 reference to the European Social Charter, and 16 references to the American Convention on Human Rights. No references were made to the Arab Charter on Human Rights. References to other regional and sub-regional treaties[96] are sporadic. This is despite the number of such treaties. Only the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) stands out as an outlier to this general trend: 88 recommendations refer to this treaty.

majority called for action from Somalia, South Sudan and the US. Both Somalia and South Sudan accepted these recommendations and became parties to the CRC in 2015. The US remains a signatory.

[93] See Section 2.C.

[94] Kalin, supra n17, 32.

[95] This data includes all recommendations that call for the state under review to 'sign', 'ratify', 'accede', 'adhere', 'join' and 'become a party' to a core UN human rights treaty or for the state under review to 'consider' such action.

[96] eg the South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution and the Southern African Development Community Protocol on Gender and Development.

	Number of references						
	Africa	**Asia-Pacific**	**EEG**	**GRULAC**	**WEOG**	**Observer**	**Total**
African Union treaties	15	0	2	4	19	0	40
Council of Europe treaties	4	3	54	4	96	1	162
Organisation of American States treaties	0	0	1	19	1	0	21

Table 3: References to Regional Human Rights Treaties by Regional Group

As Table 3 shows, references to regional treaties tend to be made by those states that are members of the relevant regional organisation. There are some exceptions. In its second UPR, Somalia received three recommendations referring to the Protocol to the African Charter on the Rights of Women (Maputo Protocol): two of which were from WEOG states (Australia and Sweden).[97] It is likely that one impetus for these recommendations was the inclusion in one of the reports on which UPR is based - the OHCHR summary of stakeholders' information[98] - of a submission from Human Rights Watch regarding ratification of the Maputo Protocol.[99] However, a general lack of knowledge about regional human rights treaties is likely to be a contributing factor to the low number of references to regional human rights treaties. Regional human rights treaties rarely feature in the three reports on which each UPR is based. Whilst states are directed to provide information on the 'scope of international obligations identified in the "basis of review" in resolution 5/1' in their national reports,[100] very few states refer to regional human rights treaties. This information is not included in the OHCHR compilation of UN information that forms part of the information base for each UPR. It is only included in the OHCHR summary of stakeholders' information if raised in submissions.

(iii) Other treaties

Treaties that are not *human rights* treaties *stricto sensu* are also cited in UPR recommendations. Table 4 sets out the most frequently referenced of these 'other' treaties and the regional groups that refer to these treaties

[97] Somalia (13 April 2006) A/HRC/32/12, Recs 135.9 and 136.80. Namibia made the third recommendation (Rec 135.8).
[98] HRC Res 5/1, para 15(b).
[99] Summary prepared by the OHCHR in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Somalia (6 November 2015) A/HRC/WG.6/24/SOM/3, para 6.
[100] HRC Dec 6/102, 27 September 2007, A/HRC/DEC/6/102, para 1.

in their recommendations. There are significantly more references to these treaties than regional human rights treaties. The numerous references to these treaties suggest that states act as though the boundaries between human rights law and other areas of law are porous.

There are 383 recommendations that reference one or more conventions adopted by the International Labour Organisation and these have been made by all regional groups. States that made the recommendations consider these treaties to be part of the human rights regime. Furthermore, the number of references to the Refugee Convention and its Protocol (144) and those treaties relating to statelessness (155) would suggest that the states invoking these instruments are making the same assumption.

The blurring of boundaries is particularly pronounced as regards international criminal law. The number of references to the Rome Statute of the International Criminal Court, Kampala Amendments to the Rome Statute and Agreement on the Privileges and Immunities of the International Criminal Court is greater than for many of the core UN human rights treaties. There are 933 recommendations that refer to the Rome Statute alone, making it the seventh most cited treaty behind the ICCPR, ICCPR-OP2, CAT, OP-CAT, ICMW and CPED and ahead of core human rights treaties such as the ICESCR, CEDAW and CRC. States occasionally acknowledge that the Rome Statute is not a human rights treaty,[101] but the sheer number of references suggests this is not the dominant view. EEG, GRULAC and WEOG states in particular promote the view that international criminal law – and its oversight mechanisms – are considered as part of the international human rights regime through their copious invocations of the Rome Statute.

Other treaties referenced include conventions adopted by the Hague Conference on Private International Law (including the Hague Convention on Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption). There are also references to the Arms Trade Treaty, the Convention on the Suppression of Terrorism, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, the Minamata Convention on Mercury, the UN Framework Convention on Climate Change, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the UN Convention against Transnational Organized Crime, the UN Convention against Corruption, the Convention on the Political Rights of Women, the WHO Framework Convention on Tobacco Control, the Marrakesh Treaty to facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise Print Disabled, and the Vienna Convention on Consular Relations. In invoking these treaties, the recommending states accept, albeit implicitly, that these treaties are relevant to the enjoyment of human rights. However, given the paucity of references to these treaties - fewer than 20

[101] eg Hungary recommended Israel '[r]atify OP-CAT and, although not a human rights instrument per se, the Rome Statue of the International Criminal Court (ICC)': Israel (19 December 2013) A/HRC/25/15, Rec 136.8.

for most of these treaties – it is premature to argue that there is a widespread view amongst states that these are part of the human rights regime, even if some states are of that view.

In fact, it is remarkable that some treaties are not referred at all. Security treaties, such as nuclear weapon free zone treaties,[102] are not raised in UPR recommendations. States do not seem to perceive these as human rights treaties, even though they are premised on ideas of freedom from fear, and the prohibition on nuclear weapons is linked to human rights.[103]

[102] eg Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean 1967; South Pacific Nuclear Free Zone Treaty 1985.
[103] See Human Rights Committee, General Comment No 36, 30 October 2018, para 66.

	Number of References	References by Regional Group (% of references)[104]				
		Africa	*Asia-Pacific*	*EEG*	*GRULAC*	*WEOG*
Rome Statute of the ICC, Kampala Amendments, and Agreement on Immunities and Privileges	991	11	5	32	20	31
ILO Conventions[105]	383	9	26	9	36	20
Refugee Convention and Protocol	144	12	4	13	34	37
Statelessness Conventions[106]	145	9	2	30	30	29
UNESCO Conventions[107]	94	39	18	18	16	7
Genocide Convention	85	20	0	60	15	5
Palermo Protocols[108]	79	11	15	16	20	37
Peace Agreements	59	25	5	7	5	56

Table 4: References to 'Other' Treaties by Regional Group

[104] Three references to the treaties were made by Palestine and the Holy See as 'observer' states to the UN and are not indicated in the proportion of references made by regional groups.
[105] Including references to the treaties listed infra n208, as well as Convention Nos 2, 81, 97, 102, 117, 118, 143, 155, 169, 170, 174, 186, 188 and 189.
[106] Convention Relating to the Status of Stateless Persons 1954 and Convention on the Reduction of Statelessness 1961.
[107] Including: UNESCO Convention against Discrimination in Education 1960; UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003; and UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005.
[108] Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 2000; Protocol against the Smuggling of Migrants by Land, Sea and Air 2000; and Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition 2001.

