A Critical Appraisal of Human Rights Monitoring through the Lens of Global Governance Theory: The Universal Periodic Review in relation to Yemen as a State in Crisis

A Critical Appraisal of Human Rights Monitoring through the Lens of Global Governance Theory: The Universal Periodic Review in relation to Yemen as a State in Crisis

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Abstract

This thesis employs global governance theory to undertake a critical investigation of the function of the Universal Periodic Review (UPR) as a governance regime in relation to concepts of legitimacy and authority, particularly in response to the state of Yemen as a state in crisis. Fundamental to this investigation is the conceptualisation of the global human rights framework as an 'international human rights regime complex'. This contributes to an evaluation of the UPR's governance function as an entity that supports multi-directional interaction between the institutions within that regime complex.

This study evaluates the governance function of the UPR regarding its input (source) legitimacy, procedural legitimacy and output (substantive) legitimacy. It assesses the means by which the UPR commands authority and legitimises other entities within the proposed 'international human rights regime complex' and the evolving role of civil society. Alongside this, a central focus is a recognition and exploration of the various challenges to the UPR's legitimacy and authority. This includes matters of process compliance above substantive compliance, states failing to implement recommendations, politicisation and ritualism, and reprisals against human rights defenders. These matters are variously subject to the historical, cultural and social context of a state or region and the broader geopolitical dynamic, as well as the institutional failings of the United Nations (UN). Whilst a peer review mechanism such as the UPR cannot resolve these challenges of itself, it has an important role to play.

Taking account of this context, this thesis concludes with recommendations to strengthen the UPR's governance function generally and in particular for states in crisis such as Yemen. It closes by contemplating what states such as Yemen might lose in the absence of the UPR.

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Table of abbreviations

Abbreviation	Defined term
AQAP	Al Qaida in the Arab Peninsula
CAT	Convention against Torture and Inhuman and Degrading Treatment / Committee against Torture (1984)
CEDAW	Convention on the Elimination of Discrimination Against Women (1979)
CoI	Commission of Inquiry
CPED	Convention on the Protection from Enforced Disappearance (1992)
CPIA	Country Policy Institutional Assessment (World Bank)
CRC	Convention on the Rights of the Child (1989)
CRDP	Convention on the Rights of Persons with Disabilities (2006)
CSO	Civil Society Organisation
ECHR	European Convention on Human Rights (the Convention for the Protection of Human Rights and Fundamental Freedoms) (1950)
ECtHR	European Court of Human Rights
EU	European Union
GRULAC	Group of Latin American and Caribbean States
HDI	Human Development Index
HRC	Human Rights Council
IACHR	Inter-American Commission for Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights (1966)
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination (1965)
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
ICMW	International Convention on Migrant Workers (1990)
IDA	International Development Agency (World Bank)
IHL	International Humanitarian Law
ILC	International Law Commission

INGO	International Non-Governmental Organisation	
LICUS	Low Income Countries Under Stress	
MENA	Middle East and North Africa	
NGO	Non-Governmental Organisation	
NHRI	National Human Rights Institution	
OHCHR	Office of the High Commissioner for Human Rights	
OECD	Organisation for Economic Cooperation and Development	
OP-CAT	Optional Protocol to the Convention against Torture (2002)	
OP-CEDAW	Optional Protocol – CEDAW (1999)	
OP-CRC/AC	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000)	
OP-CRC/CP	Optional Protocol to the Convention of the Rights of the Child on a communications procedure (2011)	
OP-CRC/SC	Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography (2000)	
SuR	State under Review	
UAE	United Arab Emirates	
UDHR	Universal Declaration of Human Rights	
UK	United Kingdom of Great Britain and Northern Ireland	
UN	United Nations	
UNCT	United Nations Country Team	
UNDP	United Nations Development Programme	
UNHCR	United Nations Commission on Human Rights	
UNPM	Permanent Mission to the United Nations and other International Organisations	
UPR	Universal Periodic Review	
US	United States of America	
WEOG	Western and Other Group	
WTO	World Trade Organisation	

Table of interviews

Interviewee code	Nature of interviewee (anonymised unless otherwise indicated)
CSO 01	International NGO
CSO 02	International NGO
CSO 03	International NGO
CSO 04	Regional NGO
CSO 05	International NGO
CSO 06	International NGO
CSO 07	International NGO
UN 01	Senior member of the OHCHR
UN 02	Press representative OHCHR
UN 03	Mohamed A. Al-Foqumi, Minister Plenipotentiary, Deputy Permanent Representative of Yemen to the United Nations and other International Organisations
UN 04	Permanent Mission to the United Nations (WEOG)
HRD 01	Human Rights Defender (Yemeni, asylum granted in western Europe)

Chapter 1: An Introduction to the Thesis

1.1 Universal Periodic Review (UPR) and global governance

Taking a conditional international law theory approach, this study examines the United Nation's (UN) Universal Periodic Review (UPR) mechanism against the concepts of legitimacy and authority by assessing its function as a global governance entity and arguing that it forms part of a broader 'international human rights regime complex'. The incorporation of global governance theory helps to analyse the UPR's apparent and applied legitimacy and authority as a significant intergovernmental body in light of a number of roles it plays, particularly its role in relation to the Arab Republic of Yemen (Yemen) as a state in crisis.

The focus on states in crisis, which often struggle to follow up and implement UPR recommendations, has been chosen to examine how the state concerned, reviewing states, and other stakeholders, contribute to the UPR process and react to each other. The UPR's governance function is critically explored in the particular context of states in crisis to examine the impact that not implementing UPR recommendations received has upon the UPR's authority and legitimacy. In doing so, the study describes and evaluates the spectrum of state engagement with the UPR process, from the submission and content of a state's national report through to the review process and follow up, as well as assessing state engagement with the mechanism as a reviewing state making recommendations to other states under review.

The purpose of this study can thus be distilled into two objectives: one, to conduct an empirical assessment of the function of the UPR through the conceptual lens of global governance and, two, to take a case study approach to explore the nature of the UPR's governance function for Yemen as a state in crisis.

This study provides an original contribution to the research and scholarship on global governance and on the UPR. There is an emerging body of work focusing upon the UPR that: analyses its successes and its challenges;[1] discusses the impact of politicisation on the

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[1] Philip Alston, 'Reconceiving the UN Human Rights Regime: Challenges confronting the new UN Human Rights Council', (2006) 7 Melbourne Journal of International Law, 185; Rosa Freedman, 'Section 1: Background: from Commission to Council', *The Human Rights Council: A Critique and Early Assessment* (Routledge 2013); James H Lebovi and Erik Voeten, 'The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNHCR', (2006) 50(4), International Studies Quarterly, 861-888; N. Schrijver, 'The UN Human Rights Council: A

process of states making and receiving recommendations at the UPR;[2] and that evaluates the extent of the UPR as a medium of ritual and ritualism.[3] Literature on ritual and ritualism at the UPR includes scholarship on the regulatory and governance function of the UPR as a 'public audit ritual'. In this work, Jane Cowan and Julie Billaud adopt an anthropological perspective approaching the UPR from outside the 'governance matrix' to ask the open question of '*how* does the UPR work'? (emphasis in the original), rather than inquiring how well it works and how it might work better.[4] The analysis they provide is, however, firmly rooted in the physical and textual space of the (UN); this thesis does take those central spaces within its scope, but it travels further in its particular focus on states in crisis and by giving careful consideration to civil society's contribution to the governance process.

The research conducted and the studies reviewed in the preparation of this thesis reveal no comprehensive assessment of the UPR's governance function and how that relates to its legitimacy and authority. The concept and operation of regime complexes has been evaluated in the field of climate change and plant genetic resources,[5] and reference has been made to 'international human rights regimes' and 'human rights regimes',[6] but not to the specific concept of an 'international human rights regime complex'.

A key theme of this study is transparency; to uncover and propose how the UPR's standing might be preserved by making transparent what it is that this mechanism has to offer for states in crisis, such as Yemen, and what it cannot. Original empirical data generated by

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New "Society of the Committed" or Just Old Wine in New Bottles', (2007) 20(4), Leiden Journal of International Law, 809–823, 810-812, Schrijver also charts the negotiation and drafting of the Universal Declaration of Human Rights 1948.

[2] Rochell Terman and Erik Voeten, 'The Relational Politics of Shame: Evidence from the Universal Periodic Review' (2018) 13, The Review of International Organizations, 1-23.

[3] Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism*, (Cambridge: Cambridge University Press 2014); Damian Etone 'The Effectiveness of South Africa's Engagement with the Universal Periodic Review (UPR): Potential for Ritualism?' (2017) 33(2), South African Journal on Human Rights, 258-285.

[4] Jane K. Cowan, 'The Universal Periodic Review as a Public Audit Ritual: An Anthropological Perspective on Emerging Practices in the Global Governance of Human Rights', and Julie Billaud, 'Keepers of the truth: Producing 'Transparent Documents for the Universal Periodic Review', both in Charlesworth and Larking (n 3) 44-45.

[5] Robert O. Keohane and David G. Victor, 'The Regime Complex for Climate Change', (2011) 9, Perspectives on Politics, 5 and Kal Raustiala and David G Victor, 'The regime complex for plant genetic resources', (2004) 58, International Organization, 277-309, respectively.

[6] Alston (n 1); Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship', (2012) 106, American Journal of International Law 1-46, 25; and Moravcsik, 'The Origins of Human Rights Regimes: Democratic Dialogue in Postwar Europe' (2000) 54 International Organisations 217.

conducting interviews with UPR stakeholders as part of this study's research process has revealed perspectives and dilemmas that to date have not been fully investigated in relation to the UPR.

In the field of international human rights monitoring the UPR is unique. It is a significant international human rights mechanism in terms of its universal application to all UN member states and is relatively young, having commenced its work in 2008.[7] It is centred upon a state-led peer review of the human rights commitments and progress of UN member states, with input from treaty bodies, civil society and human rights experts. Premised upon a cooperative rather than an adversarial or inquisitive approach, reviewing states make recommendations in a space giving equal airtime to a plurality of voices and views.[8] State delegations gather before UN state missions at the UPR Working Group in Geneva centred upon peer review. Meeting at a legal, cultural and political crossroads, a state under review (SuR) receives comments, observations and recommendations on the state's human rights achievements and challenges. In turn, the contribution made by reviewing states promotes human rights principles and norms associated with universal rights and realisation. This is a large-scale event at the Palais des Nations in flagship Salle XX, attended by a delegation representing the SuR, state missions to the UN, and accredited civil society. The process and modalities of the UPR are provided in the institutional building provisions of Human Rights Council Resolution 5/1, and related resolutions and decisions, discussed further in chapter 2.[9]

One objective of the UPR is to review an SuR's fulfilment of its *legal* obligations and commitments to human rights protection.[10] However, as chapter 2 illustrates, the UPR is not a legal mechanism, it is inter-governmental and innately political; the key actors in the room during the Working Group are diplomats and civil servants. The recommendations made to

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[7] The first states to be reviewed, in this order, during the first Working Group of the UPR were: Bahrain, Ecuador, Tunisia, Morocco, Indonesia, Finland, the United Kingdom, India, Brazil, the Philippines, Algeria, Poland, the Netherlands, South Africa, the Czech Republic and Argentina, 'Meeting highlights for the first session', https://www.ohchr.org/EN/HRBodies/UPR/Pages/MeetingsHighlightsSession1.aspx last accessed 09 July 2018.

[8] Louisa Riches, 'Legal and normative pluralism, hybridity and human rights: The Universal Periodic Review' in Nicholas Lemay-Hébert and Rosa Freedman (eds), *Hybridity: Law, Culture and Development* (Oxon and New York: Routledge 2017) 162.

[9] UNHRC 'Institution building of the United Nations Human Rights Council', A/HRC/RES/5/1, 18 June 2007.

[10] ibid para 1(c) and 4(b).

SuRs have no legal status and there is no means of enforcement or legal means to hold states to account for a lack of follow up and implementation. Powers are vested in the Human Rights Council (the Council)[11] regarding persistent non-cooperation with the UPR, as considered in section 2.3 of chapter 2 and the introduction to chapter 5, but these have yet to be used. That said, those recommendations requiring the SuR adhere to legal commitments it has previously made, for example, as party to an international human rights treaty, engage legal concepts such as good faith and *pacta sunt servanda*, whilst recommendations that an SuR ratify a particular treaty reflect the UPR's normative function.

Whilst international human rights treaty bodies have been accorded (by some) quasi-judicial status, in particular, the status ascribed to treaty body General Comments,[12] and the capacity of treaty bodies to accept and hear individual complaints,[13] the UPR is not a vehicle for the judicialisation of human rights.[14] Nonetheless, it promotes and supports the legalisation of human rights via recommendations that a state introduce, amend or enforce domestic legislation to give better and/or full effect to rights protection and treaty obligations. A strength claimed on behalf of the UPR, where treaty bodies are weak, is universal engagement by UN member states; at the time of writing, all member states have participated in the UPR during each cycle, although the nature of engagement varies. States have universally submitted a national report,[15] attended the Working Group in Geneva and

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[11] Reference throughout this thesis is either to 'the Council' or 'the Human Rights Council'.

[12] Kersten Mechlem, 'Treaty Bodies and the Interpretation of Human Rights', (2009) 42, Vanderbilt Journal of Transnational Law, 905; the findings of treaty bodies have been said to contribute to international jurisprudence, Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice,* (Cambridge University Press 2013) 205; Wouter Vandenhole, *The Procedure Before UN Human Rights Treaty Bodies: Convergence or Divergence?* (Intersentia 2004), citing Manfred Nowak, UN Covenant on Civil and Political Rights: CCPR commentary (N.P. Engel 1993); Alfred de Zayas, Jakob Th. Möller, Torkel Opsahl, 'Application of The Covenant on Civil and Political Rights under the Optional Protocol', (1985) 28, German Yearbook of International Law, 9, see also Michael Davala, 'Conflict of interest in universal human rights bodies', in Anne Peters and Lucas Handschin (eds), *Conflict of Interest in Global, Public and Corporate Governance* (Cambridge University Press 2012)*,* 125-144.

[13] For information regarding the complaints processed in relation international human rights treaty body complaints, see OHCHR 'Human Rights Bodies: Complaints Procedures' http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx last accessed 24 May 2018.

[14] See Surya Subedi, *The Effectiveness of the UN Human Rights System: Reform and the Judicialisation of Human Rights* (London/New York: Routledge 2017) for a discussion of the judicialisation of human rights.

[15] Although not all states did so in time for translation and on occasion the report has been submitted on the day of the state's review, see appendix 1 'Compliance with UPR Reporting – 3rd Cycle'. During the first cycle, South Africa was the only state reported as having failed to submit its report prior to the Working Group in Geneva, instead submitting it on the day of its review, Etone (n 3) 264.

responded to recommendations. There was some doubt over Israel's attendance during the second cycle and this is discussed in section 4.4, chapter 4.

In terms of ratification or compliance with reporting obligations, treaty bodies cannot claim universal engagement.[16] Despite the UPR's ostensible achievement in this respect, a number of states proceed to subsequent UPR cycles with little, or unreliable evidence, of recommendations from the previous cycle having been implemented. This was the case for Yemen during its second cycle review.[17] Whilst this thesis illustrates various reasons for a lack of action by states, some posited, others implicit (lack of political will, civil war, famine, lack of resources, etc.), this failing, or absence, raises questions as to the UPR's current and future legitimacy and authority, particularly in relation to states in crisis. These questions are problematic for the UPR; as discussed in chapter 6, the UPR was not designed as a first response to situations of crisis and emergency, however, instances of significant human rights failings and violations are rarely unforeseen.

This thesis takes as its period of focus the start of the UPR's operation in 2008 up to and including July 2018, just over one year into the UPR's third cycle. Preparations by civil society for Yemen's third cycle review, which is scheduled for January 2019, have begun with the deadline for stakeholder submissions to the mechanism having been 12 July 2018. By including July 2018, reference is made to stakeholder submissions and information relating to Yemen's review that the researcher has been able to access as part of the thesis' research.

The evidence is that states in crisis continue to engage with the UPR, although the nature of this engagement, as this thesis demonstrates and theorises, varies. This begs the question, why? What is the gain for states in crisis such as Yemen when it comes to the UPR? Are the

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[16] 'Status of ratification of human rights instruments', and 'Human Rights by Country' for access to individual state information regarding treaty ratification and reporting status against treaty review cycles for details of those states that have submitted reports on time, late or still to submit, http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx and http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/AFIndex.aspx respectively, both last accessed 06 February 2018.

[17] Lack of implementation or follow up was noted in a joint submission made to the OHCHR by the Middle East Foundation for Social Development and Youth Development Foundation, Giza, Egypt, and Youth Without Borders for Development, Giza, Egypt ahead of Yemen's second cycle review, UNHRC 'Summary 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: Yemen' A/HRC/WG.6/18/YEM/3 para 14.

factors that motivate engagement with the UPR akin to those driving engagement with the international human rights framework *per se*? How fundamental is the UPR to asserting statehood and good international relations?[18] Are the consequences of failing to engage too high a price to pay in terms of international diplomacy and keeping aid donors on side?[19] Or is this the only means by which to capture the attention of the international community without having secured special agreement, for example, via a Commission of Inquiry or other independent international investigation? By conceptualising the UPR and its function through the lens of global governance theory and, as proposed in this thesis, as a vehicle firmly rooted in an 'international human rights regime complex' we can start to more properly investigate the answers to some of these questions.[20]

1.2 Structure of this thesis

This thesis is presented over eight chapters, including this one. This chapter introduces the foundations and context of the study and its conceptual framework. It presents the thesis' definition of a state in crisis and those states the study refers to, and the research design and methodology, including ethics approval, as well as highlighting the work's originality, impact and limitations. Chapter 2 is a critical assessment of the context within which the UPR was conceived. It also presents the UPR's foundations, objectives and procedure. In chapter 3 the concept, evolution and components of global governance and related concepts are discussed, paving the way for conceptualising and evaluating the UPR's legitimacy and authority in the chapters that follow.

Building upon chapters 2 and 3, it is argued across chapters 4 and 5 that the UPR fulfils a governance function that complements the work of other governance entities located within an 'international human rights regime complex', taking inspiration from Robert O. Keohane and David G. Victor's concept of a regime complex for climate change.[21] The international human rights regime complex comprises a variety of mechanisms, as presented in chapter 4,

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[18] See section 1.4 below for an account of some of the factors deemed to motivate state engagement with international human rights treaty and charter mechanisms.

[19] This latter point was raised by an international NGO during an interview for this thesis, interview CSO 07.

[20] See chapter 3 of this thesis and in particular: Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20, Ethics and International Affairs, 405; Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93, American Journal of International Law, 601; Keohane and Victor (n 5) 5.

[21] Keohane and Victor (n 5) 15-16.

and figure 2, appendix 2. It is proposed that individually and collectively these mechanisms fulfil a governance function and the, generally speaking, lack of hierarchy means the theoretical and conceptual framework of global governance is an apt lens through which to discern and define the function of the UPR as a single governance entity situated within a broader international human rights regime complex. Within chapter 4, the authority and legitimacy of the UPR is assessed with reference to its input (source) legitimacy and its procedural legitimacy.[22] Deep concerns have been expressed that the mainstreaming and institutionalisation of human rights promotes bureaucratisation that risks tangible achievements for those whose rights require urgent protection, and these matters are given critical consideration in chapter 4.[23]

Chapter 5 interrogates the UPR against the concept of output (substantive) legitimacy. It defines the nature of UPR output and explores state motivation to implement accepted recommendations, with reference also to theories of state practice and compliance. The challenges posed by measuring compliance using quantitative human rights indicators are also addressed.[24] Chapter 6 looks specifically at Yemen as a state in crisis, contemplating in more detail the global governance function of the UPR for Yemen. It analyses the nature of the recommendations Yemen receives, as well as those recommendations it makes as a reviewing state to other SuRs. Similar analysis by way of comparison is conducted regarding Iraq and Somalia as other states in crisis and the UK and New Zealand as stable states, as explained in section 1.5 below. Examination indicates states in crisis receive more recommendations than stable states and that a greater number of states make recommendations to states in crisis. This suggests the UPR directs a greater degree of the international community's attention towards those states where rights protection is most at risk.

In chapter 7, the role of civil society in relation to the UPR is critically assessed and the challenges faced by civil society seeking to operate in states in crisis are examined. These

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[22] Michael Zürn, 'Democratic governance beyond the nation state: the EU and other international institutions', (2000) 6(2), European Journal of International Relations, 183-221.
[23] Gerd Oberleitner, *Global Human Rights Institutions: between remedy and ritual,* (Polity Press 2007); Gerd Oberleitner, 'A Decade of Mainstreaming Human Rights in the UN: Achievements, failures, challenges' (2008) 26(3) *Netherlands Quarterly of Human Rights*, 359-390.
[24] Zürn, 'Democratic governance beyond the nation state' (n 22) 183-221.

matters are pertinent given the heavy reliance the UPR mechanism places upon civil society, and the central role of civil society as a stakeholder and a non-state actor in global governance theory. Chapter 7 also critically addresses the evolving role of civil society and the OHCHR (Office of the High Commissioner for Human Rights) in respect of UPR follow up and implementation. In doing so, it explores the concept of communities of practice and the opportunities for states in crisis where civil society and the UPR is concerned. It concludes that the global governance function of the UPR has the capacity to facilitate and generate a new nexus between voice, entitlement and civil society and this is crucial in respect of supporting the function of the UPR in relation to states in crisis.

In the final concluding chapter, chapter 8, this thesis draws together the conceptualisation of the UPR's function and purpose as a global governance mechanism as a whole and in particular in relation to states in crisis. It is not the aim of this study to advocate or make proposals for a complete overhaul of the international human rights regime and framework, particularly as mainstream discussions of reform by key political players focus on improvement within the current system rather than of the current system.[25] Rather, this study is concerned with investigating through the lens of global governance theory the current function of the UPR in relation to states in crisis with the objective of formulating and formalising this function, making recommendations to strengthen the mechanism and state and non-state actor engagement accordingly. Current frustrations with the international human rights regime complex will inevitably persist,[26] and human rights

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[25] 'Secretary-General's remarks at UN Reform Event [as delivered]', 18 September 2017, New York, https://www.un.org/sg/en/content/sg/statement/2017-09-18/secretary-generals-remarks-un-reform-event-delivered last accessed 21 August 2018, although see Thomas G. Weiss, *What's Wrong With the United Nations and How to Fix It* (Cambridge: Polity Press 2009).

[26] The reports and oral updates provided by the Commission of Inquiry for Syria provide a stark example of this, in particular, the closing words of Paulo Sérgio Pinheiro Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic, in his statement on 16 September 2014, 'I cannot bring myself to repeat the statistics of this war. I no longer have faith that enumerating the thousands of dead and displaced will provoke you to act. Read instead the stories of the victims. The paper before you contains the voices of 12 people. The Commission has thousands more, sealed in our database, demanding to be heard. What they want – these people who disappear, who are tortured, who starve – what they want is to return to what is left of their lives, in peace, in their country. How much longer will we deny them this?' OHCHR 'Statement by Mr. Paulo Sérgio Pinheiro Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic' (16 September 2014) http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15039&LangID=E#sthash.LvooGsTX.dpuf last accessed 21 August 2018; and 'Through their [the international community] inaction, a space has been created for the worst of humanity to express itself', UNHRC 'Oral update of the Independent International Commission of Inquiry on the Syrian Arab Republic' A/HRC/26/CRP2 (6 June 2014) para 6.

monitoring and reporting can only go so far to effect change on the ground whilst the presiding geopolitical dynamic of international public law, emanating from post-war principles and power and encapsulated by Security Council with the permanent five members at the helm, continues to operate as it does.[27]

It is in this vein that chapter 8 makes a number of recommendations and considerations for the future. It is recommended, for example, that the Human Rights Council pass a resolution to require states amongst other things: to devise and submit at the mid-term an implementation plan reporting on progress to date and ongoing implementation measures, this currently being optional; to establish a specific domestic mechanism tasked with UPR follow up; and to more effectively evidence in the national report the methodology and the specific extent of consultation with civil society and other stakeholders. In addition, the Council is recommended to garner and commit support from other relevant UN agencies, including country teams, to complement the OHCHR's support with a particular focus on states in crisis that persistently struggle to implement UPR recommendations.

The UN is widely discussed as possessing the primary responsibility for addressing matters of global concern in the context of peace, security and human rights.[28] The consensus is that human rights protection and promotion is a key component of achieving and maintaining state and global security; security, liberty and human rights are presented in international legal and political discourse as being inextricably linked.[29] Security of the person is fundamental to the right to liberty yet human rights and freedoms are (inevitably) compromised and limited in the pursuit of domestic and global security.[30] Conversely,

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[27] See, for example, David D. Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87(4), American Journal of International Law, 552-588; and Thomas G. Weiss, 'The Illusion of UN Security Council Reform', (2003) 26(4) The Washington Quarterly, 147-161.

[28] Philip Alston and Ryan Goodman, *International Human Rights: the successor to international human rights in context*, (Oxford University Press 2013); Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart Publishing 2012).

[29] Development is also considered to be part of the equation that links security and human rights, for example, see, UNGA Kofi Annan, 'In larger freedom: towards development, security and human rights for all', Report of the UN Secretary General, General Assembly, A/59/2005/Add.3, 26 May 2005, para 17: 'We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights', this report being the precursor to a number of fundamental reforms to the charter based human rights institutions, namely the replacement of the Commission for Human Rights with the Human Rights Council and the creation of the UPR.

[30] Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' (2003) 14(2) European Journal of International Law 241–264; Conor Gearty, 'Terrorism and Human Rights' (2007) 42(3) Government and Opposition 340-362.

human rights failings and violations by states foster dissent, ungoverned spaces and an absence of the rule of law that can prompt and/or exacerbate security risks with a domestic and transnational reach. More than ever, in the face of matters such as climate change, political instability, transnational terrorism and a migration crisis, there is a pressing need for world powers to address the tangible link between security, development and human rights, being the three pillars of the UN, in a meaningful way and to take action accordingly.[31] Keohane and Victor's work on regime complexes is used as a framework to conceptualise the governance function of the human rights framework spearheaded by the UN and how that function can be further strengthened and contribute to addressing this link.

1.3 Universal Periodic Review: towards implementation

At the start of the UPR's third cycle, the then High Commissioner for Human Rights posed the following question about the mechanism:

> Has there been real improvement? As we enter the third round of
>
> scrutiny, is the UPR deepening in relevance, precision and impact? Is
>
> it merely an elaborate performance of mutual diplomatic courtesies,
>
> or is it leading to real and powerful changes to anchor peace and
>
> development and improve people's lives?[32]

This question is pertinent. It alludes to the many challenges, dilemmas, and difficulties facing any human rights promotion, protection and monitoring mechanism, such as that of the UPR. Indeed, these matters and others have informed the motivation for this thesis from an early stage.

The field research for this thesis commenced in January 2014, during the second cycle of the UPR, with a visit to the UN during the UPR's 18th session. The reviews of several countries were observed, including Afghanistan, Cambodia, Chile, New Zealand, and Yemen. It was

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[31] Sigrid Quack, 'Expertise and authority in transnational governance', 361-386, in Roger Cotterrell and Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory: theorizing across disciplines*, (Cheltenham, UK, Northampton, MA, USA, Edward Elgar Publishing 2016).

[32] 'Denial of access and lack of cooperation with UN bodies will not diminish scrutiny of a State's human rights record', Zeid Ra'ad Al Hussein, [the then] United Nations High Commissioner for Human Rights, Human Rights Council 35th Session, 06 June 2017, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21687 last accessed 21 August 2018 2018.

evident that certain states, Afghanistan and Yemen in particular, were attending the Working Group of the UPR's second cycle facing allegations by civil society and reviewing states of a failure to implement few, if any, of the recommendations received during the previous first cycle.[33] In their defence, the delegations of Afghanistan and Yemen explained the challenges faced in follow up and implementation due to political instability and civil unrest, extreme poverty, and/or transitioning to a liberal democracy in a post-conflict context.[34]

Even so, it was strikingly apparent at that early stage of the fieldwork that if there continued to be a failure to implement recommendations, or report on tangible efforts to implement, the credibility of the UPR may be deemed to be at stake. Yet, having little tangible progress to report was not dissuading states from attending their scheduled UPR in Geneva, begging the question why this might be the case. Documentary analysis and empirical data generated via interviews as part of the research for this thesis reveals various reasons. These are presented primarily across chapters 5, 6 and 7 and include some intriguing revelations, such as a strategic approach on the part of the architects of the UPR to the scheduling of those states to be reviewed during the first sessions of the UPR, the influence of political allegiances, the appeal of the UPR as a state-led peer review, an opportunity to assert statehood, and the UPR's particular standing and status amongst the diplomatic community.

Nonetheless, engagement in the form of submitting a national report and sending a delegation to Geneva may not be sufficient to secure the ongoing authority and legitimacy of the UPR; the emerging narrative is a pressing need for states to implement UPR recommendations and report upon implementation. This was emphasised ahead of the third cycle during a debate held by the Human Rights Council as part of its 34th regular

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[33] Author's own notes taken during the 18th session of the UPR Working Group (January – February 2014) observation of the reviews of Afghanistan, New Zealand, Cambodia, Yemen and Chile.
[34] ibid, see also the UPR documents cited in chapter 6.

session in March 2017,[35] and has been revisited more recently in a high-level panel discussion on human rights mainstreaming and the UPR.[36]

The President of the Human Rights Council affirmed that the start of the third cycle presented an opportunity to take stock of implementation and follow up processes.[37] The importance of implementation is reflected in a newly created OHCHR overview of the third cycle building into the process the timescale for a state to produce an implementation plan.[38] Whilst the importance being afforded to implementation and follow up is imperative, it is not the only marker of the UPR's success. As highlighted in measuring the UPR's source (input) and procedural legitimacy in chapter 4, it would be remiss to only focus on follow up and implementation in assessing the UPR's governance function. A central function of a governance entity is the space it creates for a variety of actors to coalesce and commune, to contribute to and influence debate and normative change at the local, regional and global level, and in this respect the UPR has made progress, including for states in crisis.

1.4 The source and concept of human rights

There is not the scope in this thesis to conduct comprehensive and detailed analysis of the concept, source, purpose and function of human rights. This section therefore gives brief consideration to scholarship that has sought to conceptualise and comprehend the evolution of the international human rights landscape.

Charter based mechanisms overseen by the Council, which include Council regular sessions, special procedures, Commissions of Inquiry (CoIs) and of course the UPR, revolve around an

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[35] OHCHR 'Council holds general debate on the Universal Periodic Review and concludes the general debate on human rights bodies and mechanisms' 17 March 2017, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21404&LangID=E#sthash.JZzr3oS5.dpuf last accessed 21 August 2018.

[36] UNHRC, 'Annual high-level panel discussion on human rights mainstreaming - Theme: The promotion and protection of human rights in the light of the universal periodic review mechanism: challenges and opportunities', Concept note (as of 20 February 2018), 37th Session of the Human Rights Council, reference to event on Monday, 26 February 2018, https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22708&LangID=E last accessed 21 August 2018.

[37] Mr Joaquin Alexander Maza Martelli opening the first Working Group of the third UPR cycle, the review of Bahrain, at the United Nations, Palais Des Nations, Geneva, on 01 May 2017, from author's own notes, taken whilst in attendance.

[38] OHCHR UPR third cycle (2017-2021/22) http://www.ohchr.org/SiteCollectionImages/bodies/UPR/3rd_UPR_cycle.png last accessed 21 August 2018.

assessment of progress against legal state obligations that emanate from the Charter of the UN and the Universal Declaration of Human Rights (UDHR),[39] the latter of which has been said to encapsulate principles of customary law.[40] A variety of Charter and treaty based actors, none of which occupy a formal judicial role, assess a state's satisfaction of its human rights obligations, with frustration being expressed on occasion of the value of the reports produced when the content appears to be largely ignored.[41]

The current UN framework of Charter bodies and treaty bodies emerged in the wake of the Second World War, designed as a means of standard setting.[42] Although some would say they fulfil a quasi-legal function,[43] lack of binding adjudication powers is symptomatic of the evolution of the character and function of the framework and international human rights law. A fundamental purpose is the setting of standards, defining that which is lawful and unlawful, encouraging and strengthening in terms of capacity building and good practice, and reflecting the normative expectations of a society, its culture, politics and morality, all of which are important aspects of general principles of the rule of law,[44] as well as international relations, between which there has been an historic divide.[45] Success depends upon the transfer and adoption of international norms and principles.[46]

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[39] Charter of the United Nations 1945 and the Universal Declaration of Human Rights 1948.

[40] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles', (1988-1989), 12, Australian Yearbook of International Law, 82-107, 84.

[41] Pinheiro (n 26) para 6.

[42] Todd Landman, *Human Rights and Democracy: The Precarious Triumph of Ideals* (London: Bloomsbury Academic 2013).

[43] Vandenhole (n 12) de Zayas, Möller, and Opsahl (n 12) 29-30. See also Davala (n 12) 125-144; Nigel Rodley, 'Monitoring Human Rights Violations in the 1980s', in Jorge I Dominguez, Nigel S. Rodley, Bryce Wood, and Richard Falk (eds), *Enhancing Global Human Rights*, (New York: McGraw-Hill Book Company 1979). The findings of treaty bodies has been said to contribute to international jurisprudence, Bantekas and Oette, (n 12) 205.

[44] Thomas M Franck, *The Power of Legitimacy among Nations*, (Oxford University Press 1990); Harold H. Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale Law Journal, 2599; Joseph Raz, *The Authority of* Law (Oxford University Press 1979).

[45] For discussion of the bridge between international law and international relations particularly since the end of the Cold War, see Anne-Marie Slaughter, 'International Law in a world of liberal states' (1995) 6, European Journal of International Law, 503-538.

[46] For a model seeking to conceptualise this process, see the spiral model as proposed in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press 1999), and the subsequent revisions and responses to the criticisms and praise it received, with a re-focus on compliance, Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013).

Patrick Macklem neatly captures both the local and more expanded global relevance of human rights and their part in society as whole; human rights can be conceived as moral, political and legal concepts.[47] Macklem observes that human rights 'frame the moral, shape the political, and distinguish the legal in places as local and diverse as the family, the school, the workplace, the community, the nation and the State.'[48] His view, however, is that 'their true significance lies in their status as international legal entitlements that call for radical revision of the ways in which international law organizes [*sic*] politics into an international legal order'.[49] The legal concept of human rights emerges, for example, when states take a political decision to voluntarily commit to legal obligations imposed by human rights treaties. This involves a role for human rights whereby they are designed to 'monitor the distribution and exercise of sovereign power', by imposing obligations and mobilising critical judgment.[50] These facets are both implicit and explicit in the content of this thesis; the UPR is an invention that pursues these functions and this study critically engages with the UPR's success in this respect.

In terms of the legal source of human rights, the UN Charter alongside the UDHR provides the backdrop for the various Charter and treaty bodies. Under the Charter 'the peoples of the United Nations' are determined to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small' and also to develop the means to maintain 'justice and respect' in relation to obligations arising from treaties.[51] The UDHR has been described as encapsulating 'the minimum norms of customary international law in international human rights'.[52] It is a 'common standard of achievement for all peoples and all nations' and recognises 'the dignity and worth of the human person', in particular it should be noted that the UDHR supports a progressive approach to educating and promoting human rights.[53] Emanating from the UDHR are arguably the two most important international human rights treaties - the International Covenant on Civil and Political

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[47] Patrick Macklem *The Sovereignty of Human Rights* (Oxford, New York: Oxford University Press 2015) 3-26.
[48] Macklem (n 47) 1.
[49] ibid.
[50] ibid.
[51] Charter of the United Nations, Preamble
[52] Amrita Mukherjee, *Torture and the United Nations: Charter and Treaty-based Monitoring,* (London, Cameron May 2008) 12.
[53] Universal Declaration on Human Rights, adopted by the General Assembly 10 December 1948, Preamble.

Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) - which all others complement and seek to further advance.

Whilst identifying the source of a state's human rights obligations may appear a relatively straightforward exercise given rights have been distilled into treaties, declarations and stated principles, the concept of human rights continues to attract debate. Marie-Benedicte Dembour articulates four schools of thought as to the concept of human rights: the natural school 'that identifies human rights as those rights one possesses simply by being a human being'; the deliberative school for which 'rights come into existence through societal agreement'; the protest school whereby human rights are 'claims and aspirations that allow the status quo to be contested in favour of the oppressed'; and the discourse school which holds the view that 'rights exist only because people talk about them'.[54] In conceptualising according to these four schools of thought, Dembour seeks to determine which of the schools is the most prevalent, citing the natural school as having been 'long represented' Western thought, but with deliberative scholars replacing this orthodoxy in academic circles.[55]

Constructing, or perceiving, different means of conceptualising human rights allows for those rights to be situated in a framework and context which helps to unravel and make sense of what is a complex array of competing, colliding and overlapping agendas. Conversely, such segregation of rights protection overlooks intersectionality and risks conceptual over-simplification. To some extent the UPR implicitly addresses this because it is not limited to one set of rights or a particular protected characteristic. In a moral sense, human rights focus on the 'universal features of our common humanity'.[56] The distillation of the moral concept of human rights into legally binding treaties, which states then choose whether or not to commit to, is the result of 'deep political contestation'.[57] The factors that motivate that commitment are varied, ranging from a genuine desire to protect the

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[54] Marie-Benedicte Dembour, 'What are Human Rights? Four Schools of Thought' (2010) 32 Human Rights Quarterly 1-20, 2-4.
[55] ibid 19.
[56] Macklem (n 47) 13.
[57] ibid 20.

vulnerable in society, to securing better leverage when it comes to trade negotiation and domestic economic performance.[58]

Ultimately the value of the origin and concept of rights is to be judged according to the benefit those rights afford to those they purport to protect. Research indicates that 'good human rights conditions are associated statistically with stable states'.[59] This gives rise to the issue of human rights protection in those states that are not stable and those that are, in terms of stability and/or human rights protection, 'in crisis'.

1.5 Universal Periodic Review and 'states in crisis'

This section defines the meaning of 'states in crisis' in this thesis. It considers the current state-based world order from a constructivist and realist perspective and details those states relevant to this study. It closes with reference to the enduring challenge and paradox the 'international human rights regime complex' poses for the principle of state sovereignty.

That states in crisis generally return to subsequent cycles of the UPR having failed to take action against few, if any, of the previous cycle(s) recommendations is at the heart of this thesis. The success of the international human rights framework in general, and the UPR in particular, will be undermined if the protection, promotion and monitoring of human rights is addressed in a vacuum that fails to acknowledge and encompass the broader context of complex matters of human rights protection and promotion in tandem with political (in)stability. An SuR at the UPR may appear to willingly and gratefully support the majority of the recommendations it receives with the intention of taking action, however, ongoing or intervening matters disrupts resource, supply and capacity and curtails progress. Conflict in the form of war and/or civil unrest inevitably derails action that may be in progress in terms of human rights protection, with Yemen being a case in point.

'States in crisis' is a broad term not limited to a particular type of 'crisis'; matters of human rights, security and development are inter-related and complex and some flexibility is

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[58] Oona Hathaway, 'Why do countries commit to human rights treaties?' (2007) 51(4) Journal of Conflict Resolution, 588-621, and Oona Hathaway, 'Do Human Rights Treaties make a difference?' (2001-2002) 111 Yale Law Journal 1935-2042.
[59] Neil A. Englehart, *Sovereignty, State Failure and Human Rights: Petty Despots and Exemplary Villains* (London and New York: Routledge 2017) 53.

required in identifying those states facing the greatest challenge in terms of human rights promotion and protection. Crisis within the remit of this thesis relates primarily to ongoing human rights failings and internal state insecurity and instability. States in crisis, including weak states and fragile states, pose a greater risk of human rights breaches and violations due to a loss of agency and failings in proper policing and functioning of public institutions and infrastructure, resulting in poor levels of individual security, vis-a-vis strong states.[60] That said, the state occupies the role of both protector of human rights and primary abuser and strong states often pose their own risk to human rights protection.[61]

The concept of a 'state in crisis' reflects a broader move to adopt more positive language when referring to states with deep seated issues; the Failed States Index was renamed the 'Fragile States Index' in 2014,[62] and there has been a shift in focus away from failure towards 'resilience',[63] particularly in light of the contested nature of the term 'failed state'.[64] Furthermore, literature on the nature, causes and consequences of failed states is fragmented and there is a vacuum of authority in this respect.[65] For the purpose of this study, for a state to be 'in crisis' there must be evidence that individual and/or collective rights are being seriously compromised and/or habitually disregarded or violated, with a causal link to the collapse, or extreme fragility, of state infrastructure, often directly related to conflict.[66]

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[60] Neil A Englehart, 'State capacity, state failure and human rights', (2009) 46(2) Journal of Peace Research, 163-180, 164-166, applying Mitchell's principal–agency theory to the realm of human rights, citing Neil J. Mitchell, *Agents of Atrocity: Leaders, Followers, and the Violation of Human Rights in Civil War*, (New York: Palgrave Macmillan 2004).

[61] Englehart ibid 163-180.

[62] Fund for Peace, Fragile States Index, http://fundforpeace.org/fsi/ last accessed 21 August 2018.

[63] Morten Boas and Kathleen M Jennings, 'Insecurity and Development: The Rhetoric of the 'Failed State'' (2005) 17(3) The European Journal of Development Research 385-395 and Olivier Nay, 'Fragile and failed states: Critical perspectives on conceptual hybrids' (2013) 34(3) International Political Science Review 326-341.

[64] See for example, James Putzel and Jonathan Di John, 'Meeting the challenges of crisis states', Crisis States Research Report, (Crisis States Research Centre 2012) http://www.lse.ac.uk/internationalDevelopment/research/crisisStates/download/finalreport/Meeting-the-Challenges-of-Crisis-States.pdf and 'A note on the fragility Assessment', launched in Kinshasa, DRC, 2013', Fragility assessment, fragility spectrum, G7+, http://static1.squarespace.com/static/5212dafbe4b0348bfd22a511/t/538e3f65e4b01aec8314ebe5/140183126 9040/g7%2B+English+FS+Note+Design.pdf both last accessed 21 August 2018.

[65] Peter Burnell, Vicky Randall and Lise Rakner, *Politics in the Developing World* (4th edn Oxford University Press 2014) 249.

[66] Putzel and Di John (n 64), the definition of states in crisis or 'crisis states' adopted by the Crisis States Research Network, London School of Economics, crisis states is those that have collapsed 'into violence and war' or are recovering 'from episodes of extreme violence', ii.

The concept of 'crisis' also has the capacity to encompass states with high levels of corruption in terms of governance, giving rise to related implications for the adequate and proper provision of public services such as policing, a fair and transparent justice system, health and education. Further, it incorporates states within which the definition, promotion and protection of human rights is, sometimes violently, contested. Whilst fragile states might meet the definition of a state in crisis in terms of human rights protection and promotion, not all states in crisis from a human rights perspective are fragile; consider, for example, China and Saudi Arabia. The genocidal regimes of Nazi Germany and Pol Pot's Cambodia did not mean those states were fragile or failing; if anything during perpetration, the political and military might of the state was reinforced.[67] To only consider the function of the UPR in relation to 'fragile' or 'weak' states would not accommodate the fact that a state may be strong, governed by an autocratic regime, and yet still be 'in crisis' in terms of human rights recognition, malpractice and violation.

Nonetheless, the primary focus here is upon Yemen, a fragile and arguably failing state. The strength of a state and its statehood is measured in part by the strength of state institutions and scope of state functions.[68] The OECD's view is that 'states are fragile when state structures lack political will and/or capacity to provide the basic functions needed for poverty reduction, development and to safeguard the security and human rights of their populations'.[69] The optimal position of a state in relation to each will very much depend upon the perspective being taken. As Francis Fukuyama highlights, in economic terms, the preference would be to build and maintain states with strong institutions but more limited scope.[70]

From a global governance and human rights perspective, however, one might argue that strength lies in pursuing strong public institutions with a more expanded scope in terms of capacity to protect, tempered sufficiently to maintain individual freedoms and liberty. For

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[67] Stefan Wolff, 'The regional dimensions of state failure', (2011) 37 *Review of International Studies* 951-972, 956, 957.

[68] Francis Fukuyama, *State Building: Governance and World Order in the Twenty-First Century* (London: Profile Books 2004) 6-15, with reference to a number of indexes based upon various indicators that measure the capacity of the state to carry out those functions deemed attributable to the state, such as defence, law and order, property rights, public health, education, etc.

[69] 'International engagement in fragile states: can't we do better?', Preliminary Version, (OECD 2011) https://www.oecd.org/countries/somalia/48697077.pdf last accessed 22 August 2018

[70] Fukuyama (n 68) 11.

states in crisis, the malfunction and corruption of public institutions contributes to a human rights protection deficit that is characteristic of limited statehood; a state claims to have the will to act to protect human rights, but lacks the strength and the scope.[71] Autocratic states also betray a human rights deficit which in the case of Syria was the seed that swiftly destabilised the state, prompting a human rights and humanitarian crisis with implications for internal, regional and international security.[72]

Strength and scope can be related to the 'two faces of the state': the state's function in terms of ensuring individual and collective security and the provision of public services, against its lack of capacity to fulfil its function.[73] Under a global governance approach, civil society plays a key role in checking and holding to account the exercise of power and authority by states; it has the potential to complement the state's role and shape the relationship between the individual and the state.

The government or ruling elite of those states that are weak, fragile or failing commonly lacks universal authority and legitimacy,[74] contributing to limited statehood.[75] This accords with Weber's analysis of statehood and the impact of the government's loss over the monopolization of the use of force.[76] A situation of political, economic and military instability compromises the security of the general population in terms of daily life, and the security of national borders as militant and/or religious non-state actors coalesce and have the capacity to flourish.[77] The failure on the part of weak and fragile states to promote and

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[71] The idea of limited statehood is discussed in Tanja A. Borzel and Thomas Risse. 'Human rights in areas of limited statehood: the new agenda' in Risse et al *The Persistent Power of Human Rights* (n 46).

[72] As one interviewee that had lived and worked in Syria in 2010 noted, 'Syria was certainly an authoritarian regime but you could somehow see a small degree of progress and progressiveness, in particular as compared to some of the Gulf States. It had also offered a certain amount of regional stability. And then, almost overnight, the Arab spring arrived at their door and the country descended into a state of chaos and war that is still on-going to this day', Interview CS0 07.

[73] For an account of the origins of these concepts and the two faces of the state, see Barry Buzan, *People, states, and fear: an agenda for international security studies in the post-cold war era* (2nd edn Longman 1991) 39-56.

[74] Fragile states are thus to be defined as states that are failing, or at risk of failing, with respect to authority, comprehensive service entitlements or legitimacy, Frances Stewart and Graham Brown, 'Fragile States' CRISE Centre for Research on Equality, Human Security and Ethnicity, working paper 51, January 2009, 2, http://r4d.dfid.gov.uk/PDF/Outputs/Inequality/wp51.pdf both last accessed 21 August 20183.

[75] Borzel and Risse (n 71) put forward the view that limited statehood is not confined to those states that are 'fragile, failing or failed but characterise most developing countries in the current world system', 63.

[76] M. Weber, *Wirtschaft und Gesellschaft* (Tübingen: Mohr, 1972) 821–2, cited and translated by Wolff (n 67) 960.

[77] See for example, BBC radio 4 documentary, 'Afghan Women: Speaking Out, Losing Lives', BBC Radio 4, 8 December 2014, http://www.bbc.co.uk/programmes/b04tj384; Sune Engel Rasmussen, Taliban return to

protect security has a concomitant detrimental impact upon the state's capacity to promote and protect human rights thus creating, or entrenching, a human rights deficit.[78] As the World Bank notes, fragile states are 'characterised by a debilitating combination of weak governance, policies and institutions',[79] contributing to the growth of militant non-state actor groups.[80]

Western powers over the last two decades have reconceptualised the sources of security risk from a sole focus on state actors to now encapsulate non-state actors and insurgents, whose training often occurs in fragile states and states in crisis that are characterised by power vacuums and pockets of ungoverned space.[81] This may well be a significant factor in the higher number of recommendations made to states in crisis and by a greater proportion of reviewing states, as demonstrated in chapter 6.

1.5.1 Yemen: a state in crisis

Yemen is the primary state in crisis this study focuses upon. As noted above, it was evident during the author's observation of Yemen's second cycle UPR in January 2014 that Yemen

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Afghan town that rose up and drove out its leaders, *The Guardian* (27 October 2014), http://www.theguardian.com/world/2014/oct/27/taliban-return-afghan-town-gizab; Nicola Abé, 'What Germany Left Behind: A Feeling of Abandonment in North Afghanistan', (Der Speigel Online International, 22 April 2014), http://www.spiegel.de/international/world/security-eroding-in-northern-afghanistan-after-german-withdrawal-a-965522.html, all last accessed 22 August 2018.

[78] This idea is not new, see for example, Françoise J Hampson, 'International Humanitarian Law in Situations of Acute Crisis', Report of the Conference on the Promotion and Protection of Human Rights in Acute Crisis (Department for International Development/ Human Rights Centre, University of Essex 1998), http://www.essex.ac.uk/rightsinacutecrisis/english.htm last accessed 22 August 2018.

[79] *Fragile States: The Low Income Countries Under Stress (LICUS)* (World Bank 2006) http://ieg.worldbank.org/Data/reports/licus.pdf last accessed 21 August 2018, see also Stewart Brown (n 74) 2.

[80] Although these factors cannot be attributed to internal insecurity alone: motivations for engagement in and joining violent jihad are both theological and political, Andreas Armborst, 'Modelling terrorism and political violence', (2010) 24(4) International Relations 414 – 432, as well as attributable to broader matters relating to informal association and friendship, Marc Sageman, *Leaderless Jihad: Terror networks in the twenty-first century,* (University of Pennsylvania Press 2008)*,* Scot Atran and Marc Sageman, 'Theoretical Frames on Pathways to Violent Radicalization: Understanding the Evolution of Ideas and Behaviors, How They Interact and How They Describe Pathways to Violence in Marginalized Diaspora', (ARTIS research and risk modelling, August 2009) https://sites.lsa.umich.edu/satran/wp-content/uploads/sites/330/2015/10/ARTIS_Theoretical_Frames_August_2009.pdf last accessed 22 August 2018.