Another set of instruments referenced in UPR recommendations are peace agreements. These include inter-state peace agreements,[109] as well as agreements concluded between a state and a non-state armed group.[110] Most recommendations referencing peace agreements are issued by African and WEOG states. Peace agreements concluded between states are accepted as treaties.[111] By contrast, there is considerable debate on the legal nature of a peace agreement that is concluded between a state and an armed group: some see these as 'binding international instruments',[112] whilst others simply suggest that they are 'not treaties'.[113] Regardless of their characterisation as a treaty or another instrument, it is difficult always to characterise peace agreements as *human rights* treaties or instruments. Peace agreements will frequently address a variety of matters – such as regulation of power-sharing, wealth-sharing and security arrangements – of which human rights forms but one part. Some UPR recommendations highlight the human rights and humanitarian law aspects of the relevant peace agreement, mentioning free and fair elections and democracy[114] or the rights of refugees and internally displaced persons.[115] However, the majority of references simply urge compliance with the peace agreement itself. As with the 'other' treaty references discussed above, recommending states implicitly accept that such agreements are part of the human rights regime.[116]

The practice of UPR indicates that the phrase 'human rights instruments to which a state is party' has been interpreted expansively. Whilst most references to treaties are to the core UN human rights treaties (even where the treaty has not been ratified), treaties in related areas such as international criminal law and refugee law are also referred to. This may, in some part, be due to the information provided by the OHCHR prior to each review.[117] The numerous references to these other treaties suggest that they are part of the

[109] eg the Peace, Security and Cooperation Framework for the Democratic Republic of the Congo and the Region 2013.
[110] eg the Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist) 2006.
[111] Article 2(1)(a) VCLT defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single agreement or in two or more related instruments and whatever its particular designation.'
[112] eg Report of the International Commission of Inquiry on Darfur to the Secretary-General, 1 February 2005, S/2005/60, para 174.
[113] *Prosecutor v Kallon and Kamara* SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, paras 45-50.
[114] eg Niger to Guinea: 'Ensure that the upcoming elections are democratic, transparent and fair in order to allow for a definitive return by Guinea to the democratic international and regional arena, in line with the Ouagadougou Agreement of 15 January 2010': Guinea (14 June 2010) A/HRC/15/4, Rec 71.88.
[115] eg Finland to Mynamar: 'Support the active and meaningful participation of women, "ethnic groups", internally displaced persons and refugees in the implementation of the Nationwide Ceasefire Agreement, including the national dialogue': Myanmar (23 December 2015) A/HRC/31/13, Rec 144.30.
[116] eg Canada to Democratic Republic of Congo: 'Pursue the implementation of the peace accords with a view to stabilizing and pacifying the eastern part of the Democratic Republic of the Congo and create suitable conditions to ensure and promote respect for international humanitarian law and the protection of the civilian population': Democratic Republic of Congo (4 January 2010) A/HRC/13/8, Rec 97.2.
[117] See Section 5.B.

human rights regime. Given this generous interpretation of the term 'human rights instrument', it is all the more noteworthy that there are very few references to regional human rights instruments.

D. Voluntary Pledges and Commitments

Only 94 recommendations explicitly refer to a 'pledge' or 'commitment' undertaken by the state under review. This is a surprisingly low figure for two reasons. First, 100 states had been members of the Human Rights Council by the end of the second cycle of UPR,[118] with the majority making voluntary pledges regarding human rights.[119] Second, states undergoing review often make voluntary commitments in the national reports they submit as part of the UPR process. Data from UPR Info suggests that 160 states had made 1,100 such commitments during the first two UPR cycles.[120]

The recommendations referring to voluntary pledges and commitments relate to a variety of actions from ratification of treaties, to issuing standing invitations to the special procedures of the Human Rights Council, to 'uphold[ing] commitments to prevent impunity for human rights violations.'[121] Most of the recommendations are inward-looking; that is to say, they relate to a state committing to do certain things that will improve the human rights situation within its jurisdiction.

Occasionally, binding obligations under international human rights law have been reframed as voluntary commitments. For example, the Republic of Korea recommended to Yemen that it '[h]onour its voluntary commitment to submit national reports to the treaty bodies by the due date.'[122] But timely submission of state party reports to human rights treaty bodies is an obligation that arises from the human rights treaties to which the state is party.[123] By characterising timely reporting as a voluntary commitment, a binding treaty obligation is downgraded into a voluntary measure.

There does not appear to be any significant regional variation in terms of making or accepting recommendations that refer to voluntary pledges and commitments. 74 were accepted (79%) with no significant difference between regional groups in terms of acceptance rates. There appears to be no distinction in terms of accepting recommendations explicitly based on a formal treaty obligation (the

[118] For a list of members of the Council, see: https://www.ohchr.org/EN/HRBodies/HRC/Pages/PastMembers.aspx [last accessed 1 November 2020],
[119] Details of past elections (and links to voluntary pledges made) are available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCElections.aspx [last accessed 1 November 2020].
[120] Data available by searching the UPR Info database, supra n6, for 'Voluntary Pledges only'.
[121] Colombia, A/HRC/24/6 (4 July 2013), Rec 116.71.
[122] Yemen (5 June 2009) A/HRC/12/13, Rec 27. The voluntary commitment can be found in the National Report submitted in accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1 (20 February 2009) A/HRC/WG.6/5/YEM/1, 14.
[123] eg, Article 40(1) ICCPR provides that states parties 'undertake to submit reports on the measures they have adopted…(a) Within one year of the entry into force of the present Covenant for the States Parties concerned; (b) Thereafter whenever the Committee so requests.'

acceptance rate for 'implementation' of treaty obligation recommendations was 73%) and those based on non-binding pledges or commitments.

E. International Humanitarian Law

Resolution 5/1 also provides that 'given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the [UPR] shall take into account applicable international humanitarian law'. As discussed above,[124] this formulation was a compromise solution following considerable debate during the negotiations on the modalities of the UPR. There was substantial opposition to the inclusion of IHL as a basis for the UPR. Despite the concerns expressed at that time, the practice of UPR demonstrates some limited engagement with IHL.

During the first two cycles of UPR there were 120 recommendations that made a reference to IHL; this includes 39 recommendations that reference one or more IHL instruments[125] and a remaining 81 that make a general reference to IHL.[126] Reference was made to the 1949 Geneva Conventions collectively (2), Geneva Convention IV (19), Additional Protocol I to the 1949 Geneva Conventions (12), Additional Protocol II to the 1949 Geneva Conventions (12), Additional Protocol III to the 1949 Geneva Conventions (4), Ottawa Convention on Anti-Personnel Landmines (3), Chemical Weapons Convention (1), Hague Regulations (1), First Protocol to the 1954 Hague Convention (1), and the Second Protocol to the 1954 Hague Convention (1).[127] Of these specific references, there is a preference for 'Geneva Law' – an unofficial term which describes the body of law that protects the victims of armed conflicts in the power of a Party to the conflict[128] – over rules of 'Hague Law' that regulate the conduct of hostilities and the means and methods of warfare. This might be due to the closer connection of Geneva Law, with its obligations of humane treatment and rules on the treatment of detainees, to human rights protections.

There are fewer references to IHL than to the Statelessness Conventions (145), the Refugee Convention and its Protocol (144), ILO Conventions (383) and the various instruments relating to the International Criminal Court (991).[129] This is despite the inclusion of IHL as a basis of review, albeit one that should be 'taken into account'. Recommendations that do reference IHL were made to only a handful of states. Of the 32 states that received recommendations referring to IHL, 50% were made to just 3 states:

[124] See Section 2.5.
[125] In this study 'IHL instruments' is understood as those instruments that seek to regulate conduct during armed conflict and belligerent occupation – what might be termed 'Hague Law' and 'Geneva Law'. International criminal law instruments and the OP-CRC-AC have been excluded. Zhu, supra n11, takes a broader view of what constitutes IHL.
[126] eg Kuwait's recommendation to Iraq to '[c]ommit to abide by international humanitarian law and international law': Iraq (15 March 2010) A/HRC/14/14, Rec 27.
[127] The Ottawa Convention on Anti-Personnel Landmines and the Chemical Weapons Convention are treated as IHL instruments given that they contain prohibitions on the use of certain weapons during armed conflict.
[128] Sassòli, *International Humanitarian Law* (2019) at 10.
[129] See Section 4.C.

Israel (35), Syria (14) and Somalia (11). The rest received recommendations in the single digits. All recommendations that reference the Fourth Geneva Convention and the Hague Regulations are to Israel addressing the situation in the Occupied Palestinian Territories and the Golan Heights.

The low number of references to IHL in UPR recommendations may be attributed in part to the opposition to including IHL as a basis of UPR and the view that IHL does not properly fall within the province of UPR, or indeed the work of the Human Rights Council more generally.[130] However, these reasons can only be part of the explanation. Fifty of the 120 recommendations refer to IHL without further mention of human rights protections. In fact, recommendations regarding IHL were made by some states that were opposed to its inclusion in the bases of review. For example, Australia made three recommendations referring to 'obligations under international humanitarian law'[131] and Turkey made three recommendations calling for respect for IHL.[132] Both these states initially expressed the view that the Human Rights Council was not competent to engage with questions regarding IHL in the UPR.[133] In fact, with 59 states from all 5 regional groups referring to IHL in their recommendations,[134] and an additional 19 states from all 5 regional groups accepting recommendations that refer to IHL,[135] states from all regional groups have engaged with IHL in the UPR - both making and accepting such recommendations. This includes states that were involved in armed conflicts, such as Colombia, the Democratic Republic of the Congo, Iraq, Sri Lanka, Syria and the US.

Resolution 5/1 provides no guidance on what is to be considered *applicable* IHL. Whether this term refers to those IHL treaties to which the state under review is a party,[136] customary IHL, or only those norms that overlap with human rights protections was left open to interpretation. The practice of UPR does not shed much light on states' perceptions of 'applicable'. There are references to conventional IHL. Yet, 60% of the references call on the state under review to become a party to a treaty and so are referring to IHL instruments that are *not* applicable to the state under review.

The remainder of the references to IHL are general references. For example, Mexico called on Pakistan to '[s]trictly adhere to international human rights law and international humanitarian law and

[130] On the latter, see Alston, Morgan-Foster and Abresch, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"' (2008) 19 *European Journal of International Law* 183.
[131] Iraq (15 March 2010) A/HRC/14/14, Rec 121; Angola (5 December 2014) A/HRC/28/11, Rec 134.187; Syrian Arab Republic, supra n73, Rec 109.119.
[132] Somalia (11 July 2011) A/HRC/18/16, Recs 98.48 and 98.77; Syrian Arab Republic, supra n73, Rec 110.6. See also the recommendations made by the UK to the Central African Republic and Colombia: Central African Republic (4 June 2009) A/HRC/12/2, Rec 14; Colombia (9 January 2009) A/HRC/10/82, Rec 17.
[133] See Section 2.E.
[134] The distribution of recommendations was: Africa: 9; Asia: 25; EEG: 14; GRULAC: 28; WEOG: 41. 3 recommendations were made by observer states.
[135] These included: 10 African states; 6 Asian states; 1 EEG state; 1 GRULAC state; and 1 WEOG state.
[136] As suggested by Malaysia, supra n46.

international refugee law in its fight against terrorism',[137] but it is not clear which rules of IHL are being referred to. Such recommendations may be referring to customary rules of IHL or treaty rules or both. In fact, despite the considerable body of customary IHL that is binding on all states,[138] there is only one reference to custom in the context of IHL. Sweden called on Syria to 'Protect civilians and civilian infrastructure, in accordance with international humanitarian law and customary international law, and stop its indiscriminate and aerial bombardments, including the use of barrel bombs.'[139] The recommendation was accepted.[140] This is the sole instance of customary international law – both in the context of IHL and generally - being invoked in the first two cycles of UPR. This may be due to uncertainties as to whether a particular rule forms part of customary international law and a reluctance on the part of the recommending state to engage in a debate on whether a rule has such status. It also reveals a clear preference for treaty law.

F. UPR Recommendations

UPR recommendations have been referred to in 404 recommendations; with 101 references occurring in the first cycle, and the remainder in the second cycle (303).[141] The rather low number of references in the second cycle is noteworthy given that subsequent cycles of UPR 'should focus, inter alia, on the implementation of the preceding outcome'.[142] One explanation for the low number is that there is an expectation that accepted recommendations will be implemented by the state under review before its next UPR. Where such recommendations are implemented, there is simply no need to refer back to them.[143] Another, less charitable, explanation is that most states are not interested in following up on accepted recommendations in later rounds of UPR.

The references to UPR recommendations in the first cycle relate to the *process* of implementation of recommendations from that cycle. There are three broad categories of recommendation. The first calls on states to ensure an inclusive process involving civil society and relevant government departments – including translating and disseminating the outcome of the UPR - when implementing recommendations.

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[137] Pakistan (4 June 2008) A/HRC/8/42, Rec 25.
[138] See Henckaerts and Doswald-Beck, *Customary International Humanitarian Law* (2005).
[139] Syrian Arab Republic, supra n73, Rec 109.99.
[140] The recommendation was accepted, although 'reservations' were expressed 'about the politicized nature of the wording and the aggressive, accusatory and provocative language in which they were expressed.' HR Council, Report of the Working Group on the Universal Periodic Review: Syrian Arab Republic, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (13 March 2017) A/HRC/34/5/Add.1, 7.
[141] A further 132 recommendations refer to a follow-up process to the UPR but do not expressly mention UPR recommendations.
[142] HRC Res 5/1, para 34; HRC Dec 17/119, para II.2.
[143] Kothari has noted that 'One of the defining features of the UPR process has been the robust follow-up mechanisms that have emerged throughout the reporting cycles of the UPR.' He refers, amongst other things, to UPR mid-term reports and the '[d]evelopment of matrices and tools to track the implementation status of UPR recommendations.' Kothari, 'Research Brief: The Universal Periodic Review Mid-Term Reporting Process: Lessons for the Treaty Bodies' (Geneva Academy, 2019) 3, available at: https://www.geneva-academy.ch/research/publications/detail/504-the-universal-periodic-review-mid-term-reporting-process-lessons-for-the-treaty-bodies [last accessed 1 November 2020].