[81] The UK's International Engagement Security Strategy states 'The key threats are terrorism, extremism and instability; cyber; and the weakening of the rules-based international order, making it more difficult to achieve the consensus needed to deal with global threats', 'UK's International Engagement Security Strategy', Ministry of Defence and Foreign and Commonwealth Office, 2, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/596968/06032017_Def_Engag_Strat_2017DaSCREEN.pdf last accessed 09 July 2018.

had made little if any progress against first cycle recommendations. Further investigation at that time into the political, economic, social and cultural fabric of Yemen revealed a burgeoning crisis with regard to human rights promotion and protection in terms of capacity and capability as well as political and cultural will, indicating Yemen to be an apt focus for this study, and as further outlined below.[82]

The World Bank's Country Policy and Institutional Assessment (CPIA) provides data sets and indicators of a country's development position that rate a country against 16 criteria grouped into four clusters: economic management; structural policies; policies for social inclusion and equity; and public sector management and institutions.[83] This data set is one of a number of sets referred to by the Fragile States Index,[84] which offers a means of ascertaining the extent of crisis for a state as reported annually over a period of time. It is accepted that there are limitations with using indexes that seek to measure a country's performance against a set of criteria be they human rights or development based.[85] Those states experiencing crisis in terms of governance and state infrastructure are more likely to suffer from poor data collection and poor resources allocated to this task and will therefore inevitably perform poorly in terms of their rankings; the challenge of reliance upon indicators is explored in more detail in section 5.4, chapter 5.

Notwithstanding the limitations of collecting and collating data for states in crisis, in 2008 at the commencement of the UPR, Yemen was categorised as being the world's 21st most fragile state.[86] Yemen's first cycle UPR was during May 2009, by which time it was ranked as the 18th most fragile state. By the time of its second cycle review in January 2014, it was ranked 8th. In 2017, Yemen was ranked the 4th most fragile state, and the third most fragile

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[82] Initial research involved reviewing various human rights reports for Yemen, for example, both first and second cycle UPR documentation and matters relating to Yemen's human rights treaty commitments.
[83] CPIA, World Bank https://datacatalog.worldbank.org/dataset/country-policy-and-institutional-assessment last accessed 20 May 2018. This data has been used by academics for example, W. Naudé, A. U. Santos-Paulino, and Mark McGillivray (eds), Fragile States: Causes, Costs, and Responses (Oxford Scholarship Online 2012) and informs the basis of various indexes measuring state fragility and/or weakness.
[84] 'Methodology', Fund for Peace (n 62).
[85] See chapter 5, section 5.4 of this thesis, 'The challenge of human rights indicators', also: '…analysts are sceptical of the analytical value of the concept on epistemological grounds, arguing that it is difficult to objectively define, identify and analyse failed states with methodological rigour', Edward Newman, 'Failed states and international order: constructing a post-Westphalian World', (2009) 30(3) Contemporary Security Policy 421-443, 421.
[86] 'Country Data', Fund for Peace (n 62).

in 2018, and was in receipt of significant support from the World Bank's IDA (International Development Association) including emergency projects relating to electricity access, health and nutrition, and crisis response, all symptoms of Yemen's fragility and its ongoing war.[87]

The World Bank's 'Fragility, Conflict and Violence Group' 2014 publication contains an analysis of fragile and conflict affected states.[88] This report focuses on those states that are beneficiaries of IDA funds and presents findings in relation to progress made against the World Bank's strategic priority of supporting fragile and conflict affected states. For the purpose of this study, the findings are less relevant, and arguably out of date given the fast-moving pace of conflict issues, particularly in the Middle East, but for reference, Yemen features on the 'partial FCS' (fragile and conflict affected states) list.[89] Further detail of Yemen's complex historical and religious / political divisions is provided by the European Council on Foreign Affairs.[90]

The matters referred to in this subsection therefore illustrate that Yemen meets the definition of a state in crisis set out in the introduction to section 1.5 above.

1.5.2 Other sample states: Somalia, Iraq, the UK and New Zealand

There is not the space in this study to focus in detail on more than one state in crisis. However, to only focus upon one state may cast doubt upon the reliability and robustness of findings made. To mitigate this, other states including those in crisis, Iraq and Somalia, and those that are stable, the UK and New Zealand, are also referred to.

Iraq is in the same regional group as Yemen, the Asia-Pacific group, and Somalia is in the African Group.[91] Like Yemen, each has been reviewed as part of the first and second cycle, but not yet the third. In 2008 at the start of the UPR, Somalia was ranked by the FSI as the

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[87] World Bank, IDA projects and operations, http://projects.worldbank.org/search?lang=en&searchTerm=&status_exact=Active%5eClosed&prodline_exact=GU%5ePE&countrycode_exact=RY last accessed 18 May 2018.

[88] Laura Ralston, 'Success in Difficult Environments: A Portfolio Analysis of Fragile and Conflict-affected States', Policy Research Working Paper 7098, World Bank Group, Fragility, Conflict and Violence Group, November 2014, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/11/10/000158349_20141110112833/Rendered/PDF/WPS7098.pdf last accessed 22 August 2018.

[89] Ralston (n 88) 5-6.

[90] European Council on Foreign Relations, 'Mapping the Yemen Conflict' https://www.ecfr.eu/mena/yemen last accessed 18 August 2018.

[91] United Nations Regional Groups of Member States http://www.un.org/depts/DGACM/RegionalGroups.shtml last accessed 24 May 2018.

most fragile state in the world and Iraq as the fifth most fragile.[92] Somalia's first cycle UPR

was in May 2011 and its second cycle review during January 2016; over this period it was

continually ranked as the world's most fragile state.[93]

Somalia has been said to suffer historically, socially, culturally, economically and politically as

a post-colonial country in part due to the imposition of Western style centralised state-

governed structures of law and order onto a clan and kinship model.[94] Modern day Somalia

has struggled to maintain stability following prolonged periods of civil war, food insecurity,

famine, drought and outbreaks of cholera as well as the monopoly of state power in the

hands of a few, generally according to ethnic grouping.[95] Whilst Somaliland, which operates

as an autonomous region in Somalia, has succeeded in creating some stability by operating

under a parallel legal and political system it is not internationally recognised; for the

purposes of international law Somaliland remains part of Somalia despite meeting

conditions of statehood by satisfying certain normative criteria related to basic human rights

protection and democratic governance.[96]

Iraq's first cycle review was February 2010, at which time it was ranked as the 7th most

fragile state, it was the 13th most fragile state at the time of its second cycle review in

November 2014.[97] It was ranked in 2017 as the 10th most fragile state. Iraq has been the

site of international and domestic conflict, particularly since the invasion led by the US and

the UK in 2003 and more recently as a result of the hold taken by Daesh in the northern

regions of the country.[98] Discussions of the identity of Iraq as a state including from its

formation to contemporary geopolitics and complex domestic religious / political divisions,[99]

and the 2003 Iraq invasion by Western powers and its ongoing relationship with the West,[100]

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[92] Fund for Peace (n 62).

[93] ibid.

[94] Martin Doornbos and John Markakis, 'Society and state in crisis: what went wrong in Somalia?' (1994) 21 (59) Review of African Political Economy 82-88.

[95] OCHA 'Somalia State by State Drought Analysis' United Nations Office for the Coordination of Humanitarian Affairs (February 2018), https://reliefweb.int/sites/reliefweb.int/files/resources/20180228_state-by-_state_drought_analysis.pdf last accessed 09 April 2018.

[96] B. Poore, 'Somaliland: Shackled to a Failed State', (2009) 45 Stanford Journal of International Law 117.

[97] Fund for Peace (n 62).

[98] Faisal Irshaid, 'Isis, Isil, IS or Daesh? One group, many names' BBC News Online, 02 October 2015, http://www.bbc.co.uk/news/world-middle-east-27994277 last accessed 21 May 2018.

[99] For an account on this subject, see Charles Tripp, A History of Iraq (3rd ed. Cambridge University Press 2007).

[100] Though not directly relevant to this study, there is an ongoing preliminary inquiry into alleged war crimes violations committed by UK nationals in Iraq during the period of the Iraq occupation and conflict of 2003-2008, 'Focus: Alleged war crimes committed by United Kingdom nationals in the context of the Iraq conflict

go well beyond the scope of this thesis. However, as a fragile state that has been the site of invasion by an international coalition and subsequent internal conflict, Iraq presents a useful comparator when looking at recommendations data. Whilst Somalia is included on the World Bank's 'always FCS' (fragile and conflict affected states) list, Iraq is absent, no doubt because it was not eligible to be included in the measure, the criteria being those IDA funded states that had been ranked as FCS for at least two years during the period the report covers (2001-2013).[101]

The two stable states identified for comparison are the UK and New Zealand. New Zealand is grouped into the same UPR session as Yemen and therefore provides a contemporaneous comparator stable state.[102] In 2017, it was ranked as one of the most stable states in the world, 170 out of 178.[103] Including the UK in this study reflects the nationality of the researcher and presents a comparator that is not only a strong state but was a member of the Human Rights Council at the start of the UPR and one of the very first states to be subject to review.[104] It is also one of the five permanent members of the UN Security Council.[105]

Additional states are referred to for illustrative purposes, as appropriate. There are a number of other states that might have been specifically included as well or instead, but given the geographical location of the most fragile states in the world and those with the lowest Human Development Index score, this would have led to a bias towards Central and East Africa.[106]

Whilst UPR follow up and implementation by states in crisis may be poor, these states continue to engage with this mechanism by continuing to submit a national report and

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and occupation from 2003 to 2008', International Criminal Court, https://www.icc-cpi.int/iraq last accessed 06 April 2018.

[101] Ralston (n 88) 5-6.

[102] For past and future timetables of the UPR, see 'UPR sessions', http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx last accessed 21 May 2018.

[103] 'Fragile States Index 2017: Factionalization and Group Grievance Fuel Rise in Instability' 14 May 2017, http://fundforpeace.org/fsi/2017/05/14/fsi-2017-factionalization-and-group-grievance-fuel-rise-in-instability/ last accessed 06 April 2018.

[104] Past members of the Human Rights Council, http://www.ohchr.org/EN/HRBodies/HRC/Pages/Group20062007.aspx last accessed 21 May 2018.

[105] UNSC membership, http://www.un.org/en/sc/members/ last accessed 21 May 2018.

[106] UNHDI http://hdr.undp.org/en/countries last accessed 18 May 2018 and Fund for Peace, Fragile States Index (n 62).

sending a relatively high status delegation to the Working Group in Geneva. In this context, this research piece identifies and critically explores those factors that secure this engagement. It considers the extent to which a lack of UPR follow up or implementation inhibits normative change and examines whether the nature of engagement by states in crisis serves to undermine or, paradoxically, reinforce the authority and legitimacy of the UPR, and thereby its governance function.

1.6 Research methodology, design and method

This PhD is a socio-legal study within the paradigm of conditional international law theory, taking a critical constructivist approach, each of which is defined below.

Conditional international law theory is an emerging practice of empirical research in the field of international law. In the context of conditional international law theory empirical work, which 'involves the systematic use of qualitative or quantitative methods',[107] is concerned with two aspects of international law: 'the *conditions* under which international law is formed and those under which it has effects in different contexts, aiming to explain variation' (emphasis in the original).[108] This theory operates to 'narrow the gap between abstract theory, empirical research and the world of practice' by 'oscillating' between each and through the conduct of 'empirically grounded work regarding particular international law contexts'.[109] This approach encapsulates the methods and methodology underpinning this research project which takes theories and concepts of global governance combined with empirical research to map and define practice related to the UPR in a specific real world context.

Interestingly, Gregory Shaffer and Tom Ginsburg suggest that outlier states should be disregarded when assessing the impact of international law to better focus on those states 'in the middle' where international law has the greatest impact.[110] This thesis countenances

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[107] Shaffer and Ginsburg (n 6) 2.
[108] ibid 1.
[109] ibid 1-2.
[110] Following the empirical studies of Beth Simmons and others, Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009); Hathaway 'Do Human Rights Treaties Make a Difference?' (n 58); and Hunjoon Kim and Kathryn Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (2010) 54 International Studies Quarterly 939, as cited by Shaffer and Ginsburg (n 6) 24.

this suggestion precisely because of the conditional international law approach adopted. Central to the thesis is an assessment of the global governance function of the UPR for states at the margins, paying attention to the particular challenges and conditions within those states and the imperative of non-state actor contribution in subsequent compliance, re-building and implementation.

Aspects of international relations theories are relevant to the UPR; it places the eyes of the international diplomatic community on compliance, setting the UPR apart from treaty bodies, regional human rights courts and *ad hoc* tribunals. By its nature, this study is therefore socio-legal with interdisciplinary elements. Scholarship and research in the field of international law has emerged as a separate discipline to legal scholarship, the latter having been historically divided into two categories; black letter law, commonly accepted as involving doctrinal research,[111] and law in context.[112] Further, the concept of legal research has expanded to encompass methods and methodologies more common to the field of social sciences, namely, socio-legal research where research is undertaken from a perspective that involves assessing and evaluating the social function of law and has led to 'the theoretical empirical analysis of law as a social phenomenon'.[113]

Until recently, research in the field of international law was largely from a positivist perspective, with a socio-legal approach all but absent.[114] Positivism encompasses those theories that describe the law 'as it is', as encapsulated in treaties, custom and other forms of consent, tending 'to view states as the only subjects of international law, thereby discounting the role of non-state actors'.[115] Positivist normative hierarchies held attraction for international lawyers by validating international law as a separate credible field of study

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[111] Mike McConville and Wing Hong Chui, 'Introduction and Overview', in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh: Edinburgh University Press 2007) 3-4.
[112] ibid 1.
[113] Fiona Cownie and Anthony Bradney, 'Socio-Legal Studies: A challenge to the doctrinal approach', in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 35, citing *Review of Socio-legal Studies: Final Report* Swindon, ESRC, 1994, 1.
[114] Anne-Marie Slaughter and Steven R. Ratner, 'Symposium on Method in International Law: Appraising the Methods of International Law: A Prospectus for Readers', (1999) 93 American Journal of International Law, 291-423, 293, there is no reference in this symposium on the methods of international law to socio-legal, rather to a law and non-law interdisciplinary method which includes reference to 'sociology, international relations, economics, postmodern literary theory'.
[115] Slaughter and Ratner (n 114) 293.

and practice, but the need for such justification has since dissipated.[116] The result has been a drive to seek out the specificity of legal norms.[117] The predominant view amongst constructivists, however, is that law and morality are not entirely separate, they are not 'radically distinct concepts' and attempts to separate them by focusing on the specificity of legal norms are criticised as reflecting positivist assumptions.[118] However, constructivism has fallen prey to the criticism of being circular by implying that causes and their results are 'mutually constitutive'; critical constructivism acknowledges the weakness of a purely constructivist approach, seeking to break such circularity.[119]

For Jutta Brunnée and Stephen Toope, the international lawyer can 'unpack the positivist underpinnings of most IR [international relations] theorists' understanding of rules… to offer alternative explanations of normativity'.[120] They propose an interactional theory of international law that links the 'bindingness' of law to the internal morality of the subjects and the creators of that law.[121] Linked to this is the critical constructivist's concern with what actors actually *do,* where 'doing' including words spoken as well as action taken.[122] This aligns with the analysis of this study of the words and actions of SuRs and reviewing states to determine the global governance function of the UPR.

As such, there are three key elements to the research design for this study, which is characterised by a mixed methods multidimensional approach. A mixed methods approach does not limit the researcher to an 'either/or' approach, being committed neither to purely qualitative research nor purely quantitative research, but driven by 'the broad inquiry logic

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[116] This is evidenced by the emergence of empirical research in international law, as discussed in this section which is related to the view that 'the theoretical debate over whether international law matters is a stale one', Shaffer and Ginsburg (n 6) 1.

[117] J Brunnée and S Toope, 'International Law and Constructivism' (2000–01) 39 Columbia Journal of Transnational Law 19–74, 55.

[118] ibid 56.

[119] Elizabeth Stubbins Bates, 'Sophisticated Constructivism in Human Rights Compliance Theory', (2014) 25(4) European Journal of International Law 1169-1182, 1174, citing Ryan Goodman and Derek Jinks, *Socializing States: promoting Human Rights through International Law* (New York: Oxford University Press 2013) 16.

[120] Brunnée and Toope (n 117) 37.

[121] ibid 37.

[122] ibid 28, citing Friedrich Kratochwil, 'Citizenship: On the Border of Order'*,* in Yosef Lapid & Friedrich Kratochwil (eds), *The Return of Culture and Identity in IR Theory* (Lynne Rienner 1996) 181, positing that societies function on the basis of practices, not universal precepts; Nicholas Greenwood Onuf, 'Constructivism: A User's Manual', in Vendulka Kubalkova et al. (eds) *International Relations in a Constructed World* (M.E. Sharpe 1998) 58 and 59.

that guides the selection of specific methods and that is informed by conceptual positions common to mixed methods practitioners'.[123]

One element of the research design of this study is qualitative research. This has taken the form of the analysis of original empirical data generated via interviews undertaken with various UPR stakeholders. The sample of interviewees was formulated by identifying which civil society organisations (CSOs) had made stakeholder submissions to Yemen's second cycle UPR. Contact was made with CSOs to request an interview with an appropriate person. As is to be expected with such an endeavour, not all those contacted responded. In addition, successful contact was made with personnel at the OHCHR. Attempts to arrange interviews with diplomatic permanent missions to the UN were less fruitful, with only one formal interview being carried out in May 2017. Contact was also made with a Yemeni NGO. During an informal conversation between the author and the director of the NGO at the UN in Geneva it was apparent that the potential interviewee was not at that time fully aware of the UPR mechanism. The author shared details of the UPR but it was not possible at the time of data collection to arrange a further and more formal interview.

Ultimately, a total of eleven formal interviews were conducted, seven with representatives of CSOs, two with personnel from the OHCHR, one with a permanent mission to the UN and one with a human rights journalist. Interviews were conducted during May and June 2017 in person in Geneva save for two via telephone/Skype. In January 2014, during the initial field visit to the UN, informal conversations were had with a Permanent Mission to the UN for a stable state in this study's sample, and with two civil society representatives. The content of these conversations have also informed deliberations within this thesis. Whilst the final sample size may appear small, the position and experience of those within the sample and the quality of the interviews undertaken offers a sufficiently robust source of qualitative data to fulfil a triangulation purpose in terms of documentary analysis and analysis of available statistical data, and to reveal perspectives and knowledge that would not be available from documentary analysis alone.

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[123] Charles Teddlie and Abbas Tashakkori, 'Overview of Contemporary Issues in Mixed Methods', in Abbas Tashakkori and Charles Teddlie (eds), *Sage Handbook of Mixed Methods in Sociological Research* (Sage Publications Limited 2010) 5.

A semi-structured approach was taken to the interview process to permit specific focus and direction in terms of subject matter and theme, as well as allowing scope during the process for interviewees to be unfettered by the confines of tightly focused questions, and thereby enabled to speak more freely. The interview process provided an opportunity to uncover unforeseen, less visible or more nuanced themes and matters. Transcripts have been analysed to detect and measure attitudes towards the UPR and its function in relation to states in crisis. The analysis contributes to the determination of the global governance function of the UPR in general and for states in crisis in particular and has been integrated throughout the thesis.

A further key aspect of the research methods underpinning this study is qualitative research in the form of documentary analysis. This has involved analysis of documents that directly contribute to a state's review. These comprise a national report, an OHCHR compilation of UN information and an OHCHR summary of stakeholder submissions regarding a particular SuR. These documents and their function and content and are considered in more detail primarily in chapters 2, 4, 6 and 7.[124]

Finally, quantitative data in relation to UPR recommendations collated by an INGO based in Geneva, UPR Info, has been accessed and analysed. UPR Info hosts a significant body of UPR data that has been coded and organised under the instruction of Edward McMahon, culminating in two open source databases. One database codes UPR recommendations according to the recommending state, the SuR, and a recommendation's theme or action category.[125] The second provides access to statistics regarding recommendations, for example, those states that make the most recommendations and statistics according to regional grouping, response, action, issue, etc.[126] Analysis within chapter 6 refers to these two databases in particular.

Conclusions as a result of this analysis have contributed towards determining the function of the UPR in relation to Yemen as a state in crisis, supported by observations made regarding recommendations relating to other states in crisis. Measurement of the rate of acceptance

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[124] UNHRC A/HRC/RES/5/1 (n 9).

[125] UPR Info: Database of Recommendations https://www.upr-info.org/database/ last accessed 21 August 2018.

[126] UPR Info: Statistics of Recommendations https://www.upr-info.org/database/statistics/ last accessed 21 August 2018.

of recommendations made, and the type of recommendation accepted has been conducted to discover any emerging patterns, for example, in terms of regional allegiances, the prominence and influence of normative orders and action taken against supported recommendations. Consideration is given to whether subsequent state action in implementing recommendations is influenced by the identity of the recommender.

As noted, there are aspects of this thesis that are interdisciplinary involving elements of international relations theories and security studies. Research in these two areas of study has been textual and the relevant concepts and theories are applied to the UPR in this chapter above in section 1.5, and in chapters 4, 5 and 6, as well as referred to in questions put to interviewees. All elements of the research design are underpinned by thematic analysis to address the question of the UPR's global governance function and its associated legitimacy and authority to respond to the question of how the UPR functions in relation to states in crisis.

1.7 Originality and impact

By having as its focus states in crisis and by providing detailed analysis and evaluation of the global governance function of the UPR mechanism, this thesis provides an additional distinct perspective to other research and scholarly activity that focuses upon the UPR.[127] It is an important piece of work that explores the complex and nuanced interaction of the human rights monitoring and protection function of one entity, the UPR, with state and non-state actors situated within what this thesis defines as an 'international human rights regime complex'.

In this endeavour it is original and takes a novel perspective; interrogating the challenge that states in crisis pose to the legitimacy and authority of the UPR considering the grave

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[127] See section 1.1 above for reference to other UPR related research, and also Felice D. Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' (2007) 7(1) Human Rights Law Review 109; Marianne Lilliebjerg, 'The Universal Periodic Review of the UN Human Rights Council - An NGO Perspective on Opportunities and Shortcomings' 26 (2008) Netherlands Quarterly of Human Rights 311; Karolina M. Milewicz and Robert E. Goodin, 'Deliberative Capacity Building through International Organizations: the Case of the Universal Periodic Review of Human Rights' (2016) 48 British Journal of Political Science 513; Edward R. McMahon, 'The Universal Periodic Review: A Work in Progress, An Evaluation of the First Cycle of the New UPR Mechanism of the United Nations Human Rights Council' in Dialogue on Globalisation Report (Geneva: Friedrich Ebert Stiftung, September 2012); Christian Tomuschat 'Universal Periodic Review: a New System of International Law with Specific Ground Rules?' in Ulrich Fastenrath et al (eds) *From Bilateralism to Community Interest: Essays in honour of Bruno Simma* (Oxford University Press 2011).

difficulties those states face in terms of human rights progress and, as a result, the challenge of the UPR mechanism meeting its objectives. In addition, this work provides a conceptualisation of the UPR and its function for states in crisis and proposes how the UPR's standing might be preserved by making transparent what it is that this mechanism offers states in crisis, such as Yemen, and what it cannot.

Impact, in relation to academic research, has been defined by the Research Excellence Framework (REF) as 'an effect on, change or benefit to the economy, society, culture, public policy or services, health, the environment or quality of life beyond academia'.[128] This piece presents recommendations to feed into policy consideration and provides originality by identifying the global governance function of the UPR and by providing a means to measure the authority and legitimacy of the mechanism via the form and extent of state engagement. The proposals and modelling will be shared in an executive summary document for distribution to individuals and institutions, namely civil society, UN permanent missions and personnel of the Human Rights Council, including those interviewed as part of the research process, some of whom have pledged their support in disseminating this research and its outcomes. In addition, through links formed with INGOs it is anticipated that certain INGOs will be open to distributing the findings via their email alerters and social networking media.

1.8 Limitations

It is acknowledged that other fields of study might fall within the scope of this research project, for example, matters relating to development particularly given the focus on states in crisis which are in receipt of UK and international aid related to the pursuit of development goals.[129] However, it is not feasible to situate the politics and ramifications of

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[128] Policy Guide, REF impact, The Higher Education Funding Council of England (HEFCE), last updated 19 February 2016, http://www.hefce.ac.uk/rsrch/REFimpact/ last accessed 06 February 2018.
[129] For UK aid details: DFID Iraq Profile, July 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723176/Iraq-July-2018.pdf; DFID Somalia Profile, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723292/DFID-Somalia-Profile-July-2018.pdf; DFID Yemen Profile, July 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/723344/DFID-Yemen-Profile-July-2018.pdf, for international aid details: OECD Countries, http://www.oecd.org/countries/ all last accessed 22 August 2018.

international development policies and agendas as well as state fragility centre stage, though reference to presiding matters is made as and when appropriate.