Only one such recommendation was rejected. Venezuela noted a Canadian recommendation to 'Ensure a participatory and inclusive process with civil society, including NGOs who may be critical of the government's efforts, in the follow up of UPR Recommendations'.[144] Notably, Venezuela did accept a similar recommendation from Norway.[145] The second category of recommendation is more outward-looking. States are called on to 'seek technical and financial assistance from the international community to implement the recommendations'.[146] All these recommendations were accepted. The final category of recommendation calls for a commitment to provide mid-term or periodic reports to the Council on implementation of accepted UPR recommendations. Of the six recommendations that call for such action, two were noted (by Kazakhstan and Tanzania).

Of the 303 second cycle references to UPR recommendations, 67 relate to the process of implementation and 236 refer to UPR recommendations from the first cycle. Table 6 shows a breakdown of the second type of reference.

Regional Group of State under Review	Reference to an 'accepted' recommendation from first cycle		Reference to a 'noted' recommendation from first cycle	
Action in Second Cycle	*Accepted*	*Noted*	*Accepted*	*Noted*
Africa	37	11	13	9
Asia-Pacific	40	11	4	20
Eastern Europe	11	0	0	4
Latin America and Caribbean	14	5	9	18
Western Europe and Others	12	5	0	13
TOTAL	**114**	**32**	**26**	**64**

Table 6: Cycle 2 Recommendations referring to Accepted and Noted Cycle 1 Recommendations

Not all the references to UPR recommendations from the first cycle are references to 'accepted' recommendations. Tracking each reference back to the original recommendation reveals that 38% of recommendations reference a recommendation that was noted by the state under review in the first cycle.[147] This is despite the instruction that 'the second and subsequent cycles should focus on, *inter alia*, the

[144] Venezuela (Bolivarian Republic of) (7 December 2011) A/HRC/19/12, Rec 96.37.
[145] Venezuela, supra n144, Rec 93.19.
[146] Côte d'Ivoire, supra n72, Rec 99.101.
[147] Where, despite a reference to a previous recommendation, no such recommendation was made then this has been recorded as a 'noted' recommendation. eg, Burkina Faso recommended that Brazil should 'Continue with the implementation of recommendations related to the ratification of human rights international instruments'; however, no recommendations were made to Brazil in the first cycle of UPR relating to ratification of human rights instruments. See Brazil (9 July 2012) A/HRC/21/11, Rec 119.1.

implementation of accepted recommendations'.[148] States do not tend to accept such recommendations. Only 29% of these previously 'noted' recommendations are accepted. Most of these 'repeat' recommendations are made by the state that made the original recommendation in the first cycle. For example, during the first cycle of UPR Slovenia had recommended that Swaziland[149] abolish the death penalty. However, Swaziland indicated that it was 'not yet ready to accept this recommendation.'[150] Slovenia returned to this recommendation in the second UPR cycle, calling for Swaziland to 'Abolish the death penalty, as previously recommended'.[151] Once again, the recommendation was 'noted'.

Twenty-two percent of the recommendations that reference a recommendation 'accepted' in the first round of UPR are 'noted' in the second cycle. One third of these relate to a commitment to sign, ratify or accede to an international human rights treaty. For example, in its first UPR Australia accepted recommendations to ratify OP-CAT but only 'noted' recommendations that recalled these commitments in its second UPR. There are alternative possible explanations for such behaviour. One is that states do not view acceptance of a UPR recommendation as creating a commitment to act. Another is that something changed in the state under review between the first and second UPR, such as a change of government or a change of policy. A third is that states took acceptance of UPR recommendations more seriously in the second round of UPR and so were unlikely to accept a recommendation regarding treaty ratification unless there was certainty that the recommendation could be implemented. In the case of Australia, the last explanation seems the most persuasive. Australia said that it 'is actively considering the ratification of the OPCAT' in response to the second cycle recommendations,[152] and subsequently ratified OPCAT.[153] Similarly, Somalia confirmed that in light of capacity and resource constraints it needed to 'prioritise' ratification of certain human rights instruments and therefore general recommendations regarding ratification of core human rights treaties could not be accepted.[154]

5. INTERNATIONAL 'HUMAN RIGHTS' LAW IN UPR

The negotiations on the bases of review and their use (or lack thereof) in the first two cycles of UPR provide some insights into states' perceptions of international 'human rights' law.

[148] HRC Res 16/21, Annex: Outcome of the review of the work and functioning of the United Nations Human Rights Council, para I.C.1.6 [emphasis added]. See also HRC Dec 17/119, para II.2.
[149] Now Eswatini. The official documents relate to when the state was called Swaziland.
[150] Report of the Working Group on the Universal Periodic Review, Swaziland, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (6 March 2012) A/HRC/19/6/Add.1, para 11.
[151] Swaziland (13 July 2016) A/HRC/33/14, Rec 109.37.
[152] Australia, Addendum (19 February 2016) A/HRC/31/14/Add.1, para 5.
[153] 21 December 2017. See https://treaties.un.org/Pages/showActionDetails.aspx?objid=08000002804e0fea&clang=_en [last accessed 1 November 2020].
[154] Somalia, Addendum (7 June 2016) A/HRC/32/12/Add.1.

A. 'Other' International Law Material in UPR Recommendations

A stark finding of our analysis of UPR recommendations is that states have not limited themselves to the bases of review set out in Resolution 5/1. In the practice of UPR, states have expanded the review to include a wide range of other international law material. Remarkably, 5,608 recommendations – almost 10% of all recommendations made in the first two cycles and 31% of the recommendations in our database – call for implementation of international law material not obviously captured by the bases of review. There are 3,776 distinct references to *specific* materials that *prima facie* fall outside the bases of review;[155] as well as 2,242 *'general* human rights' references.[156]

Of the 3,776 distinct references to specific international law materials not captured by the bases of review listed in Resolution 5/1, some are to binding materials, such as international court judgments, whilst the majority are to soft law instruments, including various declarations and principles. Materials from human rights bodies are referenced, including outputs from UN treaty bodies and special procedure mandate holders, as are materials from entities that are not traditionally considered human rights bodies, such as the World Food Programme, the United Nations Development Programme and the Food and Agricultural Organization. These materials are rarely referred to in conjunction with a Resolution 5/1 basis of review. Only 213 references exist alongside a reference to a basis of review (6%). Recommendations are made to states to 'implement' these international law materials (or the actions they call for) and these have been accepted by states from all regional groups.

[155] Some recommendations refer to more than one international law material that is not captured by the bases of review.
[156] See Section 5.D.

Material Referenced	Number of references	Africa	Asia-Pacific	EEG	GRULAC	WEOG	Observer
		% of references made					
Principles Relating to the Status of National Human Rights Institutions[157]	1,279	28	22	9	15	26	0
Millennium Development Goals[158]	198	31	47	7	11	4	2
UN Declaration on the Rights of Indigenous Persons[159]	63	16	13	5	33	33	0
Standard Minimum Rules for the Treatment of Prisoners[160]	57	9	12	16	2	61	0
Human Rights Council Resolution 9/12 (Human Rights Voluntary Goals)[161]	45	0	0	0	100	0	0

Table 7: Five Most Cited International Law Instruments by Regional Group

[157] See GA Res 48/134, 20 December 1993, A/RES/48/134.
[158] See GA Res 55/2, 18 September 2000, A/RES/55/2.
[159] GA Res 61/295, 13 September 2007, A/RES/61/295.
[160] This figure includes references to both the original (ECOSOC Res 663C (XXIV), 31 July 1957; ECOSOC Res 2076 (LXII), 13 May 1977) and updated Standard Minimum Rules (Nelson Mandela Rules) (GA Res 70/175, 8 January 2016, A/RES/70/175).
[161] 18 September 2008, A/HRC/RES/9/12.

Table 7 shows the 5 most cited of these 'other' international law instruments.[162] The vast majority of the references (34%) are to the Paris Principles Relating to the Status of National Human Rights Institutions, with references to other materials being far fewer in number. However, many more materials are referenced sporadically: 50 different international instruments are referred to fewer than 10 times. So, despite their importance in their respective fields, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[163] are only referred to 5 times and the Guiding Principles on Internal Displacement[164] 8 times. Instruments adopted by experts, such as the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity[165] (21), and regulatory frameworks, such as the Extractive Industries Transparency Initiative[166] (3) are also referred to.

States from all regional groups make recommendations referring to these international law instruments. There are variations in terms of issues being pursued. For example, Asia-Pacific and African group states made most of the references to instruments and standards relating to development. These groups accounted for 92% of the references to the GA's Overseas Development Aid Target,[167] 78% of the references to the Millennium Development Goals and 74% of the references to the Sustainable Development Goals.[168] All of the references to Human Rights Council Resolution 9/12 (Human Rights Voluntary Goals) were made by Brazil and all but one of the 37 references to the UN Rules for the Treatment of Women Prisoners (the Bangkok Rules)[169] were made by Thailand.[170]

Materials from different sources are cited to varying degrees. There are 884 references to outputs from the UN treaty bodies. These references include occasional references to general comments (14) and concluding observations (19). The vast majority are general references to 'recommendations' for action made by treaty bodies. Given that the UN treaty bodies are mandated to provide guidance on performance of core human rights treaty obligations, these outputs have a close link to one of the bases of review: 'human rights instruments to which a state is party'. Most of the recommendations calling for implementation of treaty body outputs refer to outputs from the Committee on the Rights of the Child (214) and the Committee on the Elimination of Discrimination Against Women (203). There are far fewer references to

[162] Citations were counted as they were presented in recommendations: eg, a recommendation referring to the title of an instrument contained in a GA resolution – such as the Declaration on Human Rights Defenders – was counted as a reference to the actual instrument rather than the parent resolution. This provides an accurate picture of the material states refer to in their recommendations.
[163] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.
[164] 11 February 1998, E/CN/4/1998/53/Add.2.
[165] 'Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity', March 2007.
[166] See: eiti.org [last accessed 1 November 2020].
[167] GA Res 2626 (XXV), 24 October 1970. There were 38 references.
[168] GA Res 70/1, 25 September 2015, A/RES/70/1. There were 24 references.
[169] GA Res 65/229, 21 December 2010, A/RES/65/229.
[170] Switzerland made the other recommendation.

outputs from the Human Rights Committee (101) and the Committee on Economic, Social and Cultural Rights (69). The acceptance rates for recommendations calling for implementation of treaty body recommendations is 72%, which reflects the acceptance rate for recommendations calling for implementation of the core UN human rights treaties (73%).

There are 236 references to outputs from special procedures. Recommendations have focussed on implementation of outputs from thematic special procedures rather than country specific mandates. There are only 19 references to outputs from country specific mandates. This reflects the more contentious nature of the country mandates and their limited number.[171] Six recommendations referring to the work of the Special Rapporteur on the situation of human rights in Cambodia and the single recommendation referring to the Independent Expert on the situation of human rights in the Sudan were accepted. Both these mandates are concerned with capacity building and technical assistance and were established with the support of the state concerned. The remaining 12 recommendations were rejected.

There are far fewer references to resolutions, decisions and other 'recommendations' from the Human Rights Council (113), the GA (97) and the Security Council (88). The references to GA resolutions are predominantly references to resolutions regarding the abolition of the death penalty generally and directed towards those African, Asia-Pacific and GRULAC states that retain the death penalty. They tend to be rejected: only 17% of recommendations being accepted. Almost half of the references to Security Council resolutions are to Resolution 1325 on Women, Peace and Security.[172] The overall acceptance rate for recommendations referring to Security Council resolutions is 72%.

Outputs from a variety of other UN entities and specialised agencies, are also referred to, albeit less frequently. These references tend to be rather general, invoking unspecified 'recommendations' from the various bodies. States are called upon to implement 'recommendations' from the High Commissioner for Human Rights and their office (OHCHR) (42), the ILO and its supervisory bodies (24), and the UNHCR (21). There are sporadic references to outputs from other specialised agencies, including the World Health Organisation, UN Education, Scientific and Cultural Organization (UNESCO) and the Food and Agricultural Organisation (FAO).

Only two recommendations call for implementation of ICJ judgments and one recommendation calls for the implementation of an order for provisional measures. Nicaragua called for the implementation of the *Nicaragua* judgment.[173] This recommendation was noted by the US. Mexico's call for the US to

[171] See Freedman, 'The Human Rights Council', in Mégret and Alston (eds), *The United Nations and Human Rights* (2020) 233.
[172] SC Res 1325, 31 October 2000, S/RES/1325 (2000).
[173] ICJ Reports 1986, 14. See A/HRC/16/11, supra n80, Rec 92.53.

implement the *Avena* judgment was accepted.[174] The Russian Federation noted the recommendation from Georgia to 'comply' with provisional measures ordered by the ICJ,[175] because it 'did not comply with the basis of the review stipulated in HRC Resolution 5/1'.[176] A further 8 recommendations called upon Israel to accept and implement the Advisory Opinion in the *Wall* case.[177] Each of these was noted.

States seem to be working on the basis that, limiting references to the UN Charter, the UDHR, human rights treaties and voluntary pledges and commitments overlooks numerous other materials that are relevant to improving the situation of human rights in the state under review. Failure to mention these materials would be to ignore a significant part of the picture, even though these materials do not form part of the official bases of review.

Most 'other' international law materials cited are soft law instruments. Whilst many academics and lawyers are concerned with the hard/soft law distinction - and some are critical of the very idea of soft law[178] - state delegates who make UPR recommendations are far less troubled by the distinction. The practice of UPR indicates an erosion of the hard/soft law divide. In fact, states demonstrated this willingness to overlook formal distinctions during the negotiations on the modalities of the UPR.[179] The bases of review set out in Resolution 5/1 reflect a broad range of human rights commitments undertaken by states at the international level, including a mix of both hard and soft law.

As Boyle and Chinkin have observed: 'contemporary international law is often the product of a complex and evolving interplay of instruments, both binding and non-binding, and of custom and general principles.'[180] This is reflected in the design and practice of UPR, with the notable absence of custom. Although states have broadened the bases of review in practice to include a variety of soft law instruments, customary international human rights law is almost entirely missing. States appear more comfortable with written texts, even if not binding, than with an unwritten source, even if binding.