Determining the sample for any study requires decisions to be made about what to exclude. In focusing on Yemen with reference to Iraq and Somalia as states in crisis and the UK and New Zealand as stable states does, of course, mean there are many states that have not been included, particularly in chapter 6 in which quantitative data is assessed and conclusions made. These conclusions would ultimately require testing against a larger sample of states to be certain of their robustness.

Finally, whilst chapter 5 gives some thought to the motivations for state engagement with international organisations as embodied by the UPR, the thesis does not attend in detail to the reasons for states forming international organisations. This is an area of research that has primarily attracted the focus of international relations scholars, but there is value in scholars in the field of international law giving careful thought to these matters given the growing authority and power of international organisations.[130] This is not, however, the primary focus of this thesis' subject matter.

1.9 Ethics approval

Ethics approval was sought and granted shortly after the researcher's enrolment on the research degree programme by the University Faculty Research Ethics Committee in December 2013.

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[130] Clive Archer, *International Organizations* (4th edn Routledge 2015); Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press 2014) and Dominic Zaum (ed), *Legitimating International Organizations* (Oxford University Press 2013).

Chapter 2 Universal Periodic Review: context and concept, foundations, and procedure

Introduction

This chapter critically assesses the context within which the UPR was conceived. It explains the UPR's founding documents, objectives, and procedure. These matters are critically addressed in chapters 4 and 5 when mapping the global governance function of the UPR. This chapter does not therefore interrogate global governance theory or the governance function of the UPR; it provides insight into the aspirations and criticality of the mechanism at the time of its conception and design and signposts some of the challenges the UPR faces for subsequent discussion.

The first section briefly charts the demise of the Commission on Human Rights (the Commission) and its replacement by the Human Rights Council. The second section sets out the UPR's objectives according to its founding instruments and successive decisions and resolutions. Section three describes the UPR's modalities and procedures and discusses the defining feature of the Working Group, the peer review conducted as part of an 'interactive dialogue'. This chapter broadly concludes that structurally, the UPR effectively addresses the ills of the Commission and that state engagement with the UPR has been successful, although the substance of that engagement varies from one state to the next.

The UPR is a Charter-based mechanism forming part of the machinery of the Human Rights Council with administrative functions being carried out by the OHCHR.[131] A number of the UPR's features mean it is distinct from other monitoring mechanisms, namely, it is: cooperative in its approach, rather than adversarial or inquisitive; non-selective; and structured primarily around a state-led peer review. Civil society and human rights experts contribute indirectly to the process, and treaty body recommendations are disseminated, matters that are given further consideration in chapters 4 and 7.

For some, the UPR represents 'the Council's most important mechanism' being premised upon 'an exchange of good practices on the basis of dialogue and cooperation, the key pillars of the Council';[132] it is perceived to be an 'innovative mechanism',[133] a 'significant

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[131] UNHRC A/HRC/RES/5/1 (n 9).
[132] Statement by Venezuela, HRC General Debate on the UPR (n 35).
[133] Freedman (n 1) 253 – 295.

innovation',[134] and 'perhaps the major innovation' in the establishing of the Council,[135] being 'the one entirely new mechanism' that serves to distinguish the Council from its predecessor the Commission.[136]

2.1 Conceiving the Human Rights Council and the UPR

The Human Rights Council is a subsidiary organ of the General Assembly.[137] Conceived at a particular moment in time in a very specific context it was lauded by its supporters as a fresh start to replace and present a departure from the much-criticised human rights monitoring hitherto conducted by the Commission.[138] Conducting a detailed assessment of the context of the Council's creation is beyond the scope of this thesis, and others have undertaken this task,[139] however a brief summary illustrates the weight of expectation upon the Council and the mechanisms within its purview.

The Commission was established pursuant to Article 68 of the UN Charter. Its initial task was standard setting and the Universal Declaration of Human Rights (UDHR) was an important output in 1948 that heralded early success.[140] Implementation of standards was to follow and it is the Commission's operation in this respect that became the subject of much criticism. It betrayed a highly politicised 'naming and shaming' approach,[141] to the extent that by the time of the US administration of George W. Bush, the Commission had become 'a popular target in general attacks on the United Nations because of its perceived malfunctioning'.[142]

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[134] UNHRC 'Annual high-level panel discussion' (n 36).

[135] Freedman (n 1) 297-302; Rhona Smith, 'China's contribution to human rights through the UPR', (2011) 17 Asian Yearbook of International Law 85, 89, respectively.

[136] G Sweeney and Y Saito 'An NGO Assessment of the New Mechanisms of the UN Human Rights Council' Human Rights Law Review 9(2) 2009, 203.

[137] See 'United Nations System', http://www.un.org/en/aboutun/structure/pdfs/UN_System_Chart_2015_Rev.4_ENG_11x17colour.pdf last accessed 22 February 2018.

[138] Freedman (n 1) 9 – 37.

[139] Nico Schrijver provides a comprehensive review of the historical conditions at the close of the Second World War that led to the creation of the Commission on Human Rights by ECOSOC, pursuant to Article 68 of the United Nations Charter; a critical assessment of the newly formed Human Rights Council; and also charts the negotiation and drafting of the Universal Declaration of Human Rights 1948, Schrijver (n 1). See also, Philip Alston (n 1).

[140] Schrijver (n 1) 811, citing chapter 5 in Philip Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press; New York: Oxford University Press, 1992).

[141] Lebovi and Voeten (n 1).

[142] Schrijver (n 1) 813.

A range of criticisms were levied at the Commission, including in relation to membership. The criteria used for membership attracted disapproval,[143] members included states known as 'human rights abusers',[144] and it was apparent that motivation for states seeking membership was 'not to strengthen human rights but to protect themselves against criticism or to criticize [*sic*] others'.[145] Further, there were allegations of failing to act in response to state-led gross violations of human rights including a failure to intervene in the genocide in Rwanda in 1994.[146] Other criticisms were the apparently politically motivated country-specific resolutions, a lack of resources to be equipped to respond to human rights crises, and the inhibiting effects of regionalism.[147]

A High-level Panel on Threats, Challenges and Change published its report in 2004 having been tasked with determining how to adapt the UN to meet the challenges of the twenty first century.[148] The Panel acknowledged the interconnectedness of threats to global security and that 'institutions must overcome their narrow preoccupations and learn to work across the whole range of issues, in a concerted fashion'.[149] The report also focused on the Commission's 'legitimacy deficit'.[150] The Panel concluded that consideration should be given to 'upgrading' the Commission to a 'Human Rights Council' with Charter status standing alongside the Security Council 'reflecting in the process the weight given to human rights,

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[143] In terms of the Human Rights Council's membership, when electing members, states are to take account of a candidate's contribution to the promotion and protection of human rights (para 8) and it is required that Council members 'uphold the highest standards in the promotion and protection of human rights' (para 9), UNGA 'Human Rights Council' A/RES/60/251 (3 April 2006).

[144] Michael Jordan, 'New calls for Reform of UN Rights Commission: Cuba's Re-Election Law Week to the Commission on Human Rights is Drawing Criticism from Rights Groups' The Christian Science Monitor (Boston, US, 7 May 2003) 7, cited by Alston (n 1) 188. Alston suggests in the same publication that the preoccupation with the issue of membership 'fails to address the more important factors in the Commission's downfall', 185.

[145] UNGA 'A More Secure World: Our Shared Responsibility', Report of the High-Level Panel on Threats, Challenges and Change, chaired by Anand Panyarachun A/59/565 (2004), 02 December 2004, para 283.

[146] Address by Kofi Annan to the Commission on Human Rights, 07 April 2004, https://www.un.org/sg/en/content/sg/speeches/2004-04-07/address-kofi-annan-commission-human-rights accessed 01 November 2017.

[147] Freedman (n 1) 9 - 37, as summarised in Louisa Riches, 'Book Reviews: The United Nations Human Rights Council: A Critique and Early Assessment', (2015) 5 Asian Journal of International Law 415, 415. See also, Ron Wheeler, 'The United Nations Commission on Human Rights, 1982-1997: A Study of 'Targeted' Resolutions' (1999) 32(1) Canadian Journal of Political Science 75.

[148] UNGA Kofi Annan, 'A More Secure World: Our Shared Responsibility', report of the Secretary-General's High-level Panel on Threats, Challenges and Change, A/59/569, 2 December 2004, http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf last accessed 05 March 2018.

[149] ibid vii.

[150] Ibid.

alongside security and economic issues, in the Preamble of the Charter', rather than being a subsidiary of the Economic and Social Council.[151]

Building upon the High-level Panel report, Kofi Annan proposed an institution-building package reiterating the sentiment that a loss of confidence in the work of the Commission meant 'a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole'.[152] Annan declared that:

> A Human Rights Council would offer a fresh start. My basic premise is that the main intergovernmental body concerned with human rights should have a status, authority and capability commensurate with the importance of its work. The United Nations already has councils that deal with its two other main purposes, security and development. So creating a full-fledged council for human rights offers conceptual and architectural clarity. But what is most important is for the new body to be able to carry out the tasks required of it.[153]

Despite debates that were 'protracted and at times heated', during discussions preceding the Council's creation there 'was a surprising degree of consensus on three propositions'.[154] These were: that the Commission was discredited and 'had largely failed'; 'that a new, higher-level body with a different composition had to be established'; and that the institutional human rights machinery required strengthening.[155] Implicit in Annan's comments above is the desire to situate a Human Rights Council on a par with the Security Council and the Economic and Social Council, but the proposal for the Council to have equal standing was not met with open arms; there were 'extensive consultations and at times really difficult negotiations'.[156] The result was to position it within the General Assembly.[157]

General Assembly Resolution 60/251 provides, amongst other things, that the Council

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[151] ibid para 291.
[152] ibid para 182.
[153] UNHRC Address by Kofi Annan to the Commission on Human Rights: 'Secretary-General Outlines Major Proposals to Reform UN Human Rights Machinery, In Address To Geneva Human Rights Commission', 07 April 2005, http://www.un.org/press/en/2005/sgsm9808.doc.htm last accessed 10 November 2017.
[154] Alston (n 1) 186.
[155] Alston (n 1) 186.
[156] Schrijver (n 1) 815. The Security Council is superior to the General Assembly, as implicit in the wording of the Charter of the United Nations article 12: 'While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.'
[157] UNGA A/RES/60/251 (n 143) para 1.

should: 'address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon' and 'promote the effective coordination and the mainstreaming of human rights within the United Nations system'; it is designed to 'serve as a forum for dialogue on thematic issues on all human rights'; 'promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits'.[158] Resolution 60/251 requires the General Assembly to review the work of the Council within five years.[159]

The formation and operation of the Council was unlikely to provide a panacea for the ills of the Commission given it mirrored much of the Commission's character and its procedures. It was designed as a reform mechanism rather than an overhaul of the system already in place, but its similarity to the Commission suggests a lack of appetite and vision to make meaningful changes to human rights monitoring.[160] Despite proposals for a smaller number of Council members, membership was ultimately only reduced from 53 to 47.[161] The Special procedures mechanism overseen by the Commission was transferred to the Council,[162] as was the essence of its regular sessions, special sessions, commissions of inquiry and the participation and role of NGOs and other relevant non-Council members.[163] The Human

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[158] ibid paras 3, 5(b) and 5(d) respectively.

[159] ibid para 1.

[160] As Scanella and Splinter highlight, the negotiation of UNGA A/RES/60/251 (n 143) was informed by the 'mantra' that there 'was the need to preserve what was best in the Commission and to fix its shortcomings', citing the eighth preambular paragraph of resolution 60/251, Patrizia Scanella and Peter Splinter, 'United Nations Human Rights Council: A promise to be Fulfilled' (2007) 7(1) Human Rights Law Review. 41-72, 44.

[161] Weiss *What's Wrong with the United Nations* (n 25) 50-51, cited by Rosa Freedman, 'New Mechanisms of the UN Human Rights Council', (2011) 29 Netherlands Quarterly of Human Rights 289-323. The allocation of seats to the regional groups of the United Nations is detailed in UNGA A/RES/60/251 (n 143) para 7: 'based on equitable geographical distribution (…) seats shall be distributed as follows among regional groups: Group of African States, thirteen; Group of Asian States, thirteen; Group of Eastern European States, six; Group of Latin American and Caribbean States, eight; and Group of Western European and other States, seven; the members of the Council shall serve for a period of three years and shall not be eligible for immediate re-election after two consecutive terms'.

[162] Special procedures were first introduced in 1967 as part of the Commission's work to act against human rights violations related to colonialism, racism and apartheid with two mandates being agreed: an Ad-Hoc Working Group of Experts on South Africa and a Special Rapporteur on Apartheid. It is interesting to note that there were five abstentions on the vote on the resolution agreeing the mandate of the latter, France, Italy, New Zealand, UK and US, see Marc Limon and Hilary Power, *History of the United Nations Special Procedures: Mechanism Origins, Evolution and Reform*, (Universal Rights Group 2014) 5 and 49, citing UNCHR 'Action effectively to combat racial discrimination and the policies of apartheid and segregation' Resolution 7(XXIII) (16th March 1967).

[163] UNGA A/RES/60/251 (n 143) para 11: 'the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on

Rights Council does, however, hold more regular sessions than the Commission did being no fewer than three per calendar year, compared to the Commission having held only one annually.[164] Nonetheless, the Council's mechanisms broadly reflect those of the Commission.

Sweeney and Saito see the UPR as 'the one entirely new mechanism' that sets the Council apart from the Commission.[165] This was commonly perceived as a proposal to 'fix' the 'politicisation and selectivity that characterised much of the Commission's consideration of country situations'.[166] Freedman refers to the Council's special sessions as a second new mechanism allowing 'the Council to meet outside of plenary sessions to discuss grave and crisis human rights situations, either country-specific or thematic' and being 'specifically designed to combat criticism that the Commission did not have the time or flexibility to deal with grave or crisis situations'.[167] Whilst the Commission did host special sessions, these totalled only five throughout its lifetime,[168] compared to the Council having held, at the time of writing, 28 special sessions.[169]

The Commission failed to be results-oriented and to 'allow subsequent follow-up discussions to recommendations and their implementation';[170] implicit is the need for the Council not to follow suit. Further, the Council 'must find more mature ways of managing disagreement and confrontation' and renounce the Commission's method of 'conducting business through

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arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities.'

[164] Scanella and Splinter (n 160) 46.

[165] ibid 203.

[166] ibid 45-46.

[167] Freedman (n 1) 312.

[168] Two on the 'Situation of human rights in the territories of the former Yugoslavia', 13-14 August 1992 and 30 November - 1 December 1992; a third on Rwanda, 24-25 May 1994; a fourth on East Timor 23-27 September 1999; and a fifth on the 'Grave and massive violations of the human rights of the Palestinian people by Israel', 17-19 October 2000, pursuant to Economic and Social Council resolution 1990/48, 25 May 1990, 'Human Rights Archives: Previous Sessions – Special Sessions', http://www.ohchr.org/EN/HRBodies/CHR/Pages/PreviousSessions.aspx last accessed 16 August 2018.

[169] Five of which have related to the human rights situation in the Syrian Arab Republic, no special sessions have as yet been held in relation to Yemen, despite United Nations Secretary-General António Guterres having declared it 'the worst humanitarian crisis in the world', OHCHR 'Secretary-General's remarks to the Pledging Conference on Yemen [as delivered]', in Geneva on 3 April 2018, http://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Pages/SpecialSessions.aspx and https://news.un.org/en/focus/yemen last accessed 01 June 2018. For details of the Council's Special Sessions since its inception, see 'Human Rights Council: Special Sessions' https://www.ohchr.org/EN/HRBodies/HRC/Pages/Sessions.aspx last accessed 16 August 2018.

[170] Scanella and Splinter (n 164) 49.

regional groups and other blocks'.[171] The Council however, finds itself plagued by similar ills to those that haunt the Commission.[172]

At an early stage concerns arose around producing consensus on Council texts and recommendations.[173] In its first year, the Council is said to have 'faced more confrontations and polarization than even its discredited predecessor was used to'.[174] The Council is also tarnished by politicisation; inevitable given it is comprised of government delegates.[175] Freedman identifies three main forms of politicisation: 'ideological discourse, overt politicisation, and politicisation through an ostensible 'success story''.[176] The danger posed by the politicisation of an organisation is that members' engagement is motivated by the desire to pursue matters that support a social, political or cultural agenda that sits outside of the issue under consideration. The work of Special Procedures faces similar funding and resourcing issues under the Council as it did before, and political drivers behind the establishment of country specific mandates persist as a matter of consternation.[177]

Like the Commission, the Council has been criticised for failing to act in situations of serious human rights violations.[178] Issues have also arisen regarding membership of the Council. Although the Council recommended that the General Assembly remove Libya as a Council member in 2011,[179] similar concerns about Saudi Arabia's membership have gone unheeded.

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[171] ibid 50, although Scanella and Splinter express concern that the Council continued the trend, in its early stages, of working through regional groups, 70.

[172] For a more detailed critical assessment of the Human Rights Council see, for example: Philip Alston and Ryan Goodman, *International Human* Rights (Oxford University Press 2012), Rosa Freedman, *The Law, Policy and Politics of the UN Human Rights Council*, (Brill Nijhoff 2015); Michael Goodhart, *Politics and Practice* (2nd ed., Oxford University Press 2016), Freedman (n 1); Rhona Smith, '"To see themselves as the others see them": The five permanent members of the Security Council and the Human Rights Council's Universal Periodic Review', (2013) 35(1) Human Rights Quarterly 1-35; Subedi (n 14).

[173] Helen Upton, 'The Human Rights Council: First Impressions and Future Challenges' (2007) 7(1) Human Rights Law Review 29-39.

[174] Schrijver (n 1) 809.

[175] Freedman (n 1) 145.

[176] ibid 127.

[177] Jeroen Gutter, 'Special procedures and the Human Rights Council: Achievements and Challenges Ahead', 2007) 7(1) Human Rights Law Review 93-107, for details of current members, see 'Current membership of the Human Rights Council', http://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx last accessed 05 March 2018.

[178] Freedman (n 1) 197-251, with reference to Darfur, Sudan.

[179] In 2011, the Human Rights Council reaffirmed in the preamble to Special Resolution 15/1 that 'the United Nations General Assembly may suspend the rights of membership in the Council of a member that commits gross and systematic violations of human rights' and went on to recommend at paragraph 14 that Libya's membership be suspended, the US co-sponsored the resolution, UNHRC, 'Report of the Human Rights Council on its fifteenth Special Session', Resolution S-15/1 (25 February 2011) and UNGA 'Suspension of the rights of

One interviewee observed that Saudi Arabia 'systematically commits intimidation and reprisals against civil society actors seeking to engage with the Council and its mechanisms'.[180] For Richard Bennet, Head of Amnesty International's United Nations Office, the Council's failure to act puts its credibility at stake.[181] The Council's power to remove a member is evidence of formal power. [182] It is important that institutions use the powers bestowed upon them to be seen to be acting fairly (and thus command authority); subsequent adherence to founding principles and powers as part of the fulfilment by the Council of its governance function is vital.

Not addressing the issue of Saudi Arabia's membership is a potential governance failure on the Council's part that may betray the political influence of allies to Saudi Arabia, including the UK and the US.[183] If so, the US's decision to withdraw cooperation with the Council is all the more surprising.[184] To improve the standing of Council members, the INGO International Service for Human Rights produces a human rights 'scorecard' for states seeking membership, the scorecard is premised upon structural and process human rights

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membership of the Libyan Arab Jamahiriya in the Human Rights Council', A/RES/65/265 (01 March 2011), pursuant to UNGA A/RES/60/251 (n 143) para 8.

[180] Interview CSO 06.

[181] Human Rights Watch, 'UN: Suspend Saudi Arabia from Human Rights Council 'Gross and Systematic' Violations in Yemen Threaten Council's Credibility', 29 June 2016, https://www.hrw.org/news/2016/06/29/un-suspend-saudi-arabia-human-rights-council, Amnesty International, 'Suspend Saudi Arabia from UN Human Rights Council', 29 June 2016, https://www.amnesty.org/en/latest/news/2016/06/suspend-saudi-arabia-from-un-human-rights-council/ both last accessed 14 August 2017.

[182] UNGA A/RES/60/251 (n 143) para 8: 'General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights'.

[183] For example, the UK government's links with Saudi Arabia particularly in terms of the arms trade *R (on the application of Campaign Against Arms Trade) v The Secretary of State for International Trade* [2017] EWHC 1726 (QB). The continued sale of arms by the UK to Saudi Arabia has not only raised concerns about compliance with the UK's own checks and limits on such sales, but would appear to fall foul of 'European Parliament resolution of 25 February 2016 on the humanitarian situation in Yemen' (2016/2515(RSP)) calling for EU member states to implement an embargo on the sale of arms to Saudi Arabia.

[184] Nick Allen and Harriet Alexander, 'United States withdraws from UN Human Rights Council as criticism mounts over border policy' The Telegraph, 20 June 2018, https://www.telegraph.co.uk/news/2018/06/19/united-states-announce-withdrawal-un-human-rights-council/; Katrina Manson, 'US withdraws from Human Rights Council', *Financial Times*, 19 June 2018, https://www.ft.com/content/ebc12438-73f7-11e8-aa31-31da4279a601; Julian Borger, 'US quits UN Human Rights Council – 'a cesspool of political bias'' *The Guardian* (19 June 2018) https://www.theguardian.com/world/2018/jun/19/us-quits-un-human-rights-council-cesspool-political-bias all last accessed 10 July 2018.

indicators.[185] Judging the human rights merits of a state on this basis is not without issue, often such indicators do not truly reflect the extent of rights protection on the ground, as section 5.4, chapter 5 outlines.

2.2 UPR foundations, basis of review and objectives

In the context of the Commission's failings, a heavy burden was placed upon the Human Rights Council and its mechanisms, with some seeing the credibility of the Council being 'inextricably linked to the UPR'.[186] A key feature of the UPR's design is the 'universality of the review, which was guided by the principles of non-selectivity and equality of all States'.[187] As a result, both the functional nature of the UPR, underpinned by substantive matters relating to its objectives, and its structural nature, underpinned by procedure, serve to alleviate the weight of the Commission's legacy.

However, the functional and structural realisation of the UPR has generated complex challenges of its own. These are explored more fully in chapters 4, 5 and 6 and include issues of tangible state engagement and follow up; travel bans and reprisals against members of civil society;[188] and engagement with the UPR diluting the perceived need for some states to engage with other international human rights mechanisms.[189] Furthermore, the UPR risks being symptomatic of the bureaucratisation, institutionalisation and legalisation of human rights whereby global human rights institutions 'seek to translate the concerns of human rights – upholding human dignity, protecting the vulnerable, empowering the powerless, remedying wrongdoing – into processes and procedures', considered in section 4.4, chapter 4 and section 5.3, chapter 5.[190] Whilst the UPR's prescriptive procedural parameters ensure a non-selective approach they risk process compliance over substantive compliance, an issue also addressed in section 4.4.

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[185] 'HRC Election: How does Iceland Rate?', International Service for Human Rights, 06 July 2018, https://www.ishr.ch/news/hrc-election-how-does-iceland-rate, for additional scorecards see https://www.ishr.ch/news/hrc-elections-how-do-candidates-2018-rate both last accessed 16 August 2018.
[186] Lilliebjerg (n 127) 311.
[187] Statement by Venezuela, HRC General Debate on the UPR, 2017 (n 35).
[188] Dr Purna Sen, *Universal Periodic Review: Lessons, Hopes and Expectations*, (Commonwealth Secretariat, 2011).
[189] Interview CSO 01.
[190] Gerd Oberleitner, *Global Human Rights Institutions* (n 23) 14.