The OHCHR compilation of UN information which feeds into each UPR is likely to account for some of the references to this 'other' material. The compilation includes, for each state under review, relevant information from the treaty bodies, special procedures, OHCHR, UN country teams, ILO

[174] ICJ Reports 2004, 12. See A/HRC/16/11, supra n80, Rec 92.54.
[175] ICJ Reports 2008, 353.
[176] Russian Federation (5 October 2009) A/HRC/11/19, paras 54 and 86.
[177] ICJ Reports 2004, 3.
[178] eg Klabbers, 'The Redundancy of Soft Law' (1996) 65 *Nordic Journal of International Law* 167; d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 *European Journal of International Law* 1075.
[179] See Section 2.G.
[180] Boyle and Chinkin, *The Making of International Law* (2007) at 210-11.

committee of experts, UNESCO and UNHCR, amongst others.[181] The OHCHR compilation seems to serve as an influential document from which states draw and demonstrates the potential importance of actors who operate 'behind the scenes'.[182] At the same time, states do not limit themselves to materials included in the compilation.

Many of the 'other' international law materials are referenced only a few times each; but the citation of a particular material indicates that at least the recommending state 'tacitly assert[s] the validity, legitimacy and relevance of the invoked human rights norm.'[183] This in turn affects future discussion of the issue, as the recommending state cannot later argue that the particular material is invalid, illegitimate or irrelevant to human rights. This is particularly important for expert adopted materials and materials drawn up by non-human rights bodies. As Baxter has noted in a different context, 'the future course of discussion, negotiation, and even agreement will not be the same as they would have been in the absence of the [material].'[184] Over time, if more and more states reference a particular instrument, the stature of that instrument grows and it becomes a central point of reference on an issue.

One such instrument is the Paris Principles on national human rights institutions. The Paris Principles are invoked in 1,279 recommendations: 990 of those recommendations were accepted (77%). It was invoked more times than all but one of the core UN human rights treaties. The number of recommendations that invoke the Paris Principles - both in absolute terms and relative to the number of recommendations that refer to individual treaties -, the diversity of states that made the recommendations and accepted them, and the language of the recommendations all point to the Paris Principles having considerable influence and being an important point of reference. A confluence of factors explains the high citation figure for the Paris Principles. The Principles already have a certain weight in UPR, with 'A-status' national human rights institutions – that is, those fully compliant with the Principles – having a privileged position.[185] States are regularly encouraged to establish or strengthen a national human rights institution in

[181] See eg Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Bolivarian Republic of Venezuela, A/HRC/WG.6/26/VEN/2 (25 August 2016).
[182] There is growing attention to the work of international civil servants, such as those in the OHCHR, who 'identify and frame issues for collective debate, set the agenda, negotiate appropriate rules and policies, partake in their implementation and monitor their advancement': Mansouri, 'International Civil Servants and Their Unexplored Role in International Law' *EJIL:Talk!* (3 October 2019). See also Baetans (ed.), *Legitimacy of Unseen Actors in International Adjudication* (2019). On UPR specifically, see Billaud, 'Keepers of the Truth: Producing "Transparent" Documents for the Universal Periodic Review' in Charlesworth and Larking, supra n14, 63; McGaughey, 'The Role and Influence of Non-governmental Organisations in the Universal Periodic Review – International Context and Australian Case Study' (2017) 17 *Human Rights Law Review* 421.
[183] Kalin, supra n15, 257-8. See also Kalin, supra n17, 33.
[184] Baxter, supra n19, 565.
[185] The OHCHR compilation of information from stakeholders contains a separate section for information from the national human rights institution of the state under review that is in 'full compliance with the Paris Principles'. Such national human rights institutions are also 'entitled to intervene immediately after the State under review during the adoption of the outcome of the review'. HRC Res 16/21, paras 9 and 13.

line with the Principles.[186] Furthermore, mention of the Principles is an 'easy' recommendation as it is not particularly critical of a state's human rights record.

B. Breadth of Subject Matter

UPR recommendations also reveal states' perceptions of the content of *human rights* law. States invoke instruments from a variety of related fields, suggesting that they are part of the human rights regime. Whilst resolution 5/1 contains explicit acknowledgment of the 'complementary and interrelated nature' of IHL and human rights,[187] there have been only 120 recommendations referring to IHL norms and instruments, and there have been far more references to instruments from other fields of international law.

International criminal law instruments are referenced frequently.[188] The invocation of these instruments confirms the 'contemporary turn to criminal law in human rights'.[189] Accountability and the fight against impunity occupy a prominent place on the human rights agenda. The obligation to investigate and prosecute certain human rights violations and the rejection of amnesties are seen as part of the human rights law mainstream.[190] Through supervision of national prosecutions, regional human rights courts have been described as exercising a 'quasi-criminal jurisdiction', constituting 'international criminal law by other means'.[191] A large part of this turn to criminal law has been the development of international criminal law institutions.[192] It is this in particular that is reflected in the practice of UPR recommendations, with 933 references to the Rome Statute of the International Criminal Court. This is more than the number of references to several core UN human rights treaties. There are additional references to the Kampala Amendments to the Rome Statute (37), the Agreement on Privileges and Immunities of the ICC (140) and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (23).

States also reference numerous ILO conventions in UPR recommendations. ILO standards and recommendations are also invoked.[193] This citation practice feeds into the debate as to whether labour rights are human rights.[194] In 1996, Leary wrote of a 'regrettable paradox', whereby 'the human rights

[186] eg GA Res 74/156, 23 January 2020, A/RES/74/156; HRC Res 39/17, 8 October 2018, A/HRC/RES/19/17.
[187] See Section 2.E.
[188] See Section 4.C.
[189] Engle, 'Mapping the Shift: Human Rights and Criminal Law' (2018) 112 *ASIL Proceedings* 84, 84.
[190] See Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell Law Journal* 1069; Pinto, 'Historical Trends of Human Rights Gone Criminal', LSE Law, Society and Economy Working Papers 4/2020.
[191] Huneeus, 'International Criminal Law by other Means: the Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107 *American Journal of International Law* 1. See also O'Flaherty and Higgins, 'International Human Rights Law and Criminalization' (2015) 58 *Japanese Yearbook of International Law* 45, 68, noting that human rights bodies and courts have carved out 'a significant criminal law mandate'.
[192] Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell Law Journal* 1069.
[193] There are 26 references to ILO 'standards' and 'recommendations'.
[194] See Kolben, 'Labour Rights as Human Rights' (2010) 50 *Virginia Journal of International Law* 450; Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151.

movement and the labor movement run on tracks that are sometimes parallel and rarely meet'.[195] Today, there are far more intersections between the two.[196] One such intersection is the UPR, with recommendations containing 383 references to ILO conventions. Two ILO conventions in particular are invoked frequently. The first is ILO Convention No 189 on domestic workers, which is invoked in 149 recommendations. That convention mentions a number of international human rights instruments in its preamble and has been described as taking a 'human rights approach'.[197] Second, ILO Convention No 169 on Indigenous and Tribal Peoples is also well-represented in UPR recommendations with 122 references. UPR recommendations are informative not only for the number of references to ILO conventions, but also how they are referenced. In several instances, states that invoke the ILO conventions explicitly characterise them as human rights treaties. For example, Ghana recommended that Lebanon '[r]atify various international human rights statutes and conventions, including the Rome Statute…and the ILO Conventions Nos. 87, 169 and 189'.[198]

A body of law that is closely associated with international human rights law is international refugee law. Whereas many commentators express the view that the Convention relating to the Status of Refugees is itself a human rights treaty,[199] the occasional commentator contends that it is not.[200] There are 144 references to the Convention relating to the Status of Refugees and its Protocol in UPR recommendations, as well as additional references to UNHCR conclusions, guidelines and recommendations. The view of states is that, if not specifically a human rights issue, these instruments are relevant to the enjoyment of human rights.

A closely related subject matter is the protection of stateless persons. The Convention on the Reduction of Statelessness and the Convention relating to the Status of Stateless Persons are each referenced in over 100 UPR recommendations. The relationship between statelessness and human rights law is uncertain. For example, drawing on the work of Goodwin-Gill,[201] Foster and Lambert have argued

[195] Leary, 'The Paradox of Workers' Rights as Human Rights', in Compa and Diamond (eds), *Human Rights, Labor Rights, and International Trade* (1996) 22.
[196] See Kolben, supra n193.
[197] Mantouvalou, supra n193, 169.
[198] Report of the Working Group on the Universal Periodic Review, Lebanon (22 December 2015) A/HRC/31/5, para 132.23.
[199] Edwards, 'International Refugee Law', in Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law,* 3rd edn (2017)539, 543 ('The Refugee Convention is a human rights instrument of a particular scope'); Hathaway, *The Rights of Refugees under International Law* (2005) at 5 ('refugee law is a remedial or palliative branch of human rights law'); McAdam, *Complementary Protection in International Refugee Law* (2007) at 14 (the Refugee Convention is 'a specialist human rights treaty').
[200] Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law', in Rubio-Marín (ed.), *Human Rights and Immigration* (2014) 22 ('Contrary to conventional wisdom, the Geneva Convention is not a human rights treaty in the orthodox sense, for both historical and legal reasons').
[201] Goodwin-Gill, 'The Rights of Refugees and Stateless Persons', in Saksena (ed.), *Human Rights Perspective and Challenges (in 1990 and Beyond)* (1994) 378.

that 'statelessness as a human rights issue is…a concept whose time has come.'[202] They argue that instead of being seen as a narrow technical issue, which can be resolved by harmonizing domestic law, statelessness should be seen as a human rights issue.[203] The practice of UPR is informative in this regard. In addition to the 145 references to the statelessness conventions, states sometimes describe the statelessness treaties as human rights treaties. For example, Ecuador recommended that the Solomon Islands 'Sign or ratify the following international human rights instruments:…the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness', a recommendation which was accepted.[204]

States thus include international criminal law, international labour law, international refugee law and the international law relating to stateless persons as part of the human rights law regime. States treat the boundaries between these bodies of law as fluid. Each of them is seen as relevant to the improvement of the human rights situation on the ground,[205] and potentially even as part of human rights law themselves. IHL, on the other hand, is seen as 'complementary' and there is a relative reticence to make recommendations that explicitly refer to this body of law even though dozens of armed conflicts take place each year involving numerous states.[206]

As with the breadth of materials cited, States are likely taking their lead from the OHCHR compilation of UN information which feeds into the review. The compilation includes information on the status of ratification of the core UN human rights treaties, as well as 'other main relevant international instruments' for each state under review.[207] These instruments include the Genocide Convention, the Rome Statute, the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, the Refugee Convention and its Protocol, the Convention Relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness, the ILO 'fundamental Conventions',[208] as

[202] Foster and Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28 *International Journal of Refugee Law* 564, 584.
[203] Foster and Lambert, supra n202.
[204] Report of the Working Group on the Universal Periodic Review, Solomon Islands (11 July 2011) A/HRC/18/8, para 81.5; Report of the Human Rights Council on its eighteenth session (22 October 2012) A/HRC/18/2, para 372.
[205] HRC Res 5/1, para 4(a).
[206] According to one report, at least 48 armed conflicts took place in 28 states in 2016 alone. Bellal, *The War Report: Armed Conflicts in 2016* (Geneva Academy, 2017) at 15, available at: https://www.geneva-academy.ch/research/publications/detail/202-the-war-report-2016 [last accessed 1 November 2020].
[207] See eg Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, Togo (22 August 2016) A/HRC/WG.6/26/TGO/2, I.A.2.
[208] These are Convention No. 29 concerning Forced or Compulsory Labour; Convention No. 105 concerning the Abolition of Forced Labour; Convention No. 87 concerning Freedom of Association and Protection of the Right to Organize; Convention No. 98 concerning the Application of the Principles of the Right to Organize and to Bargain Collectively; Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value; Convention No. 111 concerning Discrimination in Respect of Employment and Occupation; Convention No. 138 concerning Minimum Age for Admission to Employment; and Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

well as the UNESCO Convention on Discrimination in Education.[209] The OHCHR compilation appears to serve as an influential tool for coalescing state views on what is a 'human rights' instrument.

C. The Absence of Regional Human Rights Law Instruments

Given the broad interpretation of human rights law, it is remarkable that UPR recommendations rarely refer to regional and sub-regional human rights law instruments. As seen in Section 4.3, there are only 40 references to AU treaties, 160 to Council of Europe treaties and 21 to OAS treaties. There are also relatively few references to other regional material, such as judgments of regional human rights courts, and very few references to material from outside Europe.

There are 195 references to international law material adopted by regional intergovernmental organisations and human rights bodies. This number includes 51 references to judgments from regional human rights courts. There are 36 recommendations calling for implementation of judgments from the European Court of Human Rights, which are made primarily by parties to the ECHR.[210] A further 13 recommendations call for implementation of judgments from the Inter-American Court of Human Rights, and 2 reference judgments from the ECOWAS Community Court of Justice. However, it is not member states of these regional communities that led the call for implementation of these regional court judgments: 10 of these recommendations are from WEOG states, whilst 5 recommendations regarding the Inter-American Court judgments are from members of the OAS (Canada (2), Costa Rica, Ecuador and Mexico). Despite being binding on states party to the dispute, the acceptance rate for recommendations calling for implementation of regional court judgments is 67%.

The other 144 references are to other outputs from a variety of regional organisations and bodies. The acceptance rate for recommendations containing these references is 61%. The general picture is one of limited engagement with regional bodies beyond Europe. There are 105 references to outputs from European organisations, including various Council of Europe institutions, the European Union and the Organisation for Security and Cooperation in Europe (OSCE) and 86% of these are made by members of those organisations. Beyond Europe, there are 17 references to outputs from African Union institutions, 4 references to material from SADC, 13 references to outputs from OAS institutions, 2 references to Commonwealth missions, and single references to a recommendation from CARICOM, the N'Djamena Declaration, and the ASEAN Declaration on Human Rights. Regional human rights law instruments are neglected.

[209] The document also includes as 'relevant' the status of ratification of the 1949 Geneva Conventions and the Additional Protocols thereto.

[210] There is only one exception. Mexico called for the UK to 'comply with the rulings of the European Court of Human Rights on the cases concerning the United Kingdom': United Kingdom (6 July 2012) A/HRC/21/9, Rec 110.48.

Although some authors suggest that regional human rights treaties are 'beyond the scope of the UPR's mandate',[211] Resolution 5/1 refers to 'human rights instruments to which a State is party'. This basis of review is broad enough to encompass regional and sub-regional human rights treaties.[212] It might be that states are of the view that the regional human rights systems are separate from the UN human rights system and therefore regional instruments should not be invoked in the UPR process. Equally, it might be that some states deliberately decide not to reference regional instruments so as not to undermine the universality of the point they are making. However, in various contexts, states,[213] the Human Rights Council,[214] and the regional human rights systems[215] have stressed the importance of improving collaboration between the regional and UN human rights systems. Certainly those states that do refer to regional human rights instruments must be of the view that such instruments do fall within the ambit of the UPR. If states so desire, UPR is one way in which the connections between the UN and regional human rights systems could be improved.