The UPR's two founding resolutions are General Assembly resolution 60/251, 'Human Rights Council'[191] and the annex to Human Rights Council resolution 5/1, 'Institution-building of the United Nations Human Rights Council', commonly referred to as the institution-building package.[192] General Assembly Resolution 60/251 requires 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 in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session.[193]

Subsequent to this resolution, Human Rights Council Resolution 5/1 details the basis of the review, its principles and its objectives. The UPR is a unique mechanism for three reasons. Firstly, its focus is not limited to a particular right or set of rights and all UN member states are subject to it, distinguishing the UPR from UN treaty committees on both counts. Secondly, international humanitarian law falls within the UPR's scope: paragraph 2 of resolution 5/1 refers to 'the complementary and mutually interrelated nature of international human rights law and international humanitarian law' advising that 'the review shall take into account applicable international humanitarian law'.[194] Thirdly, the peer review element is unique in the field of international human rights monitoring, though it features within other international institutions. Indeed, the architects of the UPR

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[191] UNGA A/RES/60/251 (n 143).
[192] UNHRC A/HRC/RES/5/1 (n 9).
[193] UNGA A/RES/60/251 (n 143) para 5(e).
[194] Recommendations made during the first two cycles that referred to international humanitarian law as coded by UPR Info amount to 713 (233 first cycle, 480 second cycle) make reference primarily to child soldiers, ratification and/or compliance with Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. On occasion there is reference to a specific matter, for example, Canada recommended that Somalia 'Take clear steps to ensure that Somali security forces (and militias under its purview) comply with international human rights law and international humanitarian law, including by integrating human rights training into security sector reform programmes'. This recommendation gives clear instructions as to specific action (and is coded as action category 5 – see chapter 5 of this thesis for an account of UPR Info's coding of recommendations), and was supported by Somalia, UPR-Info database, with filter 'international humanitarian law' searched against all cycles, UPR Info: Statistics of Recommendations (n 126).

investigated peer review in other institutions such as the OECD (Organisation for Economic Cooperation and Development), the World Trade Organisation and the African Union.[195]

The UPR's peer review element might be seen as flouting principles of sovereignty and non-interference by creating the conditions in which one state seeks to inform and influence another state's domestic and internal affairs and makes direct comment upon a state's perceived failings.[196] This matter is given further thought in chapter 4, section 4.1.3. Suffice to say there appears to be little evidence of this having prompted concern, save for comments made by Syria at the opening of its second cycle review when it declared its commitment to universal human rights and the building of a democratic society but stated it was only willing to accept advice from certain African, Asian and Latin American countries.[197]

The institution-building package outlined in Resolution 5/1 states that UPR is to be based upon:

(a) the Charter of the United Nations,
(b) the Universal Declaration of Human Rights, human rights instruments to which a State is party (namely, international human rights treaties), and
(c) voluntary pledges and commitments made by States.[198]

The UPR's objectives are broad, referred to in paragraph 4 of Resolution 5/1 in the following terms:

(a) The improvement of the human rights situation on the ground;
(b) The fulfilment of the State's human rights obligations and commitments and assessment of positive developments and challenges faced by the State;
(c) The enhancement of the State's capacity and of technical assistance, in consultation with, and with the consent of, the State concerned;

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[195] Interview UN 01. Scanella and Splinter refer to peer review in the Council of Europe, The International Atomic Agency, the International Labour Organization, the International Monetary Fund, the New Partnership for Africa's Development, the Organisation for Economic Co-operation and Development, the Organisation of American States and the World Trade Organisation, Scanella and Splinter (n 164) 63-64.

[196] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, for a discussion of the principle of non-intervention, or non-interference see Marcelo Kohen, 'The Principle of Non-Intervention 25 years after the *Nicaragua* judgment' (2012) 25 Leiden Journal of International Law 157–164.

[197] The delegation's view was that Western countries had no right to provide human rights advice given their role in, for instance, conflicts in Libya and Iraq and, furthermore, their colonial legacy, as referred to in Riches (n 8) 173.

[198] UNHRC A/HRC/RES/5/1 (n 9) Section A: 'Basis of the Review', paras 1, 2 and 3.

(d) The sharing of best practice among States and other stakeholders;

(e) Support for cooperation in the promotion and protection of human rights;

(f) The encouragement of full cooperation and engagement with the Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights.

The spirit of this lexicon is undoubtedly aspirational. Guiding principles are for the process to be neither 'overly burdensome' nor 'overly long', and not to absorb 'a disproportionate amount of time, human and financial resources'.[199] The mechanism should not 'diminish the Council's capacity to respond to urgent human rights situations', a gender perspective should be fully integrated and, as noted above, the participation of all relevant stakeholders, including NGOs and NHRIs is to be ensured.[200] The requirement for the review to be based upon objective and reliable information provides a yardstick against which the content of the national report can be measured in the broader context of treaty body findings and stakeholder submissions.

The UPR's founding resolutions have been augmented by subsequent resolutions.[201] In 2009, an open-ended intergovernmental working group was established to review the Council's work and functioning. The Council subsequently adopted the group's outcome document as a means of supplementing the institution-building package of Resolution 5/1, and improving procedural and operational aspects of the UPR.[202] Developments included: increasing the sixty minutes previously allocated to the SuR to speak during the Working Group to seventy minutes; a state's Working Group being increased from three hours to three hours and thirty minutes; and the length of each UPR cycle increased from four years to four and a half years for the second cycle and five years for the third.[203]

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[199] ibid para 3 (h)-(l).
[200] ibid (n 9) para 3(a)-(m).
[201] Namely, UNHRC 'Follow-up to Human Rights Council resolution 5/1' A/HRC/DEC/6/102 (27 September 2007); 'Review of the work and functioning of the Human Rights Council', 25 March 2011 adopted by Human Rights Council Resolution 16/21, A/HRC/RES/16/21, 12 April 2011; 'Follow-up to the Human Rights Council resolution 16/21 with regard to the universal periodic review', A/HRC/DEC/17/119, 19 July 2011, (which includes general guidelines for the preparation of information under the Universal Periodic Review); Letter from President of the Human Rights Council on rules and practices of the Universal Periodic Review Working Group, 18 September 2013.
[202] UNHRC A/HRC/RES/16/21 (n 201).
[203] The Human Rights Council sought to address the time constraints prior to the start of the UPR's second cycle, A/HRC/DEC/17/119 (n 201): the review within which the interactive dialogue takes place shall be

It was determined that member states should have three minutes during the interactive dialogue in which to speak, and observer states two minutes. In the event of insufficient time for all states registered to speak, the time available would be divided equally between all states; this appears to now be the standard approach, at times amounting to as little and one minute ten seconds.[204] It was agreed that the first cycle timetable of reviews would apply to the second and subsequent cycles, and that improvements to the Working Group report should be made, including the thematic clustering of recommendations.[205] In terms of strengthening the UPR following the first cycle, it was agreed that 'the second and subsequent cycles of the review should focus on, inter alia, the implementation of the accepted recommendations and the developments of the human rights situation in the SuR',[206] but no specific or tangible direction as to how focus on implementation should be achieved was proffered at that stage.

The changes are merely procedural; there is no evidence of a review of the substance of the UPR having been conducted five years after the mechanism began.[207] For some, the requirement for a review in five years was set to calm the minds of those states that may have been reluctant to initially give their full support to the UPR, with five years in truth being too short a time within which to conduct a full and substantive review.[208]

2.3 UPR procedure, the Working Group and the interactive dialogue

This section describes the process and modalities of the UPR and the documentation upon which the review is based. It discusses the interactive dialogue that is the mainstay of the Working Group in Geneva. It does so by way of context and to provide a reference point for the theoretical and conceptual analysis of chapter 3 that follows. A critical discussion of the challenges that the UPR's procedure, Working Group and interactive dialogue give rise to in relation to the global governance function of the UPR takes place in chapter 4.

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extended to three hours and thirty minutes and that member States shall have 3 minutes in which to speak, and observer States 2 minutes. However, in the event of that not permitting sufficient time for all those States that have registered to speak, the time available shall be divided equally between all States, paras 3-8.
[204] Author's own notes from observing UPR Working Groups in January 2014 and May 2017.
[205] A/HRC/DEC/17/119 paras 1 and 15, respectively.
[206] ibid para 6.
[207] UNGA A/RES/60/251 (n 143) para 16, and to report to the General Assembly as to the review.
[208] Interview CSO 02.

Each member of the UN is scheduled for one review during each UPR cycle, this means a review once every five years given the extended length of a UPR cycle from the third cycle onwards. There are three phases of the UPR. The first is the production of relevant documentation to inform the review, the second is the Working Group hosted by the OHCHR at the UN headquarters in Geneva, the third is follow up and implementation, including mid-term reporting. To date, there has only been one occasion when a state has not appeared before the Working Group as per the UPR timetable, and this was soon rectified.

Israel's second cycle review was scheduled during the UPR's 15th session, however Israel declined to engage due to its ongoing suspension of relations with the Council and the OHCHR at that time. It had suspended relations in response to being on the Council's regular session agenda under standing item 7 which it perceived to be an act of discrimination and unfair treatment.[209] Israel's lack of cooperation prompted a request for 'all appropriate steps and measures' to be taken to secure engagement.[210] Following diplomatic discussions, Israel's review was rescheduled for the 17th UPR session and a state delegation duly attended, meaning the Council narrowly avoided Israel being the first state to refuse to engage at all with the UPR.[211]

2.3.1 Process and modalities – documentation

Three documents are produced in anticipation of a state's UPR that form the basis of the review. These are a national report, an OHCHR compilation of UN information and an OHCHR summary of stakeholder submissions.[212] Approximately two months before its Working Group, a national report of no more than 20 pages produced by the SuR,[213] is due for submission to the OHCHR, allowing the OHCHR to produce and make available translated versions of the same.[214] The Council encourages states 'to prepare the information through

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[209] UNHRC 'Report of the Working Group on the Universal Periodic Review: Israel', A/HRC/25/15, 19 December 2013, paras 6 and 7.
[210] UNHRC 'Report of the Human Rights Council of its seventh organizational meeting', A/HRC/OM/7/1, 04 April 2013.
[211] ibid para 5.
[212] UNHRC A/HRC/RES/5/1 (n 9) para 15
[213] ibid para 15 (a).
[214] 'Both the State's written presentation and the summaries prepared by the Office of the High Commissioner for Human Rights shall be ready six weeks prior to the review by the working group to ensure the distribution of documents simultaneously in the six official languages of the United Nations, in accordance with General Assembly resolution 53/208 of 14 January 1999', ibid para 17.

a broad consultation process at the national level with all relevant stakeholders'.[215] The nature of consultation varies significantly from one state to another; at one end of the spectrum are those states seeking to actively engage with civil society, for example New Zealand, whilst at the other end are those states for whom such consultation presents a challenge due to ongoing conflict, such as Yemen.[216] Whilst the convention is to submit a written report, it would appear this is not compulsory: 'information prepared by the State concerned (…) *can* take the form of a national report' (emphasis added).[217]

For the third cycle, the OHCHR issued supplementary guidance for the national report encouraging a comprehensive focus on follow up and implementation.[218] The guidance refers to good practice and the use of headings to structure content, as well as practical suggestions and technical guidance.[219] In addition, states are urged to provide information as to normative and institutional framework developments since the previous review.[220] This reflects a desire to harmonise the approach of states, no doubt driven by concerns of variance in terms of consultation and methodology and the reliability and detail of the national report's content.[221] According to Freedman, during the first cycle 'the majority of states cooperated to a large extent with the collation of materials'.[222] Exceptions fell into two categories: those that might have been expected to refuse to engage at all such as the Democratic People's Republic of Korea (DPRK), 'for whom failure to fully cooperate was still a 'success'' and, secondly, those states with limited resources for the collation of materials, such as Comoros.[223]

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[215] ibid para 15 (a).

[216] UNHRC 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: New Zealand' A/HRC/WG.6/18/NZL/1 (08 November 2013) paras 7-10 and 17. See section 7.4, chapter 7 of this thesis for a discussion of Yemen's consultation during the preparation of its second cycle national report, and intention for the third cycle.

[217] UNHRC A/HRC/RES/5/1 (n 9) para 15 (a).

[218] OHCHR '3rd Cycle Universal Periodic Review National Report – Guidance Note' https://www.upr-info.org/sites/default/files/general-document/pdf/ohchr_guidance_national_report_3rdcycle_en.pdf last accessed 19 June 2018.

[219] ibid 1-2.

[220] A/HRC/DEC/17/119 para 2B, additional guidance for the report's focus is referred to in paragraph 2 of this decision.

[221] Sen (n 188) 12 and 21, reporting that Interviews with a selection of commonwealth states revealed that a somewhat haphazard and uncoordinated approach characterised preparations for the UPR's first cycle and undermined the quality of state reports and civil society's capacity to engage.

[222] Freedman (n 1) 262.

[223] ibid 262. A review of the UPR documentation via the OHCHR portal by the author of this thesis reveals the DPRK's national report is dated 27 August 2009, well ahead of its first cycle review on 07 December 2009,

In addition, the OHCHR produces a compilation report limited to 10 pages summarising 'information contained in the reports of treaty bodies and special procedures, including observations and comments by the State concerned, and other relevant official United Nations documents'.[224] It also identifies where a state has made progress.[225] The convention during the first and second cycles was to include at the head of this report a table detailing the state's reporting obligations to relevant treaty bodies and whether those obligations had been met. In addition, cooperation with special procedures and whether standing invitations had been issued or not was noted. This approach does not appear to have been adopted during the third cycle.[226]

The deadline for civil society and other stakeholders to make written submissions to the OHCHR, of no more than 10 pages in length,[227] is between six and eight months before the Working Group takes place.[228] The OHCHR produces a summary of the submissions received, thematically collating matters of concern. It publishes in full only those submissions and annexes to the submissions referred to in the summary document for member states to access.[229]

'Universal Periodic Review: Documentation by Country',
http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx last accessed 22 August 2018. The first cycle national report of Comoros appears to have been late; the report is undated but available only in French, unlike the second cycle national report available in translation, and dated 08 November 2013, the Working Group being on 31 January 2013, 'Universal Periodic Review: Comoros'
http://www.ohchr.org/EN/HRBodies/UPR/Pages/KMIndex.aspx last accessed 22 August 2018.
[224] UNHRC A/HRC/RES/5/1 (n 9) para 15 (b).
[225] Evidence of Tunisia being more open to the international human rights regime complex, for example, extending an open invitation to all special procedures mandate holders with visits at the time of the third cycle UPR (May 2017) having taken place, and strengthening the legislative framework enacting a range of national human rights legislation, 'Report of the Office of the United Nations High Commissioner for Human Rights: Tunisia', A/HRC/WG.6/27/TUN/2, 20 February 2017, paras 9 and 10 respectively.
[226] This is according to a review of OHCHR compilation reports by the author that have been submitted during the various UPR cycles, 'Universal Periodic Review: Documentation by Country' (n 223).
[227] UNHRC A/HRC/RES/5/1 (n 9) para 15(c).
[228] Stakeholder submissions for those states under review during the UPR's 27th session (the first UPR session of the third cycle) were due 22 September 2016 for a review period that commenced 01 May 2017, just over seven months before the review, submissions for the 28th session were due 30 March 2017 just over 6 months before the review period that commenced 06 November 2017, OHCHR '3rd UPR cycle: contributions and participation of "other stakeholders" in the UPR (Last update: 22 May 2017)',
http://www.ohchr.org/en/hrbodies/upr/pages/NgosNhris.aspx last accessed 22 February 2018.
[229] OHCHR 'Universal Periodic Review (Third Cycle): Information and guidelines for relevant stakeholders' written submissions', para 7(d), https://www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx last accessed 09 July 2018.

2.3.2 Process and modalities – the Working Group

The cornerstone of the UPR is the Working Group, which incorporates the 'interactive dialogue', described in the paragraph below. This takes place in Geneva at the UN headquarters, Palais des Nations. It is a formal process that has been likened to both positive and negative aspects of ritual and ritualism, examined in section 4.4, chapter 4.[230] Reviewing states are also permitted to table advance questions to the SuR, as discussed in section 5.3.4, chapter 5. The Working Group is facilitated by a troika comprising representatives from three Council member states chosen by the drawing of lots.[231] An SuR can request for one troika member to be from its own regional group, and may make a single request for one troika member to be substituted.[232]

The interactive dialogue involves peer-led review, although the extent to which it is interactive or characterises a dialogue is questionable. At three and a half hours in length it does not permit in depth investigation or consideration.[233] Nonetheless, the interactive dialogue is an innovation providing a space for a plurality of voices via which opinions are shared. It encapsulates the normative character of the UPR; encouraging changes in state practice to more fully align with universally agreed human rights principles and norms. The peer review character by state actors and the process of commenting, observing and making recommendations divorces the UPR mechanism from being a pure assessment of progress against legal obligations. It is a forward-looking governance process, as well as a reflection upon achievement against previous pledges and commitments that involves an element of exchange.

Part of this exchange includes up to 70 minutes for the SuR to make a verbal contribution. This is divided between an opening statement, during which the delegation generally speaks to the national report, has two opportunities to respond to comments and questions including advance questions, and then makes a closing statement.[234] During this time, the SuR might respond to advance questions and those made by reviewing states during the interactive dialogue. Despite the limited time, what is striking about the interactive dialogue

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[230] Charlesworth and Larking (n 3).
[231] UNHRC A/HRC/RES/5/1 (n 9) para 15(d).
[232] ibid para 19.
[233] ibid para 21.
[234] Author's notes during UPR observation.

is that pertinent human rights challenges faced by an SuR are soon revealed via the comments, observations and themes of the recommendations made; they rise to the surface on a global stage from which there is no hiding.

The interactive dialogue is a distinguishing feature of the UPR compared to other international human rights monitoring mechanisms structured as it is around peer review.[235] The peer review at the heart of the interactive dialogue was preceded by proposals for a working group made up of fifteen experts, but this was not welcomed by member states.[236] During discussions and negotiations as to the design of the UPR there was talk of it being called a Universal *Peer* Review; the words 'peer' and 'periodic' were often used inter-changeably, with 'peer' ultimately disappearing in name but not in nature.[237] The peer review within the interactive dialogue allows equal treatment of all states so that states are heard in equal measure. This creates a parity of treatment, a novelty in relation to the five permanent members of the UN Security Council[238] which dominate some of the most important international relations decisions. Such parity of treatment is fundamental given the legacy of the Commission set out above.

The interactive dialogue is designed to be progressive and focus on capacity-building needs. It involves comment, reflection and feedback from the SuR which might include reports on progress and implementation, and action taken to address nepotism and corruption within the state's government.[239] In addition, there are examples of general requests for support from the international community to assist a state in meeting its obligations and addressing its challenges.[240] Observation of the interactive dialogues of a number of SuRs revealed that

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[235] This is process is distinct from that of treaty committees in which the rights position of the state being reviewed is measured and commented upon by a panel of independent experts that comprise the treaty committee and the approach adopted is inquisitorial.
[236] Interview UN 01.
[237] Gaer (n 127) 111-112; Freedman (n 1) citing Speech of Secretary-General Kofi Annan to the Commission on Human Rights, 'Reforming UN Human Rights Machinery', 7 April 2005, UN Press Release SG/SM/9808 HR/CN/1108.
[238] Smith '"To see themselves as the others see them"' (n 172).
[239] Author's notes during UPR observation.
[240] As was the case during Afghanistan's second cycle UPR, author's observation of the UPR 18th session, January 2014.

the interactive dialogue is also informed by important contemporaneous matters of concern.[241]

As noted, the UPR is not the first international mechanism featuring peer review. The OECD has used peer review since the organisation's inception over 50 years ago.[242] It oversees a peer review of each country based on a similar periodicity to the UPR, being once every 4-5 years. The OECD peer review is driven by objectives that include accountability and learning and it is these objectives that are to be equally applied to all countries, although the OECD does acknowledge that each peer review should be situated within its own context with recommendations being adjusted accordingly.[243]

In 2010, the Financial Stability Board (FSB), which is linked to the International Monetary Fund (IMF) and the World Bank, started a thematic and country peer review process. This is undertaken as a means to encourage consistent implementation, to evaluate whether standards and policies have their intended results, and 'to identify gaps and weaknesses in reviewed areas and to make recommendations for potential follow-up'.[244] Furthermore, the FSB review is based on principles that include complementarity, transparency and engagement, which echo the objectives and principles of the UPR.

Peer review has been described by Fabricio Pagani as:

> (…) the systematic examination and assessment of the performance
> of a state by other states, with the ultimate goal of helping the

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[241] During Cambodia's review in January 2014 a number of states expressed concern about the government's handling of demonstrations by garment workers earlier that month, with the majority requesting a credible investigation into the incidents and a lifting of the ban on peaceful assembly. The response of the Cambodian delegation was that the ban on peaceful assembly was in line with the country's sovereign laws. Another example is Bahrain's review during May 2017 at which concern was expressed that members of civil society had been refused permission to travel to attend the UPR, author's notes during observation at the UPR, 18th session January 2014 and 27th session May 2017.

[242] OECD 'The OECD's Peer Review Process: a tool for cooperation and change', http://www.oecd.org/site/peerreview/ last accessed 22 August 2018.

[243] OECD 'DAC peer Review Assistance Guide', *OECD Development Co-Operation Directorate, Development Assistance Committee*, DCD/DAC (2014) 52, 23 October 2014, http://www.oecd.org/dac/peer-reviews/DCD-DAC%282014%2952_Reference%20guide%202015-16.pdf last accessed 22 August 2018.

[244] 'Handbook for Financial Stability Peer Reviews', 12 March 2015 (which replaces earlier versions), 2, http://www.financialstabilityboard.org/wp-content/uploads/FSB-Peer-Review-Handbook-12-March-2015.pdf last accessed 2 July 2015.

reviewed state improve its policy making, adopt best practices and
comply with established standards and principles.[245]

Pagani goes on to explain that under peer review, examination is non-adversarial and, where an international organisation is involved, depends for its success on the support of the secretariat and the reciprocity and mutual accountability of the states involved.[246] Pagani's view is that the impact of peer review 'will be greatest when the outcome of the peer review is made available to the public…. When the press is actively engaged with the story, peer pressure is most effective. Public scrutiny often arises from media involvement.'[247] UPR media coverage is relatively minimal; the timing of the UPR's 18th session in January 2014 coincided with Syria II Peace talks in Geneva, whilst the peace talks attracted the attention of the world's media comparatively little was said of the UPR.[248]

One criticism of the UPR is that states with questionable human rights records are given the floor, albeit for a short amount of time, in which to comment and recommend on matters when the same or similar issues are far from resolved in their own 'back yard'.[249] This may be so, but an exclusionary approach would reincarnate the problems of the Commission. It would also detract from the character of the interactive dialogue in creating a unique space that accommodates diverse voices and fosters multi-directional interaction within a forum that is universal in terms of structure, scope and participation.

2.3.3 Process and modalities – outcome of the Working Group

Under Resolution 5/1, the outcome of a state's UPR can involve: an assessment of the human rights situation including reference to positive developments and challenges; sharing of best practices; an emphasis on enhancing cooperation for the promotion and protection of human rights; commitment for the provision of technical assistance and capacity-building

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[245] Fabrizio Pagani, 'Peer Review: A Tool for Co-operation and Change, An Analysis of an OECD Working Method', (2002) 11 African Security Review 15, 15.

[246] ibid 15-16.

[247] ibid 16.

[248] A search via Google using the term 'Syria II Peace talks media coverage' revealed 31 separate news outlets reporting on the talks, whereas a search of 'Yemen Universal Periodic Review 2014' revealed only two reports referring to Yemen's second cycle UPR, aside from United Nations press and comments by NGOs and international NGOs, one of which was attributed to the Yemen Times, the other was a blog post, www.google.co.uk, search carried out on 02 July 2015.

[249] Human Rights Voices 'UN Rights Council trumpets process of equating Norway with Iran and company', 28 April 2014, regarding recommendations made to Norway during the UPR's 19th session by Iran, Russia, Saudi Arabia and Sudan, http://www.humanrightsvoices.org/site/developments/?d=12139 last accessed 22 August 2018.

in consultation with, and with the consent of, the country concerned; and, voluntary commitments and pledges made by the country under review.[250] As chapter 5 discusses, these are soft outcomes, they do not refer to output as such.

Some three to four days after the Working Group, the troika presents the Working Group Report summarising 'the proceedings of the review process; conclusions and/or recommendations, and the voluntary commitments of the State concerned'.[251] The report is a factual summary; it is not an endorsement of the recommendations that have been made or an affirmation of the SuR's response.[252] Prior to its formal presentation, the SuR can provide replies to questions or issues that were not sufficiently addressed during the interactive dialogue and can review the draft report.[253] At the subsequent Council regular session the agreed report is tabled for formal adoption and the SuR must state its position in relation to all recommendations, explaining its reason for noting certain recommendations.[254]

An indicator cited as evidence of the UPR's success is that the majority of recommendations are supported by SuRs.[255] By stating its support, an SuR indicates that it accepts the substance of a recommendation and commits to implementation. This support is superficial if little follow-up occurs; there is evidence during the early stages of the third cycle that state practice is changing with some states supporting a lower proportion of recommendations

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[250] UNHRC A/HRC/RES/5/1 (n 9), in relation to the provision of technical assistance, it is noted in resolution 5/1 that 'a decision should be taken by the Council on whether to resort to existing financing mechanisms or to create a new mechanism' para 27.

[251] ibid para 26.

[252] 'Modalities and Practices for the Universal Periodic Review Process', Statement of the President of the Human Rights Council, 8/PRST/1, 09 April 2008, http://ap.ohchr.org/documents/E/HRC/p_s/A_HRC_PRST_8_1.pdf para 8, last accessed 05 March 2018. In addition, Human Rights Council President H. E. Mr Joaquin Alexander Maza Martelli, speech at the opening of the third cycle, author's notes UPR 27th session (n 241).

[253] UNHRC A/HRC/RES/5/1 (n 9) para 29.

[254] 'Recommendations that enjoy the support of the State concerned will be identified as such. Other recommendations, together with the comments of the State concerned thereon, will be noted. Both will be included in the outcome report to be adopted by the Council', ibid para 32. A reminder of this was given by the Human Rights Council President, H. E. Mr Joaquin Alexander Maza Martelli, (n 252).

[255] It was reported that during the first cycle 'over 21,000 recommendations were issued and 74 per cent of those recommendations were accepted by the states under review', 'Beyond Promises: the Impact of the UPR on the Ground', (UPR Info report, November 2014) 13 http://www.upr-info.org/sites/default/files/general-document/pdf/2014_beyond_promises.pdf last accessed 26 February 2018.

compared to previous cycles.[256]   This might indicate states taking the renewed focus on implementation seriously and is given further thought in section 5.3.4, chapter 5.

Whilst there is no explicit sanction for those states that do not implement recommendations, provided it has exhausted 'all efforts to encourage a state to cooperate with the universal periodic review mechanism', the Council may be requested to 'address, as appropriate, cases of persistent non-cooperation'.[257] It is possible that a failure to implement accepted recommendations will emerge as amounting to 'persistent non-cooperation' however, there is no evidence of this as yet.

Following the Working Group, the SuR is encouraged to devise an implementation plan and to provide an update as to progress against this plan at the mid-term point. This is a voluntary process that has emerged over the course of the UPR's lifetime. As of July 2018, mid-term reports relating to the first and second cycles of the UPR had been submitted by a total of 74 members states. Of these, 55 states had submitted mid-term reports relating to the first cycle, 15 submitted for the first and second cycles, and 34 for the second cycle only, although not all states are at the mid-term point following the second cycle.[258] Responsibility for implementation falls to the SuR and to 'relevant stakeholders'.[259] The submission of mid-term reports by NGOs at the time of writing totals only twelve.[260] This suggests the voluntary approach is not effective compared to universal submission of national reports and the number of stakeholder submissions the OHCHR receives.

Conclusion

This chapter has addressed the conditions under which the Commission was disbanded and the Council and the UPR were conceived. The UPR heralded a turning point for UN international human rights monitoring and reporting mechanisms in part by presenting an

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[256] Based on data extracted from UPR Info database, during UPR session 27, the first session of the third cycle, for example, Bahrain noted 59% of the recommendations it received (1st cycle 11%, 2nd cycle 25%), Ecuador noted 14% in the third cycle (2nd cycle 2% and 1st cycle 0%), Tunisia noted 24% in the third cycle (2nd cycle 13%, 1st cycle 0%), and the UK noted 59% in the third cycle (2nd cycle 34%, 1st cycle 37%) UPR Info: Statistics of Recommendations (n 126).
[257] UNHRC A/HRC/RES/5/1 (n 9) para 38.
[258] OHCHR 'UPR mid-term reports', updated 06 July 2018, http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx last accessed 10 August 2018.
[259] UNHRC A/HRC/RES/5/1 (n 9), para 33.
[260] One submission for Bangladesh, two for China, two for Denmark, one for Germany, one for Honduras, one for Lebanon, one for Singapore, and two for the United States, OHCHR 'UPR mid-term reports' (n 258).

entirely new mechanism structured around a process and procedure premised upon equal treatment of states and non-selectivity. For many, the UPR has proved itself to be an 'innovation'.[261] It can be concluded that the UPR's design, as distilled in its founding instruments set out in this chapter, has been successful in eschewing the partisan legacy of the Commission and its politicised focus on some states and not others.

However, the Council's review of the UPR's operation after five years was satisfied in a cursory manner involving minor adjustments to procedural and operational aspects rather than substantive matters being reflected upon. In order to improve the substance of the UPR, a focus on implementation was encouraged for the second cycle and has been treated as a priority for the third. To enhance this focus, states are being encouraged to set up a national reporting and follow up mechanism mandated to report on UPR follow up.[262] This will take time to take root; as chapter 4 shows, some states are already moving in this direction but, as with mid-term reports, this is an emerging and voluntary practice; given the stretched resources and capacity of states in crisis it is unlikely to be adopted by those states in the immediate future.

In detailing the documentation produced in anticipation of a state's review section three of this chapter demonstrates the UPR's role in collating information from a variety of sources. This is addressed further in chapters 4 and 5 as part of the UPR's multi-directional function within the 'international human rights regime complex'. In 2011, the Council issued further guidance urging states to describe their consultation methodology in the national report.[263] This relates directly to the governance function of the UPR discussed in the chapters that follow, and proposals are made in this respect in the concluding chapter of this thesis.

The third section also confirms the distinctiveness of the UPR in terms of its structure around peer review and its inclusive approach, both of which are a novelty in the field of international human rights monitoring. Unlike the treaty monitoring system, the UPR encompasses all states regardless of the human rights treaties a state has or has not ratified

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[261] Alston (n 1) 186; Freedman (n 1) 297-302; Smith 'China's Contribution to Human Rights through the UPR' (n 135); UNHRC Annual high-level panel discussion (n 36).

[262] OHCHR 'National mechanisms for reporting and follow up: briefing for UPR delegations', 29th UPR WG, January 2018, OHCHR, http://www.ohchr.org/Documents/HRBodies/UPR/National_Mechanisms_Reporting_Follow-up.pdf last accessed 27 February 2018.

[263] A/HRC/DEC/17/119 para 2B.

and fosters state participation both as a peer reviewing state and as an SuR. As with other monitoring mechanisms, state engagement with the UPR is not mandatory, yet as evidenced above, the UPR has thus far succeeded in securing universal engagement in terms of state's submitting reports, attending reviews and giving a response to recommendations.[264]

As a mechanism designed in part to rectify the partisan and selective nature of the Commission, the UPR is therefore a resounding success. Unsurprisingly, the UPR has generated challenges of its own; the limited time of the Working Group may well encourage engagement but presents a struggle in facilitating a truly interactive and in-depth dialogue, although state missions generally succeed in keeping to time whilst conveying prepared comment and recommendations as well as matters of contemporaneous concern.[265]

Additional challenges posed by the UPR, that are not necessarily unique to it, include the bureaucratisation of human rights, politicisation through the recommendation process and giving voice to states known as human rights abusers. These, and others, are explored in further detail in chapters 4, 5 and 6. Notwithstanding these challenges, the UPR's interactive dialogue creates a unique space that accommodates a diversity of voices and opinions and fosters multi-directional interaction within a forum premised upon equal treatment.

There are, however, no formal or legal powers vested in the UPR or the Council to take measures against a state that fails to substantively engage by way of implementing accepted recommendations. One interviewee suggests there should be some power to act in relation to Council membership.[266] It may be, as considered above, that a lack of implementation is ultimately defined as persistent non-cooperation. In the meantime, the UPR remains toothless in terms of enforcement. With this comes the risk that some states treat the UPR as a minimum core that absolves responsibility and commitment to engage substantively with other international human rights monitoring mechanisms, as one interview quoted in section 5.3.2, chapter 5, suggests.

Nonetheless, the normative weight of the UPR is significant; thanks to the UPR, the active participation of states involved in human rights monitoring has transitioned from a markedly

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[264] Though arguably the process is compulsory in the terms of enabling Resolution 60/251, UNGA A/RES/60/251 (n 143), Smith 'China's Contribution to Human Rights through the UPR' (n 135) 89-90.
[265] See reference to Cambodia's second cycle review and Bahrain's third cycle review (n241).
[266] Interview CSO 06.

'Western-dominated body'[267] to that which now involves all UN member states. In this respect, the UPR successfully champions an inclusive approach to rights protection and realisation. Yet, as the UPR progresses through the third cycle the gloss of novelty and achievement loses its sheen and pertinent matters of follow up and implementation, and consultation with civil society during the UPR process,[268] come into sharp focus.

It is in this context that this thesis now proceeds to chapter 3 to interrogate the concept of global governance theory and practice, and its application to the UPR as a means of determining the legitimacy and authority of the UPR in general and its global governance function in relation to states in crisis in particular.

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[267] Schrijver (n 1) 812.
[268] UNHRC A/HRC/RES/5/1 (n 9) para 15(a).

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Chapter 3: On Global Governance: Legitimacy and Authority

Introduction

This chapter critically assesses the meaning of the concept of global governance, which is contested and complex. This assessment is undertaken in the context of this thesis analysing the legitimacy and authority of the UPR, particularly in relation to states in crisis, through the lens of global governance. There are three principal reasons driving this thesis's examination of the UPR mechanism in this way. Firstly, global governance scholars' focus on legitimacy and authority as key determinants of governance, and it is the legitimacy and authority of the UPR that is questioned in the face of the non-implementation of recommendations.

Secondly, there is an emerging body of scholarship whereby entities with a global governance function are being discussed regarding their function relative to other entities within the same 'regime complex', and this approach is adopted in this thesis to further model the UPR's governance function. Although the work on regime complexes is largely the domain of international relations scholars, the regime complex is an apt concept for a socio-legal study such as this thesis given the UPR's political nature as an inter-governmental mechanism centred upon peer review by other states. According to Ersan Ozkan and Hakan Cem Cetin:

> (…) for a regime to exist there should be cooperation among the actors… regimes facilitate the 'institutionalization' of a chaotic - if not anarchic - environment, namely international arena'.[269]

A regime therefore seeks to promote and create a normative environment. A regime complex, as discussed below in section 3.4, consists of several regimes or entities operating to address the same/similar matter or issue. This reflects the 'problem diversity' of the particular issue at the centre of the regime complex.[270] It can also give rise to 'regime collision', whereby there may be a conflict of laws between one regime and another within

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[269] Ersan Ozkan and Hakan Cem Cetin, 'The Realist and Liberal Positions on the role of International Organizations in Maintaining World Order' (2016) 12 (17) The European Scientific Journal 85-96, 88.
[270] Keohane and Victor (n 5) 13 whereby 'problem diversity' refers to the variety of problems inherent to a particular challenge.

the same complex, or an overlapping of the scope of one regime with another.[271] One

consequence is that the subjects of a regime complex can take advantage of the conflict or

overlap between regimes, having the benefit of an element of choice as to which entity

within the complex to engage with to better suit the subject's needs.[272]

Thirdly, legitimacy and authority are complex concepts that do not focus solely upon output

meaning that the conceptualisation of a governance regime complex in the context of

international human rights is especially apt due to the particular operation and function of

the UPR.[273] Exploring the application of these concepts to the UPR in the context of global

governance relieves the pressure imposed by a binary perspective that otherwise limits an

assessment of the UPR to one based upon output. Determining legitimacy and authority

only by a mechanism's output risks the UPR being dismissed as ineffective if states,

particularly those in crisis, do not implement and/or tangibly follow up recommendations.

The purpose of this chapter is to therefore explore key literature that discusses the concept

and definition of global governance and the meaning of 'regime complex'. As part of this

process some consideration is given to the application of the conceptual framework of global

governance to the UPR, but this is primarily undertaken in chapters 4, 5 and 6 that follow.

This chapter comprises four sections. The first evaluates the evolution of global governance

theory and its definition over the last few decades. In the second section, thought is given to

the meaning of legitimacy and authority as being central to a governance entity maintaining

its credibility and influence.

The third section introduces global governance in the context of international human rights

monitoring and opens the discussion of the non-state actor role of civil society in the

international human rights monitoring process. It also includes brief discussion of related

concepts of new / experimentalist governance and global constitutionalism. The final

section explores the concept of a regime complex, which is then further developed in

chapter 4. With reference to the work of Robert O. Keohane and David Victor on regime

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[271] Gunther Teubner and Andreas Fishcer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the fragmentation of Global Law' (2004) 25 Michigan Journal of International Law 999 and Neil Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press 2015) 106-114.
[272] See section 4.1.4 chapter 4 below and Keohane and Victor (n 5) 15.
[273] Keohane and Victor (n 5) 5.

complexes,[274] this chapter concludes that the UPR mechanism is a single governance entity situated within a proposed 'international human rights regime complex'.

3.1 Conceptualising Global Governance

This section firstly considers how a perceived need for governance at a global level has developed, including but not limited to human rights. It then proceeds with a critical deliberation of the definition and evolution of global governance theory.

3.1.1 The currency of global governance

The concept of governance and its application at the global level has emerged as a topic of debate, inevitable given that 'global governance institutions are novel, still evolving'.[275] Daniel Bodansky suggests that part of the reason for the legitimacy of international institutions having been largely overlooked is that until recently they have '…generally been so weak – they have exercised so little authority – that the issue of their legitimacy has barely arisen'.[276] In the current climate of international and global institutions seeking to assert and expand their authority, the matter of legitimacy is pertinent and crucial in securing and maintaining the perceived need for international organisations with a governance function at a global level.

In the last two to three decades, the concept and theory of global governance has emerged in tandem with discussions regarding the meaning and manifestation of transnational networks and communities of practice,[277] the operation of regulation in the context of globalisation,[278] and the 'proliferation of non-state actors' including NGOs, transnational corporations and global media.[279] Governance at the global level must justify its concern with the domestic and local activities of states and their emanations. In the context of a country's political and economic governance, Thomas Weiss interrogates why discussions by

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[274] ibid 5.
[275] Buchanan and Keohane (n 20) 406.
[276] Bodansky (n 20) 601
[277] Roger Cotterrell, 'Transnational legal authority: a socio-legal perspective' in Cotterell and Del Mar (n 31) 262 – 268 and Christoph Möllers, 'European governance: meaning and value of a concept' (2006) 43 *Common Market Law Review* 313.
[278] Ulrich Muckenberger, 'Civilising Globalism: Transnational Norm-Building Networks as a Lever of the Emerging Global order?' (2010) 1(4) Transnational Legal Theory 523-573.
[279] Thomas G. Weiss, 'Governance, good governance and global governance: Conceptual and actual challenges', (2000) 21(5), Third World Quarterly, 795-814, 795.

international public polity of the quality of state-based governance systems have been deemed acceptable and finds a number of reasons. These are 'the glaring illegitimacy' of certain regimes; the 'third wave' of democratic rule; the 'proliferation of non-state actors' having changed the political landscape exerting 'a growing influence on what had once been almost exclusively matters of state policy'; and the 'acute suffering of such failed states as Somalia, the former Yugoslavia and Rwanda' having provided grounds for the international system to respond to humanitarian disasters lending 'weight to the argument to examine governance patterns in as-yet un-failed states'.[280] These historical matters are mapped to the 1990s which accords with the analysis within this chapter of the emergence and definition of global governance. Michael Zürn also places a particular emphasis on the 1990s as a period during which there was an apex caused by the effects of post-second world war institutions and responses that created conditions which meant that by the end of the century, international organisations had acquired and were exercising considerable authority.[281]

Despite principles of sovereignty and non-interference,[282] historical and political factors have contributed to a rationale for the construction of contemporary governance structures at the global level to function as part of a normative process for the particular focus of concern. International relations scholars have debated the concept of 'multi-level governance', and have cast doubt upon assertions that the central authority and control of the nation state is being dispersed and weakened as a result of governance entities and the evolving role of non-state actors.[283] In contrast, Michael Zürn's most recent contribution to the global governance debate contends that:

> The normative principles of the global governance system qualifies this
> [the Westphalian] notion of sovereignty in three respects: It questions
> the implicit notion that all political communities are territorially
> segmented by pointing to the notion of common goods, that need to

[280] ibid 795–800, including reference to the regimes of Idi Amin, Uganda, and Pol Pot, Cambodia and widespread democratisation in the wake of the collapse of the Cold War, as well as the monitoring of elections by the United Nations in countries such as El Salvador and Haiti, and prompting a focus on local governance.
[281] Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy and Contestation* (Oxford University Press 2018) 108-110.
[282] Kohen (n 186) 157–164 and Weiss 'Governance, good governance and global governance' (n 279) 799-800.
[283] Stephen Welch and Caroline Kennedy-Pipe, 'Multi-level Governance and International Relations', in Ian Bache and Matthew Flinders (eds), *Multi-level Governance* (Oxford University Press 2004) 127-144.

be achieved together; it questions the view that political authorities are absolute by pointing to the rights of individual and entitlements of non-state actors that they have independent of being a member of a state; and it questions the notion that there are no authorities other than the state by pointing to the possibility of international authority.[284]

These qualifications are relevant to the governance function of the UPR as this chapter alludes to, and as the remaining chapters in this thesis illustrate. The UPR goes some way to questioning territorial segmentation by supporting a system premised upon global standard setting. However, whilst its objective is to secure and protect the rights of individuals and the entitlements of non-state actors, and to assert the role of civil society in that process, the manner of the UPR's construction ultimately reasserts the primacy of the state rather than undermines it.

3.1.2 Defining (global) governance

The concept of governance remains 'misunderstood, contested and vague'.[285] James Rosenau, writing in 1992, was of the view that 'the exercise of control' was a key ingredient of governance.[286] Also in 1992, the World Bank defined governance in general terms as being the 'exercise of authority, control, management, power of government', with a more specific definition for the Bank's purposes being: 'the manner in which power is exercised in the management of a country's economic and social resources for development'.[287] For the World Bank, good governance was 'synonymous with sound development management' dependent upon transparency, accountability and a lack of corruption.[288] It is not obvious what the difference is here between governance and government, but transparency, accountability and a lack of corruption are crucial ingredients in promoting good governance.

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[284] Michael Zürn, A Theory of Global Governance: Authority, Legitimacy and Contestation, (Oxford University Press 2018) 26.

[285] Mark Dawson, *The Governance of EU Fundamental Rights* (Cambridge University Press 2017) 2.

[286] James Rosenau, *Governance without Government* (1st ed, Cambridge University Press 1992) 3.

[287] World Bank, *Governance and Development* (World Bank 1992) 3 and 1 respectively, http://www.gsid.nagoya-u.ac.jp/sotsubo/Governance_and_Development_1992.pdf last accessed 11 August 2017.

[288] ibid 3 and 4.

John Ruggie is of the view that governance in a global context is distinct from government because there is no global government:

> *Governance,* at whatever level of social organization it occurs, refers to the systems of authoritative norms, rules, institutions, and practices by means of which any collectivity, from the local to the global, manages its common affairs. *Global governance* is generally defined as an instance of govern*ance* in the absence of govern*ment*. There is no government at the global level. But there is governance, of variable effectiveness.[289] (emphasis in the original)

This explanation is not, however, sufficiently nuanced to accommodate the complexities of the exercise of authority and influence by global governance institutions. The role of government, its source and exercise of power in a democratic society at least, is distinct from governance. The government's function operates alongside the other constituents of the state (legislator and judiciary). The actions of the state in terms of its relationship to functions of government are addressed by the state's internal machinery; for example, coercive law enforcement and revenue generation,[290] and the role of the judiciary via judicial review to intervene when the executive is alleged to have exercised its power ultra vires.[291] It operates within a legal system that depends upon state sovereignty. The standard setting and regulatory function of global governance is softer than that of government and therefore palatable to states in a way that a global 'government' may not be.

Christoph Möllers finds that although the word governance can be traced back to ancient versions, that its current use is a 'neologism' attributed to the World Bank.[292] The World Bank ascribed to governance a tripartite character dictated by: the form of political regimes; the process by which authority is exercised; and a government's capacity to design, formulate, implement and discharge.[293] The World Bank's characterisation at that time

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[289] John Gerard Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights', (2014) Global Governance, 5.

[290] David Armstrong and Julie Gibson, 'Introduction' in David Armstrong et al, *Civil Society and International Governance: the role of non-state actors in global and regional regulatory frameworks* (Routledge 2011).

[291] Jeremy Waldron, *Law and Disagreement* (Oxford, New York: Oxford University Press 1999).

[292] Möllers (n 277) 314.

[293] Möllers (n 277) 314 citing Theobold, *Zur Okonomik des Staates,* (1st ed Baden-Baden 2000) 87 and also referring to the publication: *Governance: The World Bank's Experience* (Washington 1994). However, in this latter publication, the World Bank states that it first reported expressly on the topic of governance two years previously, World Bank *Governance and Development* (n 287).

placed governance primarily at the feet of government. Yet, as noted, governance is broader than government, encompassing the contribution of non-state actors to the field in question. Möllers clarifies that governance is not a synonym for 'a combination of statehood and civil society' but is 'rather a synonym for the *promotion* of these values by organisations beyond the nation state with a strong but informal influence on nation state's development' (emphasis in the original).[294]

In a similar vein, Gralf-Peter Calliess and Moritz Renner describe global governance as 'the ensemble of all forms of regulation that are oriented towards social values and have cross-border effects',[295] whilst Michael Zürn tells us that global governance 'refers to *the exercise of authority across national borders as well as consented rules and norms beyond the nation state, both of them justified with reference to common goods or transnational problems*' (emphasis in the original).[296] To stave off confusion, Zürn suggests there is a pluralisation of governance actors giving rise to conceptual distinctions as to the forms that global governance takes; he identifies world government via 'global governance by government', global governance *with* government via institutions such as the UN and global governance *without* governments (emphasis added), his example here being via transnational actors such as the International Accounting Standards Board.[297]

Elsewhere, legitimate governance is modelled as any kind of political system in which those who are 'ruled' perceive those who 'rule' as having a legitimate right to do so. Whilst this interpretation of governance limits it to a binary distinction between ruler and ruled, the normative success of a global governance mechanism with the state as its subject will be compromised if that state is itself perceived as lacking legitimacy by those ostensibly subject to the state's authority; in short, there is a legitimate governance deficit due to weak

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[294] Möllers (n 277) 315.

[295] Gralf-Peter Calliess and Moritz Renner, 'From Soft Law to Hard Code: The Juridification of Global Governance' (2007), Ratio Juris, (2009) 22, available at SSRN: https://ssrn.com/abstract=1030526, citing Michael Zürn, 'Global Governance', in Schuppert, GF (ed), *Governance-Forschung* (Baden-Baden, Nomos 2005) 121, 127.

[296] Zürn, *A Theory of Global Governance* (2018) (n 284) 3-4.

[297] ibid 4.

national institutions, absolutist regimes or those governing using their position for illegitimate ends.[298]

The dominant view of governance has evidently expanded since the World Bank's writing on the subject in the early 1990s. David Armstrong and Julie Gibson explain that whilst the concept of governance 'is not easy to define', and many elements of governance and government overlap, governance tends 'not to be based on coercive enforcement'.[299] There is an almost universally agreed departure from the 'control' focus of the form of governance initially proposed by Rosenau and the World Bank in 1992, with its purpose now relating to regulation and influence, complex processes, non-state actors and technology.[300] These are important distinctions that set the concept and function of governance apart from that of the state or of government, and reflect the approach adopted in this thesis.

The use of legal knowledge in the governance sphere has been questioned on the basis that such knowledge 'becomes a descriptive tool rather than a normative one' because 'the governance perspective transforms legal knowledge from questions of legality to questions of optimal institutional arrangement'.[301] At first glance, one might be forgiven for equating questions of 'optimal institutional arrangement' with the function and character of government, but there is a key difference. In a bid to seek out and clarify this difference, Möllers investigates the etymological roots of the words government and governance, and related concepts. He aligns the rise of the concept of government with the rise of the nation-state. The concept of the state is largely accepted as a Western construct that corresponds with the Westphalian notion of the state and statehood, as much discussed in international law literature,[302] and which preferences a homogenised approach to law as a

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[298] Robert H Dorff, 'Failed States After 9/11: What Did We Know and What Have We Learned?' (2005) 6(1), International Studies Perspectives, 20-34, 25, with reference by way of example to Saddam Hussein in Iraq, the Taliban in Afghanistan. We might add to this list Assad's regime in Syria.

[299] Armstrong and Gibson (n 290) 1-2.

[300] Weiss 'Governance, good governance and global governance' (n 279) 796, Weiss also expresses the view that 'many academics and international practitioners employ governance to connote a complex set of structures and processes', attributing the equation of governance to government to 'more popular writers', 795.

[301] Möllers (n 277) 318.

[302] For example, see, Gene M. Lyons and Michael Mastanduno (eds), *Beyond Westphalia?: state sovereignty and international intervention* (Baltimore: Johns Hopkins University Press 1995); P.A. Hayman and John Williams, 'Westphalian Sovereignty: Rights, Intervention, Meaning and Context', (2006) 20(4) Global Society 521; Steven Wheatley, *The Democratic Legitimacy of International Law* (Oxford: Hart Publishing 2010), 44, with

positivist endeavour pursued by a system of state-based sovereignty.[303] Such a construction is problematic in a global sense where state borders that are often arbitrary, with many having been imposed as part of an imperialist endeavour and post-imperialist settlement,[304] conflict with other potent frontiers, such as those that are tribal, linguistic, religious, social and/or cultural.[305]

Even so, the current dominant global world order is premised upon the primacy of the state actor and this is entrenched by the UN. This creates a paradox; as law makers in modernity, states act independently and autonomously and yet it is accepted that the very idea of human rights monitoring and protection at a global level contests notions of sovereignty, territoriality and principles of non-interference.[306] The rise and influence of international organisations and their governance function therefore offers only a weak challenge to the concept of the state as the supreme sovereign power; if the challenge of monitoring mechanisms such as the UPR to state sovereignty was perceived as a real threat, no doubt states would vote with their feet and disengage, yet states are engaging with this particular mechanism in a universal fashion.

Returning to the point Möllers raises about legal knowledge assuming a descriptive function rather than a normative one in the context of governance, by requiring a state to respond to the recommendations it receives by either supporting or noting each recommendation, and for those that are noted, being subsequently required to provide an explanation of its position,[307] the UPR creates a governance function that goes beyond a mere description or statement of norms. Given that engaging with governance mechanisms with a normative

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reference to the Peace of Westphalia (1648), and the dominant political thinkers of the eighteenth century, Immanuel Kant (*Perpetual Peace* (1795) and Jean-Jacques Rousseau *The Social Contract* (1762).

[303] Mattias Kumm, Anthony F. Lang Jr., James Tully, Antje Wiener, 'How large is the word of global constitutionalism?' (2014) 3(1) Global Constitutionalism 1 – 8, 7.