D. A Body of Generalized International Human Rights Law

UPR recommendations point to the growing recognition on the part of states of a body of *generalized,* non-specific international human rights law. By this, we are *not* referring to a body of customary international human rights law or a body of customary international human rights law together with general principles of international human rights law. Schabas has observed that 'In practice, States rarely refer to the legal instruments during the Universal Periodic Review. It is as if they are applying a body of general international human rights law rather than the precise provisions of treaties and the related case law.'[216] Although our empirical analysis shows that reference to legal instruments is by no means 'rare', the application of a body of generalized international human rights law is evident from the frequent invocation of general 'standards', 'instruments', and 'norms' without specifying precisely which standards, instruments and norms are to be followed.

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[211] Harrington, supra n14, 87.
[212] See also Smith, African States, supra n14, 350.
[213] eg, as part of the treaty body strengthening process, a number of states have called for closer collaboration between the treaty bodies and regional mechanisms. See Response of Switzerland to the OHCHR questionnaire on General Assembly resolution A/Res/68/268, Bern, February 28, 2019; Costa Rica, Cuestionario relativo a la resolución 68/268 de la Asamblea General sobre el "Fortalecimiento y mejora del funcionamiento eficaz del sistema de órganos creados en virtud de tratados de derechos humanos", adoptada el 9 de abril de 2014.
[214] HRC Res 6/20, 28 September 2007, A/HRC/RES/6/20; HRC Res 12/15, 1 October 2009, A/HRC/RES/12/15; HRC Res 18/14, 14 October 2011, A/HRC/RES/18/14; HRC Res 24/19, 27 September 2013, A/HRC/RES/24/19; HRC Res 32/127, 1 October 2015, A/HRC/RES/32/127; HRC Res 34/17, 24 March 2017, A/HRC/RES/34/17.
[215] eg, one OHCHR report provides that 'the Council of Europe Human Rights Commissioner…intends to assist in the implementation of recommendations made by the UPR Working Group to the member States of the Council of Europe by following up on the pledges those member States made during the Review process.' Report of the Secretary-General on the workshop on regional arrangements for the promotion and protection of human rights, 24 and 25 November 2008, 28 April 2009, A/HRC/11/3, para 49.
[216] Schabas, 'The Future of the United Nations Human Rights System' in Bassiouni (ed.), *Globalisation and its Impact on the Future of Human Rights and International Criminal Justice* (2015) 119 at 120.

There are 2,242 'general human rights' references in our database. These are generic references to international 'standards', 'instruments', 'legal commitments', 'norms' and 'law'. These references are not routinely made alongside a specific reference to one the bases of review or other international law material. Only 4% of the total number of general human rights references are in addition to one or more bases of review, and the majority of these accompany references to IHL. However, this is an exceptional phenomenon.

The vast majority of recommendations containing general human rights references call upon states to implement or comply with international human rights law without specifying the source of the obligation or commitment. Such language could be shorthand for the obligations and commitments recognised as the bases of the UPR in Resolution 5/1 or it could be intended to go further. Either way, it points to the identification of a body of generalized, non-specific international human rights law. The indeterminate legal source of obligation has not caused significant concern for states under review: the acceptance rate for recommendations only containing these vague general human rights references is 67%.

The way in which international law materials are referenced in UPR recommendations also serves to demonstrate the recognition of a body of generalized, non-specific international human rights law. References to the outputs of treaty bodies rarely specify which outputs are being referenced, whether general comments, views, or concluding observations. Instead, references are to the 'recommendations' of treaty bodies, unspecified. This is true also of references to other international law material, such as 'recommendations' of the ILO and its supervisory mechanisms.

Reference to this body of generalized international human rights law in UPR recommendations serves to complement the work of other human rights mechanisms. One of the 'principles' of the UPR process is that it should '[c]omplement and not duplicate other human rights mechanisms, thus representing an added value'.[217] Monitoring compliance with particular provisions of human rights treaties is likely to encroach on the mandate of human rights treaty bodies, which are better placed to suggest what is required to perform a specific treaty obligation. Applying a body of generalized international human rights law fits with the hybrid politico-legal nature of the UPR process and the lack of international human rights law expertise on the part of some of those who are undertaking the reviews.

6. CONCLUSION

UPR has much to tell us about how states perceive international human rights law. The negotiations establishing the bases of the review provide some insights. Examining the actual practice of UPR provides

[217] HRC Res 5/1, para 3(f).

a more complete picture. That fewer than one third of the 57,685 recommendations made during the first two cycles of UPR explicitly refer to the bases of review or other international law material is remarkable. Our empirical analysis of these recommendations demonstrates how international (human rights) law has been used and from this we can draw some conclusions on states' perceptions of this body of law. Whilst we have not explored how the recommendations were made or the politics behind certain recommendations, the text of UPR recommendations has proven revealing.

States do not feel constrained by the bases of review listed in Resolution 5/1. Ten per cent of all recommendations made in the first two cycles of UPR refer to international law material not listed in Resolution 5/1. Of the recommendations that refer to one or more of these other international law materials, a significant number refer to soft law. These range from recommendations of treaty bodies to principles drawn up by private expert bodies. In the practice of UPR, states do not dwell on the distinction between hard and soft law. This was foreshadowed by the negotiations on the bases of review where the distinction between hard and soft law was not a significant consideration and Resolution 5/1 refers to treaties to which the state is a party alongside voluntary commitments and pledges. Indeed, states go out of their way to refer to numerous soft law instruments that do not formally constitute part of the bases of review. The referencing of soft law is stark when compared to the number of times customary international human rights law is mentioned. Custom is mentioned in only one recommendation. States are more comfortable referring to written documents, even when they are non-binding, then they are unwritten ones, even when binding.

The notion of *human rights* law has been interpreted broadly to include related bodies of law, notably international criminal law, but also international labour law, international refugee law and international law regarding statelessness. At the same time, regional human rights law is frequently absent. There remains a division between international human rights law, of which UPR forms part, and regional human rights law. States also refer to a generalized body of human rights law in UPR recommendations: unspecified human rights 'standards', 'obligations' and 'laws' are mentioned, and general references are made to 'recommendations' of treaty bodies and other entities.

When drawing these conclusions, we are mindful that some of this practice is likely due to the way in which states perceive UPR itself. Whilst academics and lawyers are often focussed on formal distinctions between hard and soft law and discrete bodies of law, these are not crucial considerations in UPR. States do not see UPR as a strictly legal process by which to enforce international human rights obligations. It is not a judicial or quasi-judicial process like those conducted by courts or treaty bodies. Rather, reviews are conducted at the inter-governmental level by diplomats and the process is one that is *informed by* international human rights law. The goal is to improve the human rights situation in the state under review and recommendations are made on everything that is relevant: whether hard law or soft law and whether it is a

matter of human rights law narrowly defined or a closely related body of law. The very fact that these distinctions are set aside is significant when we consider the potential of international law to secure the enjoyment of human rights.

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