[304] Harsha Walia, *Undoing border imperialism* (Oakland, CA: AK Press; Washington, D.C.: Institute for Anarchist Studies 2013).

[305] 'They [new conflicts] lie along frontiers between ethnic or sectarian communities, even those dividing, for example, pastoralists from herders or the landed from the landless, from those who speak one dialect or language from neighbours who speak another', Jason Burke, 'Why Is the World at War?' *The Guardian* (04 March 2018) https://www.theguardian.com/world/2018/mar/04/why-is-world-at-war-syria-democratic-republic-congo-yemen-afghanistan-ukraine?CMP=Share_iOSApp_Other last accessed 05 March 2018.

[306] Oberleitner *Global Human Rights Institutions* (n 23) 8.

[307] 'Recommendations that enjoy the support of the State concerned will be identified as such. Other recommendations, together with the comments of the State concerned thereon, will be noted. Both will be included in the outcome report to be adopted by the Council', UNHRC A/HRC/RES/5/1 (n 9) para 32.

function involves a voluntary surrender of sorts, the question arises as to why states endorse the creation of such entities in the first place. Gerd Oberleitner gives three reasons, or assumptions, as to why states form human rights institutions.[308] The first is they allow states a means of cooperation and stability that might be more difficult in 'bilateral encounters'.[309] Secondly, international organisations afford the means for states to wield power in decision-making processes and in doing so avert scrutiny of the state's own human rights record.[310]

Whilst this might have been so under the Commission, this is no longer the case for the UPR; indeed, one aspect of the UPR that has been welcomed (and also caused concern, as noted in section 2.3.2 of chapter 2) is that any state, regardless of its size or power, can comment upon the rights records of the permanent five members of the Security Council.[311] Oberleitner's third reason is that human rights institutions offer a legitimising process 'endowing governments with legitimacy, credibility and reputation'.[312] This point accords with the view expressed by some interviewees in relation to the UPR providing a means of asserting statehood by those states generally accepted as weak, fragile or failing, considered in section 4.4, chapter 4 and the conclusion to chapter 6.

A further premise for the emergence of global governance is that it is a symptom of what Muckenberger refers to as 'the crisis of the old governance mode brought about by decentration'.[313] He views old governance as comprising gravitation points, centres, that include the nation-state and are also derived from the nation-state, his examples being companies and the family. He describes the crisis in terms of a disruption to the previous nexus between voice and entitlement at the state level, which creates a legitimacy crisis.[314] 'Decentration' is posited as the process by which parts of those decision making powers previously reserved to the centres of the old governance mode, of which the state is the primary centre, have moved away from the centre in all directions, upwards to higher levels (supra-), sideways to neighbouring levels (inter-), and downwards to levels subordinate to

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[308] Oberleitner (n 23) 8-9.
[309] ibid.
[310] ibid.
[311] Smith '"To see themselves as the others see them"' (n 172) 1-35.
[312] Oberleitner (n 23) 8-9.
[313] Muckenberger (n 278) 530.
[314] ibid 530 – 531, 534 - 535.

them (infra-).[315] The result is that the 'power of the nation-state is shifting and thereby benefitting supranational agencies – and this implies a loss of sovereignty'.[316]

The concept of 'decentration' resonates with the positioning of a state in relation to the various institutions that comprise the 'international human rights regime complex' (see below and chapter 4). Transnational networks play a fundamental role when it comes to norm-building and implementation,[317] and the concept of 'decentration' contributes a useful means of interpreting the dynamic between state, populace and other non-state actors at the global level in terms of the potential to create a new nexus between voice and entitlement.

Mark Mazower, however, dismisses global governance as 'a concept that is part of the problem and should be allowed to die without too much fuss'.[318] This concludes his scathing response to a piece in the same journal volume by Thomas Weiss and Rordan Wilkinson.[319] Mazower sees global governance as a derivative term from corporate governance that is essentially meaningless of itself due to an absence in international relations of 'a community with self-conscious direction of its own affairs'.[320] In the 'bewilderingly complex contemporary international arena' he is concerned that Weiss and Wilkinson write of the complex in place of the chaotic, and gloss over the fragmentation of 'international life'.[321]

Such anxiety may be misplaced. Part of the focus of global governance is the assessment in a globally constituted forum of the operation of those actors with a domestic governance function against previously agreed standards; in the international human rights field this will be treaty obligations, accepted recommendations, customary norms, etc. There is arguably no overarching need for coherence and order in a substantive sense; the assessment of performance against standards will be specific to the domestic conditions under scrutiny. Indeed, to err towards cohesion risks reductionism and an oversimplification of norm

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[315] ibid 535.
[316] ibid.
[317] ibid 531.
[318] Mark Mazower, 'Response' (2014) 58 *International Studies Quarterly*, 219-220, 220.
[319] Thomas Weiss and Rordan Wilkinson, 'Rethinking Global Governance? Complexity, Authority, Power and Change' 58 (2014) International Studies Quarterly 207-215.
[320] Mazower (n 318) 220.
[321] ibid.

conflicts.[322] The counter weight to chaos comes via procedural legitimacy and due process, which the UPR has accomplished, as introduced in chapter 2 and addressed in more detail in section 4.4, chapter 4.

There are concerns that 'legal theory [has] so far failed to grasp the intricate relationship between law and social norms in the context of global governance regimes'.[323] This thesis implicitly acknowledges the limits of legal theory by taking the approach of conditional international law theory that accommodates inquiry into the 'intricate relationship' not only between law and social norms, but also political and cultural norms as well as other dynamics that influence state practice, for example, acculturation as discussed in chapter 5, section 5.3.2. Calliess and Renner focus upon a governance regime evolving to assume a (formal) legal function; however, their argument is premised upon a regime having the *potential* to assume a legal function rather than it being *required* to attain that function.[324] Their analysis proceeds to interrogate how a global governance regime can 'enter into a performance competition with both domestic and international law' via its regulatory and dispute resolution service.

The UPR does not possess a formal function in relation to either formal regulation or dispute resolution, but this does not detract from its capacity to function as a governance entity within a broader governance regime, if anything it enhances it. Whilst the regulatory activity of the UPR is informal, and its dispute resolution function is all but absent, the role it plays in norm dissemination and influencing state practice in terms of human rights legislation, state commitment and practice, and the establishment and operation of state human rights institutions is fundamental and reflects both a legal and a political function.

3.2 Legitimacy and authority

This section explores the hypothesis that the capacity of a governance institution to function effectively is measured in terms of its command and maintenance of authority and legitimacy. Sustaining a strong governance role is in part via perceived legitimacy and

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[322] Teubner and Fishcer-Lescano (n 271) 1002.
[323] Calliess and Renner (n 295) 261.
[324] ibid.

authority. Bodansky discusses the dimensions of the concept of legitimacy as being both sociological and normative: the sociological dimension is linked to popular legitimacy and the acceptance of an institution's authority by the public;[325] whilst an organisation will satisfy the normative dimension of legitimacy if its authority is perceived to be well founded.[326] It would appear therefore that these two dimensions are co-dependent, relying as they do upon acceptance which in turn is influenced by perceived need / requirement. Yet they are also 'conceptually and practically distinct' on the basis that normative legitimacy lends itself to an evaluative process that does not solely depend upon the perception of a populace.[327] This can be a factor but, given that perceptions can be influenced and subject to change, it is not the sole determinant. Further, Bodansky sensibly explains that normative and sociological legitimacy 'need not correspond': 'people may, in fact, accept authority based on tradition, myth or demagoguery', namely sociological legitimacy.[328]

Perceived legitimacy strengthens the stability and effectiveness of an institution and the commitment of those subject to it.[329] This strikes a chord with the work of Hilary Charlesworth and Emma Larking who argue that ritual is present in the UPR process.[330] They define rituals as 'ceremonies or formalities that, through repetition, entrench the understandings and the power relationships that they embody'. [331] Ritual offers a means of 'enacting a social consensus', that can function to reduce contestation and indicate 'that a way of thinking or being has achieved some degree of permanence and importance', as well as being a means of 'helping make sense of incoherence in our social and political lives'.[332] There is a danger though; participation involves taking part in an 'embodied performance' that may direct a participant's focus towards the requirements of the performance rather than its significance in terms of regulation, or governance. A long-term symptom of process

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[325] Bodansky (n 20) 601.
[326] ibid.
[327] ibid 602.
[328] ibid.
[329] Martin E. Spencer, 'Weber on legitimate norms and authority', (1970) 21 Brit. J Soc. 123, and T. M. Franck, 'The power of legitimacy and the legitimacy of power: international law in an age of power disequilibrium' (2006) 100 AJIL 88.
[330] Hilary Charlesworth and Emma Larking, 'Introduction: the regulatory power of the UPR' in Charlesworth and Larking (n 3) 9.
[331] ibid 8.
[332] ibid 9.

compliance via an embodied performance at the UPR, occurring at the expense of substantive action and progress in relation to rights enhancement and protection, would ultimately erode actual, and therefore also perceived, legitimacy. This point is also given further in section 4.4, chapter 4.

3.2.1 Input, output and procedural legitimacy, and principles of democracy

Bodansky and Zürn identify three types of legitimacy: input, or source-based; procedural; and output, or substantive.[333] A mechanism's input legitimacy refers to its origins; how and why it came into being, the factors that contributed towards its conception, the historical context of its invention and the extent to which that influenced its final shape and function. Procedural legitimacy is important because an agreed procedure that is perceived to be adequate and fair has as 'legitimising effect in international law as it has in national law'.[334] Output legitimacy relates to the effectiveness of a system or organisation measured by its output; an institution commands respect and asserts authority in part by evidence of its system / organisation functioning as it ought to, of having an output relevant to its mandate. As Möllers states, 'if governance designates the institutionalized [*sic*] observation of nation-states, its legitimacy may be found in the output of a working self-government'.[335]

That which is new in terms of governance, according to Möllers, is 'the role of transnational institutions that are not directly democratically accountable, but simultaneously under an obligation to the political preferences of democratic nation-states'.[336] This is true of the European Union project, which is the subject of Möllers' analysis, but in the global context arguably less so because not all states are democratic and not all states would wish to subscribe to global governance structures shaped by the preference of Western democracies.[337] For Zürn, democracy related to input legitimacy consists of two components: a democratic principle and a deliberative principle, although he questions whether the absence of democracy in the constitution of certain institutions is an issue to be

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[333] Bodansky (n 20) attributes source-based, procedural and substantive, whilst Zürn refers to input, procedural and output and Zürn 'Democratic governance beyond the nation state' (n 22) respectively.
[334] Rudiger Wolfrum, 'Legitimacy of international law and administrative functions: the example of the International Seabed Authority, the International Maritime Organisation and the International Fisheries Organisations' (2008) 9(11) German Law Journal 2039, 2041.
[335] Möllers (n 277) 320.
[336] ibid.
[337] Klaus Dingwerth, 'North-South Parity in Global Governance: The Affirmative Procedures of the Forest Stewardship Council, (2008) 14, Global Governance, 53– 71.

overly concerned with.[338] The democratic principle relates to the principle of autonomy and a process of will-formation and decision-making whereby those affected by the decisions made have equal opportunity to actively participate and exert influence.[339] Like Möllers, he focuses on those institutions that are external to nation states such as the EU, WTO, and OECD and explores the contradiction between output legitimacy and input legitimacy.[340] The creation of institutions in accordance with democratic procedures is problematic; Zürn wryly observes that the EU would not qualify for membership of the EU because there is not sufficient democratic content in its constitution.[341]

By contrast, the deliberative principle dictates that 'any decision should be backed by arguments committed to values of rationality and impartiality'.[342] The deliberative principle is arguably achieved in respect of the process that underpinned the UPR's creation, as section 4.3, chapter 4 contemplates, which in turn relates to its input legitimacy; the method by which an institution has been created influences acceptance and the perceived legitimacy of its function. Such acceptance is crucial not only to those effected by decisions of the mechanism but also amongst those entities outside of but interacting with the institution in order to secure their ongoing interaction and engagement, for example, civil society and other human rights mechanisms.

It is largely accepted that a governance entity will be assessed in terms of effectiveness and legitimacy.[343] Whilst that effectiveness cannot be measured against elections or other means of popular approval linked to principles of democracy, it can be determined in terms of achieving set objectives.[344] For Armstrong and Gibson, legitimacy is problematic because

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[338] Zürn 'Democratic governance beyond the nation state' (n 22) 184-5.
[339] ibid, Zürn refers to David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge: Polity Press 1995); John Rawls, *A Theory of Justice* (Cambridge MA: Harvard University Press 1971) and Robert A. Dahl, 'A Democratic Dilemma: System Effectiveness versus Citizen Participation' (1994) 109(1) Political Science Quarterly, 23-34 and their thinking on democracy.
[340] ibid 184, attributing the use of the terms input and output legitimacy to Fritz W Scharpf, 'Economic Integration, Democracy, and the Welfare State, *Journal of European Public Policy*, (1997) 4(1), 18-36.
[341] ibid 183.
[342] ibid 186, citing Jon Elster 'Introduction' in Jon Elster (ed) *Deliberative Democracy* (Cambridge University Press 1998) 8, and Rainer Schmalz-Bruns *Reflexive Demokratie: Die demokratische Transformation moderner Politik* (Baden-Baden: nomos 1995).
[343] Armstrong and Gibson (n 290) 5.
[344] ibid.

it is 'much harder to comprehend *legitimacy* in any context without bringing in some kind of democratic input' (emphasis in the original).[345]

This is complicated, as Möllers observes:

> (…) we are dealing with a well-known dilemma: the creation of democratic accountability would undermine the structure of governance institutions, it would also require formal rule-making powers and it could annihilate the expertocratic criteria as well as the external observing perspective. But this does not mean that governance structures do not need democratic legitimacy.[346]

Arguably it is possible to go some way towards satisfying principles of democratic legitimacy in terms of input (source) legitimacy: the method by which an institution comes into being, the source from which it derives its objective and powers, and the process as to agreeing the founding principles and constitution that governs its operation and processes. Whilst input legitimacy clearly plays a key role in shaping the democratic legitimacy, perceived or otherwise, of an institution or mechanism, as considered above, that is only one aspect that contributes to legitimacy and authority. Zürn suggests that an acceptance that 'the actual functioning of… international institutions does not meet democratic standards' might be required, and that most democratic deficits cannot be remedied.[347] He seeks to undermine the sceptic's position that there is an irreconcilable structural dilemma by arguing in favour of the deliberative principle where, as noted, principles of rationality and impartiality inform the process of decision-making.[348] However, the myriad of competing and coalescing interests operating within any given global / international institution undermines the capacity of state and non-state actors to operate within international organisation with a governance function in a fashion that is consistently, or at all, driven by rationality and impartiality. This is given fuller consideration in section 5.3, chapter 5.

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[345] ibid.

[346] Möllers (n 277) 320.

[347] Zürn 'Democratic governance beyond the nation state' (n 22) 184.

[348] ibid 186, citing Jon Elster 'Introduction' in Jon Elster (ed) *Deliberative Democracy* (Cambridge University Press 1998) 8, and Rainer Schmalz-Bruns *Reflexive Demokratie: Die demokratische Transformation moderner Politik* (Baden-Baden: nomos 1995).

3.2.2 Authority

As section 1 above indicates, authority sits alongside legitimacy as a key component of governance; international organisations via their mandate and proliferation are seeking to assert an expanded form of authority. Roger Cotterrell considers the socio-legal perspective of authority and legitimacy in the context of transnational legal authority.[349] This perspective perceives the practice and experience of authority 'as empirical social phenomena' that 'does not need conclusive, timeless definitions of authority and legitimacy but only ways of understanding these ideas that can help in provisionally identifying relevant social practices'.[350] Citing Susan Marks' view of legitimation as 'the process by which authority comes to seem valid and appropriate',[351] Cotterrell suggests authority might be thought of as 'something primarily *claimed* in support of power by its holders, and legitimacy as something primarily *conferred* on power by those subject to it or who observe it' (emphasis in the original).[352] Those subject to the particular power that generate its legitimacy have been referred to as communities of practice and networks of communal practice.[353] Chapter 7 explores the concept of communities of practice in relation to non-state actors and civil society and the manner in which civil society's engagement with the UPR serves to endorse its authority and legitimacy.

Weber identified three types of authority and related legitimacy: legal-rational authority, linked to a legitimacy founded on legality; traditional authority, which relates to that which is because it has always been so, but which is said to be in decline in the modern word; and, thirdly, charismatic authority which relies upon the belief of a leader's followers in their leader.[354] Whilst Weber's focus was on the charisma of the leader as an individual, Stephen Turner's analysis suggests this can also be applied to a regime, institution or office,[355]

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[349] Cotterrell (n 277) 262 – 268.
[350] ibid 262 - 263.
[351] Susan Marks, *The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford: Oxford University Press 2000) 19 cited by Cotterrell (n 277) 263.
[352] Cotterrell (n 277) 263.
[353] CA Thomas, *The Concept of Legitimacy and International Law,* LSE Legal Studies Working Paper 12/2013 (London, London School of Economics, 2013) 22 and KP Coleman, *International Organisations and Peace Enforcement: The Politics of International Legitimacy* (2007), 22 both cited by Cotterrell (n 277) 263 and 264.
[354] M Weber, *Economy and Society: An Outline of Interpretive Sociology,* transl. E Fischoff et al (Berkeley, University of California Press 1978) 212-6, cited by Cotterrell (n 277) 265-6.
[355] S Turner, 'Charisma Reconsidered' (2003) 3 *Journal of Classical Sociology* 5, 9-10.

although Turner casts doubt upon the status and value of the concept of charisma from an empirical, social and historical perspective.[356]

For Roger Cotterrell, the authority of expertise is akin to charisma. He claims that the authority of expertise provides 'a vehicle both for (i) sharing a kind of (persuasive) legal authority 'horizontally' between state-centred constitutional structures and (ii) for building new 'vertical' hierarchies of authority (through standard-setting) outside these structures' determined by transnational interactions 'not effectively governed by states or international jurisdictions'.[357] The codification of authority along the lines of horizontal and vertical structures provides a useful way of modelling certain dynamics operating within the UPR mechanism, as considered further in section 4.2, chapter 4. What is certain is that for a regime to command authority it has to exercise its function and conduct its dealings in public and with transparency; 'public authority'[358] is secured by the UPR through the transparency of the Working Group and the availability of those documents upon which the review is based.

The operation of governance can be assessed in terms of dispersal, which also maps onto the function and operation of the UPR; governance is 'the exercise of public power in conditions in which normative authority and steering capacity are dispersed'.[359] In a similar vein, Rosenau describes a bifurcation of the location of authority and governance via both integration and fragmentation: 'the fragmenting and coalescing of groups into new organizational entities (…) has created innumerable new sites from which authority can emerge and towards which it can gravitate'.[360] Civil society's contribution to the UPR supports such bifurcation being active as it is on a local and a transnational level. Via the formation of communities of practice a new locus of knowledge and authority is afforded to civil society and its contribution to the UPR's governance process, see section 3.3.1 below and chapter 7.

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[356] ibid 6 and 9.
[357] Cotterrell (n 277) 265-6. The authority of expertise is explored in the same edited collection, Quack (n 31).
[358] Zürn *A Theory of Global Governance* (n 284) 4.
[359] Dawson (n 285) 3.
[360] James Rosenau, 'Governance in the twenty-first century', (1995) 1 Global Governance 19.

Returning to the analysis that normative authority is dispersed via the operation of formal legal institutions. Dawson refers to the German constitution and the Court of Justice of the European Union and their powers of enforcement; steering capacity is dispersed in the context of the relationship between the EU and its function through the vehicle of a member state.[361] The UPR does not mimic the structure of the EU and lacks supra-national authority in terms of the dispersal of normative authority via legal institutions or because of contracting between the parties (which a treaty body could claim). However, this is not to say the UPR lacks authority; what it creates is a climate of reflexive authority whereby there has been voluntary subordination to the institution of the UPR by those states that take seriously the requests made to them despite the limitations placed on their 'local or partial rationality'.[362] These limitations are not rejected, because under the operation of reflexive authority, the subject can call into question the authority of the holder at any time.

The fragmentation of international human rights monitoring into various regimes gives rise to a 'regime complex' that presents a challenge in terms of functional certainty and accountability. These challenges also manifest themselves in the context of the UPR and the international human rights regime complex proposed below and expanded upon in chapter 4. There are multiple rights regimes located within the regime complex and there is some discretion on the state's part in terms of whether to engage and in turn the extent of that engagement. A state's inaction against supported UPR recommendations could be understood in different ways. It may be symptomatic of the UPR failing to meet its objectives, or evidence of the progressive nature of the human rights movement. Alternatively, there may be very specific circumstances that have prevented progress, the war in Yemen being a case in point, or there may be the will but a lack in terms of means and infrastructure. This is considered in more detail in chapters 5 and 6.

3.3 Global governance and international human rights monitoring

Whilst over 25 years ago Philip Alston expressed the view that human rights institutions possess a governance function,[363] Mark Dawson suggests there are certain challenges in

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[361] Dawson (n 285) 3.

[362] Zürn *A Theory of Global Governance* (n 284) 250-251.

[363] Benjamin Mason Meier, Lawrence O. Gostin, *Human Rights in Global Health: Rights-Based Governance for a Globalizing World* (Oxford University Press 2018) 73, citing Alston (n 140).

seeking to situate the concept and theory of governance in the context of (international) human rights. He observes that governance is 'an essentially political concept' referring as it does to the exercise of power, whilst human rights principles and protections which impose limitations are designed as a form of 'legal constraint: of limiting power'.[364] However, as noted in the introductory chapter of this thesis, the UPR is not, *per se,* a legal mechanism, and in terms of rule setting and enforcement, it is heavily politicised;[365] as Carraro wryly observes, 'the politicization [*sic*] of the UPR is Geneva's worst kept secret'.[366]

The importance of law to politics and vice versa has been well rehearsed,[367] and the proximity of law to politics is brought into sharp focus in the spaces created by those institutions tasked with promoting, protecting and monitoring human rights internationally. Furthermore, socio-legal matters play their part. Social contract theory, which gained traction in the latter part of the 20th century with the work of John Rawls and Thomas Franck,[368] focuses on concepts of legitimacy and authority and resonates with the legal framework of international and national human rights law: the state contracts with its population, particularly in liberal democracies, to provide peace and security, alongside civil and political freedoms. Yet, in doing so, it occupies (or at least has the capacity to occupy) the dual role of both protector and violator of rights, a dilemma that sits at the heart of the

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[364] Dawson (n 285) 4, referring to fundamental rights in the context of the EU.

[365] Valentina Carraro, 'The United Nations Treaty Bodies and Universal Periodic Review: advancing human rights by preventing politicization', (2017) 39(4) Human Rights Quarterly, 943-970.

[366] ibid 965.

[367] There are numerous books and articles exploring the relationship between law and politics, theorists and philosophers including Thomas Hobbes, John Locke, Charles Rousseau. The following are selected texts that touch upon the work of these theorists and others and/or make their own original contributions; Christopher W. Brooks, *Law, Politics and Society in Early Modern England* (Cambridge University Press 2009); Michael Byers, *The role of law in international politics: essays in international and international law* (Oxford University Press 2000); David Kairys, *Law and Politics* (1983-1984) 52 George Washington Law Review 243; Lucian N Leusten and John T.S. Madeley, *Religion, Politics and Law in the European Union* (Taylor and Francis 2009); Dirk Pulkowski, *The law and politics of international regime conflict* (Oxford University Press 2014); Joseph Raz, *Ethics in the public domain: Essays on the morality of law and politics* (Oxford University Press 1994); Ota Weinberger, *Law, institution, and legal politics: fundamental problems of legal theory and social philosophy* (Dordrecht; Boston: Kluwer Academic Publishers, 1991).

[368] Whose work, amongst which, refers to earlier legal scholars and social and political theorists including, for example, Thomas Hobbes, John Locke, Immanuel Kant and Charles Rousseau, for example, see Thomas M Franck, *The Power of Legitimacy among Nations*, (Oxford University Press 1990), John Rawls, *A Theory of Justice*, (Oxford University Press 1999). For commentary on social contract theory and its moral philosophy, see for example, Nicholas Southwood, *Contractualism and the Foundations of Morality*, (New York: Oxford University Press 2010).

liberal, and neo-liberal, sensibility: for individual freedom and liberty to be enjoyed, power must be vested in the state, which in turn will inevitably curtail the freedoms thus defined.[369]

3.3.1 Global governance and the role of civil society

As stated in the introduction chapter of this thesis, the evolving role of civil society in terms of human rights advocacy, follow up and implementation, and the number and variety of international human rights mechanisms suggests a critical assessment of the application of global governance theory to the international human rights monitoring and protection framework is both timely and necessary. This is more than a descriptive task; to echo the disquiet shared by Weiss and Wilkinson, more needs to be done 'in order to realize [*sic*] the analytical utility' of global governance. They express the concern that 'we have yet to fully understand the ideas and interests that drive the organizations [*sic*] that we have, and more particularly, how they arise and develop, and subsequently permeate and modify the international system'.[370] Work that takes a critical approach to human rights indicators and fact-finding missions goes some way to address these matters, as discussed in section 5.4, chapter 5.

Civil society is positioned as being a key non-state actor both in terms of norm building and implementation and its position in relation to the state and rights holders.[371] Makau Matua identifies civil society as 'nonstate, nongovernmental formations that are formally independent from the state',[372] whilst the OHCHR defines civil society actors as: 'individuals who voluntarily engage in forms of public participation and action around shared interests, purposes or values that are compatible with the goals of the United Nations'.[373] The potential for global governance structures to generate a new nexus between voice and

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[369] Martti Koskeniemmi, *Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 84, seeks to address the fact that no-one can freely exercise their own will all of the time by referring to ascending arguments (individual ends are legitimised) and descending arguments (but some people's subjective ends can be overruled) as a means to accommodate 'the only legitimate social arrangement', referring also to Rousseau's argument of 'forcing men to be free', *Social Contract Book II*, ch.6, 83.

[370] Weiss and Wilkinson (n 319) 211.

[371] Muckenberger (n 278) 539-540.

[372] Makau Matua *Human Rights Standards: Hegemony, Law and Politics*, (New York: State University of New York Press 2016), 85.

[373] OHCHR 'Working with the United Nations Human Rights Programme: a handbook for civil society' (New York and Geneva 2008) vii, http://ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf accessed 16 April 2017.

entitlement and civil society's (at times contested) contribution can address the governance deficit and go some way towards absolving some of the tensions that arise as a result of a state-based paradigm. This has been suggested via 'common action' that allows 'a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken' in a climate within which governments 'do not bear the whole burden of governance'.[374] This approach has echoes of scholarly proposals to replace 'the modern concept of the state community' with 'the notion of human community' but, as Marcelo Dias Varella highlights, it risks being a 'seductive notion' that is deeply problematic, 'creating antagonisms' not least because 'the human community could be sometimes against the community of the states'.[375]

Conversely, there are those that criticise the pursuit of governance in the global arena as failing to represent stakeholder interests being instead 'driven by club models of power that subordinate decision making to club interests, making decisions above all for themselves'.[376] There are those interests that are over-represented and others under-represented and the same can be said regarding civil society; the competition for donor funds amongst civil society organisations can lead to some geographical areas and rights interests being 'flooded' with civil society presence, and others abandoned.[377]

A further characteristic of the operation of global governance is 'externality'.[378] A governance entity is said to function by taking 'a perspective from outside the state' by conducting an 'institutionalized observation of nation-states' whereby 'the observing organization [*sic*] does not answer to the observed state'.[379] Whilst the contribution of civil society as a non-state actor at the UPR might go some way to meet the requirement for externality, this is limited due to the exclusion of civil society from the UPR's Working Group

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[374] Chapter 5, 'Reforming the United Nations' and Chapter 1 'A New World', Commission on Global Governance, *Our Common Neighbourhood: the Report of the Commission on Global Governance* (Oxford University Press 1995).
[375] Marcelo Dias Varella, 'Central Aspects of the Debate on the Complexity of International Law' (2013) 27(1) Emory International Law Review*,* 1-22, 19-20.
[376] Michael Hamel-Green & David Held 'Transnational governance: issues, dilemmas and prospects', (2012) 24(4) Global Change, Peace & Security, 425-437, 431.
[377] Andreas Godsater and Fredrik Soderbaum, 'Civil Society in Eastern and Southern Africa' in David Armstrong et al, *Civil Society and International Governance: the role of non-state actors in global and regional regulatory frameworks* (Routledge 2011) 161.
[378] Möllers (n 277) 320.
[379] ibid.

(chapter 7 considers more fully the concept, origin and definition of civil society and appraises its evolving role and contribution to the governance function of the UPR).

Satisfying the externality aspect of global governance is therefore potentially problematic when seeking to position the UPR as a governance entity because the institutionalised observation of nation-states via the UPR is a peer review undertaken by other states. Whilst those other states are external to the SuR and do not answer to the SuR, they are not necessarily objective during the UPR process. As chapter 5 illustrates, political and regional allies can operate in a way that undermines the externality that might be claimed. This concern might be diluted when taking account of civil society's role as a key source of recommendations made during the peer review process, as explored in chapter 6, and the role of civil society in follow up and implementation, as addressed in chapter 7.

3.3.2 Other conceptual frameworks: experimentalist governance and global constitutionalism

An emergent discourse that dislodges the state as the primary actor is that of experimentalist governance whereby:

> (…) arrangements acknowledge the enduring role of states, but also are characterised by their intent to accommodate all relevant stakeholders into the process, including non-governmental organisations, multiple levels of government, or private entities.[380]

Writing in the context of global security, Nance and Cottrell describe experimentalist governance as aiming to:

> (…) keep pace with the transitory environment through an increased reliance on ideational and deliberative mechanisms designed to accommodate diversity, tap into new knowledge that may not emerge at the interstate level, and ratchet up standards and implementation strategies in response. Monitoring, verification, and enforcement are likely to remain important features of governance (…) but they alone may not be sufficient to address the regulatory

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[380] Mark Nance and M Patrick Cottrell, 'A turn toward experimentalism? Rethinking security and governance in the twenty-first century', (2014) 40(2) Review of International Studies, 277-301, 287.

challenges inherent in governing increasingly fluid and dense global interactions.[381]

Experimentalist governance is predicated upon a flexible and responsive institutional dynamic. As with any conceptual development, there is discord as to how such an institution operates. Nance and Cottrell refer to divergence in how cooperation is to be secured. One option is the threat of an imposition of legally binding rules 'from higher up', so that actors cooperate in the 'shadow of hierarchy'.[382] Another is a preference for a 'penalty default' whereby rules that are 'sufficiently unpalatable' present an alternative means of securing cooperation.[383] However, there is no explanation as to how such a penalty default actually differs from an imposition of rules from above, or how cooperation is being determined.

An interesting facet of experimentalist governance is that it 'consciously eschews the now standard division between 'hard law' and 'soft law''; it describes an iterative cycle 'in which participants establish standards, implement those standards, report on compliance with and effectiveness of the standards, and then integrate any lessons learned into new ones'.[384] The UPR is constructed to be iterative via its cyclical nature and the return in the subsequent cycle to the previous one by way of reference and reinforcement and as such the principle of experimentalist governance has something to offer. The iterative and recursive nature of the UPR is given some further consideration in chapter 5, however, given that experimentalist governance takes primacy away from the state whilst the UPR remains firmly focused upon the state as the primary actor, the concept of experimentalist governance does not lend itself to application beyond the brief consideration given here.

Another relevant and emerging approach to theorising the current global dynamic where international law and legal norms are concerned is that of global constitutionalism. Global constitutionalism 'grapples with the consequences of globalisation as a process that

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[381] ibid 287.

[382] ibid 287, citing Adrienne Heritier and Dirk Lehmkuhl, 'The Shadow of Hierarchy and New Modes of Governance' (2008) 28(1) Journal of Public Policy 1-17.

[383] Charles F. Sabel and Jonathan Zeitlin, 'Experimentalist Governance', in David Levi-Faur (ed.), *The Oxford Handbook of Governance* (Oxford: Oxford University Press, 2012), 176.

[384] Charles F. Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU', in Charles F Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford and New York: Oxford University Press 2010) cited by Nance and Cottrell (n 380) 285-6.

transgresses and perforates national or state borders, undermining familiar roots of legitimacy and calling for new forms of checks and balance as a result'.[385] Wiener draws a distinction between the concepts of constitution and constitutionalisation; the former being an order established 'to keep politics in check', the latter being the putting of 'innovative regulatory or principled practices into place' on the global or supranational scale; whilst constitutionalism is presented as a field that is 'still unwieldy and in-the-making', and 'remains confusing to some, raises scepticism among many and inspires constructive debate among others'.[386]

In addition, Weiner seeks to situate the contributions to the debate on global constitutionalism into three schools: normative, functionalist, and pluralist, highlighting the approach of each in terms of: shaping the global world order - normative school; mapping the global world order - functionalist school; or both - pluralist school.[387] Varella is sceptical of global constitutionalism, citing a number of factors that contribute to its non-existence, namely:

> (…) asymmetry of power between the powerful states; absence of clear division of powers (legislative, executive, and judiciary) at a global level; and difficulties in determining the organic competence, the material dominium, and the capacity of a general protection of human rights according to pre-established procedures.[388]

Although emerging and arguably uncertain, the concept of global constitutionalism understood as calling for new checks and balances, and wrestling with the impact of globalisation 'as a process that transgresses and perforates national or state borders',[389] has some contribution to make to the focus of this thesis. By theorising international human rights law and its intersection with international relations and geopolitics in terms of complexity, there is the potential to comprehend the various dynamics of power and the concomitant shifts prompted and/or supported by the UPR as a governance mechanism via methods informed by both norm mapping and norm shaping.[390] This is in sharp contrast to

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[385] Wiener et al (n 303) 6.
[386] Wiener et al (n 303) 5-6.
[387] ibid 6-9.
[388] Varella (n 390) 20-21.
[389] Wiener et al (n 303) 6.
[390] Ibid, noting that it is important to keep the dimensions of shaping and mapping 'analytically apart', 11.

theorising the same in terms of fragmentation, wherein lies the potential for chaos and despair, or at least 'certain worries and misgivings'.[391]

Finally, some reference should be made to the term 'international governance'. International governance is 'a situation in which the principal actors are states and the objectives relate mainly to the regulation of *interstate* relations' (emphasis in the original).[392] This conceptualisation of governance is aligned with what Muckenburger refers to as 'old' governance, which he sees as being 'in crisis' (as discussed in section 3.1.2 above).[393] Global governance is more complex in terms of having a wider range of actors: state, non-state and inter-governmental, and being concerned with 'broad areas of interaction involving this wide range of actors'.[394] This accords with analysis of the UPR: focus is on a particular state's human rights performance rather than inter-state matters,[395] and there are a multitude of actors involved in that process - state actors as the SuR and as peer review states, non-state actors in terms of civil society (national and international NGOs) and other stakeholders, as well as other international human rights monitoring mechanisms including treaty bodies, as explored in chapters 4 and 5.

3.4 Regime complexes and compliance theory

Keohane and Victor present a regime complex as comprising different entities relevant to a particular field, in their case, climate change, that have an overlapping function.[396] Koskenniemi uses the term 'rule-complex', although his conceptualisation is related to a regime complex; a rule-complex has its own form of expertise and focus, such as, human rights, trade, or the environment, and possesses its own principles and institutions.[397] A rule-complex and a regime complex therefore each comprise a collection of institutions

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[391] Maksymilian Del Mar, 'System Values and Understanding Legal Language' (2008) 21 Leiden Journal of International Law, 29–61.

[392] Armstrong and Gibson (n 290) 2.

[393] Muckenberger (n 278) 523. This 'crisis', and the role of global governance in creating and resolving this crisis, is explored below.

[394] Armstrong and Gibson (n 290) 3.

[395] This is not to say that inter-state matters have no impact, but this is as a result of politicisation rather than the oblique purpose of the UPR. Politicisation is discussed in chapter 4 and chapter 5.

[396] Keohane and Victor (n 5) 15-16.

[397] Martti Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' General Assembly, International Law Commission, fifty-eighth session, A/CN.4/L.682, 13 April 2006, see for example, paras 8.

relevant to a particular field, although a rule-complex is presented as a more singular concept. For Keohane and Victor, the institutions that populate a regime-complex have developed over time in response to a variety of factors, including political difficulties, a divergence in state interest, and/or the dysfunction of current or previous international organisation.[398] This approach supports the concept of an international human rights regime complex, which chapter 4 defines and applies to the UPR.

If we accept that regime complexes exist, questions regarding authority and legitimacy are no less relevant, if anything they are more so. Keohane and Victor explore the credibility of a regime complex in terms of its normative justification and propose a model comprising six dimensions, with a variation running from dysfunctional to functional to measure credibility.[399] The dimensions of the model are: coherence; accountability; determinacy; sustainability; epistemic quality and fairness. In the following chapter, these dimensions are each taken in turn to test the modelling of an 'international human rights regime complex' and the UPR's position within such a regime complex.

Concerns have been raised that the expansion of international law has resulted in fragmentation into specialised and autonomous spheres, or regimes.[400] There is some anxiety that 'the emergence of new and special types of law, "self-contained regimes" and geographically or functionally limited treaty-systems create problems of coherence in international law'. [401] Although specialised and autonomous, such regimes are rarely discrete or self-contained nor do they operate wholly independently of one another, as illustrated by the International Law Commission (ILC) report with reference to the European Convention on Human Rights, which:

> (…) is not, and has not been conceived as a self-contained regime in
> the sense that recourse to general law would have been prevented.
> On the contrary, the Court makes constant use of general international
> law with the presumption that the Convention rights should be read in

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[398] Keohane and Victor (n 5) 13-15.
[399] ibid 16-17.
[400] Koskenniemi (n 397) para 86.
[401] ibid para 15.

harmony with that general law and without an *a priori* assumption that Convention rights would be overriding.[402]

The fragmentation of international law and the collision and intersection of legal frameworks and regulatory systems has prompted discussion as to how conflicts arising in the substance of international law, for example a treaty dealing with trade that has implications for human rights law and environmental law, should be addressed,[403] and whether international regimes matter in terms of their direct effect on national behaviour.[404] Numerous technically specialised cooperation networks with a global scope have emerged that 'transgress national boundaries and are difficult to regulate through traditional international law'.[405] These include: 'trade, environment, human rights, diplomacy, communications, medicine, crime prevention, energy production, security, indigenous cooperation and so on'.[406]

Formal legal systems, for example, dealing with dispute resolution, matters pertaining to jurisdiction, and applicable law under a specific treaty, should 'not be read in clinical isolation from public international law'.[407] Such cross-referencing has the potential to aid coherence, although problems arise when a legal matter might arguably fall within the jurisdiction of more than one regime or matters are dealt with in a vacuum. This has prompted concerns not only about matters such as jurisdiction and applicable law but also in relation to the narrowness of focus and concern so that regimes 'are tailored to the needs and interests of each network but rarely take account of the outside world'.[408]

Fragmentation runs counter to a preference for coherence; coherence is 'valued positively owing to the connection it has with predictability and legal security', and yet it is 'a formal and abstract virtue' that does not properly conceptualise the complexity of international law. Coherence needs to be situated alongside pluralism which is 'a constitutive value of the

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[402] ibid para 164.
[403] ibid paras 46-323. Although how 'conflict' in this context is defined is not straightforward, paras 21-26.
[404] Peter M Haas, 'Do regimes matter? Epistemic communities and Mediterranean pollution control' (1989) 43(3) International Organization 377-403.
[405] Koskenniemi (n 397) para 481.
[406] ibid.
[407] ibid para 47.
[408] ibid para 482.

system. Indeed, in a world of plural sovereignties, this has always been so'.[409] Whilst each

rule-complex is constituted, for example, under a specific treaty to address a particular area

of international law, *lex specialis*, the argument pursued by Koskenniemi is that in reality

self-containment is neither feasible nor intended;[410] *lex generalis* is to be taken into account

and other relevant conventional international law. [411]

Even so, the context of these discussions is a formal, positivist conception of law and by

association, of legitimacy and authority. This approach is echoed by Buchanan and Keohane.

They assert rigid concepts of legitimacy and authority in the context of global governance by

referring to institutions mimicking the role of government whereby legitimacy is determined

either on normative grounds, the institution has the right to rule, and/or on sociological

grounds, the institution is widely believed to have the right to rule.[412]

By comparison, Maksymilian Del Mar considers the approach of the ILC report to be an

example of wrong-footing: 'arguing for unity or coherence as between the rules of a legal

system places at risk the responsiveness of specialized institutions to the changing nature of

the peculiar social problems that those institutions deal with'.[413] He perceives the ILC to be

at fault by adopting analysis that extends only to 'surface coherence', instead advocating a

focus on the 'inextricability of rules from their factual adaptability in specific institutional

contexts'.[414] Del Mar is quick to explain that he is not seeking to criticise the purposive

element of legal reasoning as such, but rather that 'positing and maintaining a distinction

between deductive reasoning and purposive interpretation is not conducive to providing an

epistemologically rich and socially complex enough account of legal work performed in

international legal institutions'.[415]

To clarify, the dangers of the supposed fragmentation of international law presented by the

ILC gives the ILC cause for concern in terms of consistency of application of international law.

What Del Mar argues is that consistency, or coherence, is not at issue when one takes

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[409] ibid para 491.
[410] ibid paras 47 and 164.
[411] ibid (n412) see for example, paras 462 and 470-472 respectively.
[412] Buchanan and Keohane (n 20) 405.
[413] Del Mar (n 406) 31.
[414] ibid 34-5.
[415] ibid 37.

account of the application of legal reasoning to a set of facts, and the social and narrative role of image and language in the process of legal reasoning which of itself promotes 'deep coherence'.[416] According to this analysis, one might set aside concerns that international law characterised by regime complexes detracts from the security of value and coherence. A move away from the desire for rigidity is also evident in the subsequent work of Keohane. In his later work, co-authored with David Victor, Keohane departs from positioning governance in tandem with a right to rule by exploring a concept of governance that has a diluted focus on the right to rule and favours a more flexible and adaptive approach that, it is argued, a regime complex is suited to.[417] Linked to the fragmentation of international law is the collision of norms and 'colliding sectors of global society', Gunther Teubner's view being that 'any aspirations to a normative unity of global law are thus doomed from the outset'.[418]

A key issue that subsequently arises, and has a corresponding impact upon the relevant institution's legitimacy and authority, is the response of a government to the guidance / requirements of the constituent institutions of a regime complex. If the government concerned addresses matters in accordance with the relevant institution's direction, governance is validated. If not, the opposite may be the case. As Armstrong and Gibson note, 'governance of any kind tends to be assessed by virtue of its *effectiveness* and *legitimacy*' explaining that '*effectiveness* may be defined as the capacity to achieve a set of objectives without undue disruption' whilst '*legitimacy* may be understood in terms of a broad degree of acceptance by those directly affected by governance' (all emphasis in the original).[419]

This prompts the question of state compliance and motivation for compliance. Compliance theory and practice is explored in section 5.3, chapter 5, however, brief reference here to Buchanan and Keohane's thoughts on content independent reasons for state action is relevant to assist in determining the nature of an entity's governance function.   Buchanan

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[416] ibid 39-48, citing the work of B. Jackson, 'Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence', (2000) 13 (4) International Journal for the Semiotics of Law 433, B. Jackson, Law, Fact and Narrative Coherence (1988) and G. Samuel, Epistemology and Method in Law (2003).
[417] Keohane and Victor (n 5) 15-16.
[418] Teubner and Fishcer-Lescano (n 271) 1004.
[419] Armstrong and Gibson (n 290) 2.

and Keohane present the argument that a party subject to the operation of a governance institution will have 'content-independent' reasons for supporting its operation, 'or at least to not interfere with its functioning'.[420] Content-independent reasons for compliance with a rule refer to an accepted obligation to comply without the need for an assessment of the nature of the content of the rule because the fact of having acknowledged an institution has authority is sufficient grounds for compliance.[421]

Consideration of content-independent reasons is of primary importance when assessing the effectiveness of those governance institutions that are rules-based, which, when writing in 2006 was the view of Buchanan and Keohane.[422] However, an institution that issues or supports recommendations as part of its governance function is not within the realm of rule-making and enforcement, therefore compliance is not mandatory; a recommendation is merely that, it is not an instruction or a demand. Arguably, legitimacy should not be measured by rate or degree of compliance. This is an important feature of the function of a governance entity in terms of the function of the UPR, particularly when considering states in crisis that struggle to implement recommendations that they may have supported.

To conclude this section, a regime complex has an overarching governance function and brings within its scope and composition multiple institutions that each possess, to various degrees, a governance function.[423] The inter-relationship of these institutions, coupled with their independence from each other, can be understood through the lens of global governance theory. Taking this approach assists with a more comprehensive conceptualisation and modelling of the capacity of the UPR and of its limitations. This modelling is presented in chapters 4 and 5 of this thesis, and feeds into recommendations as to how to define and sustain the UPR's authority and legitimacy as a mechanism with a complex governance function, particularly in relation to states in crisis.

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[420] Buchanan and Keohane (n 20) 411.
[421] ibid 411.
[422] Ibid, 'Legitimacy in the case of global governance institutions (…) is the right to rule'.
[423] Keohane and Victor (n 5) 5.

Conclusion

This chapter has appraised literature that discusses the nature of governance in a global context generally and more specifically in the field of international human rights. The analysis has explored and evaluated the key components of global governance to progress this thesis' purpose of critically appraising human rights monitoring through the lens of global governance theory, with specific application to the UPR and Yemen as a state in crisis.

Section 1 illustrates that governance is not primarily, if at all, concerned with coercive enforcement, command or control,[424] but rather it relates to regulation and the promotion of values in a cross-border manner in which non-state actors such as civil society have a key role to play. The UPR does not possess a formal function in relation to either formal regulation or dispute resolution, but this does not detract from its capacity to function as a governance entity within a broader governance regime complex, if anything, it enhances it. An entity with a global governance role is therefore taken in this thesis to be one that performs a regulatory function operating at a global level with a number of stakeholders, state and non-state, including civil society and other relevant institutions that might be situated within the particular regime complex of international human rights.

The meaning and manifestation of legitimacy and authority as key components in a governance entity's capacity to function effectively is addressed in section 2. Output legitimacy, which includes functional legitimacy, is determined by the extent to which an entity satisfies its substantive objectives. Its effectiveness, or perceived effectiveness is measured by the results that flow from its operation. Legitimacy is not, however, secured by output alone and to focus only upon this aspect would overlook important matters of input legitimacy and procedural legitimacy. The principle of input (source) legitimacy refers to the founding of an entity whilst procedural legitimacy is secured when an institution's procedures are adhered to by those subject to it, and in accordance with its founding principles and processes. These are important aspects when it comes to modelling the governance function of the UPR, as the chapter that follows demonstrates.

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[424] Calliess and Renner (n 295) 22 and Weiss 'Governance, good governance and global governance' (n 279) 796.

How output is defined in the context of the UPR is worthy of careful consideration and this is undertaken as part of chapter 5, which also assesses the role of norm dispersal and soft power in the regulatory field as recognised outputs and considers what role human rights indicators might contribute, if any, in this respect. Section 2 also illustrates that the role of the democratic principle in determining a governance mechanism's legitimacy has emerged as a key concern for some scholars that is not easily reconciled with the structure and operation of global governance institutions.[425]

Authority is presented in section 2 in accordance with Cotterrell's suggestion that authority might be thought of as something claimed in support of power by its holder whilst legitimacy is that which is conferred on a particular power by those subject to it.[426] Two facets of authority emerge, one that is commanded on normative grounds - the entity possesses the right (to rule) and the other on sociological grounds - there is wide belief in the entity's right (to rule);[427] with authority being informed by expert authority, traditional authority and charisma.[428] The codification of authority along the lines of horizontal and vertical structures is also set out in this section and provides a useful way of modelling interactions between state and non-state actors during the UPR process, as presented in section 4.2, chapter 4.

As stated in section 2 above, there is a risk that prolonged compliance with process at the UPR that is not coupled with substantive action will amount to an embodied performance akin to ritualism; if the UPR does not effect, or is perceived as failing to effect human rights progress this will result in an erosion of perceived legitimacy. Yet, if governance is not about command and control but is focused on standard setting, dissemination and persuasion, the logic would follow that the UPR satisfies this aspect of its governance role. This presents a dilemma: compliance with an institution mandated to command and control would appear mandatory and central to measuring the legitimacy of that institution, however, for a governance entity such as the UPR, a failure to be persuaded does not strictly amount to a failure of its governance function. Included in the UPR's objectives are, however: 'the

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[425] See also, Errol P. Mendes, *Gobal Governance, Human Rights and International Law* (Oxon and New York: Routledge 2014) 152-154, with reference to criticisms levied at the WTO for 'creating and exacerbating the democratic deficits within and between member nations and civil society groups in the global trade regime'.
[426] Cotterrell (n 277) 263.
[427] Buchanan and Keohane (n 20) 405.
[428] S Turner, 'Charisma Reconsidered' (2003) 3 Journal of Classical Sociology 5, 9-10.

improvement of the human rights situation on the ground' and 'the fulfilment of the State's human rights obligations and commitments and assessment of positive developments and challenges faced by the State',[429] and so part of its command of authority and perceived legitimacy does depend upon tangible achievements as a result. This gives rise to two further questions, addressed in chapter 5: how output should be defined in the context of the UPR, and how state practice and action can be attributed to the UPR's impact.

Section 3 highlights concerns regarding the application of governance theory to state actor human rights obligations on the basis that the former, governance, is political and the latter, human rights obligations, relate to legal duties.[430] This section argues that global governance as an apt framework within which to assess the operation of international human rights monitoring because conceptually and procedurally the monitoring process relates to both political covenants and action to effect legal change, the former by declaring the political will to make changes, for example to accept a recommendation to make a standing invitation to special rapporteurs, the latter by accepting to act upon certain existing legal obligations such as introduce or amend legislation to give full effect to a particular human rights treaty.

Section 3 also considers the role of civil society in the global governance of human rights and state practice and the principle of externality as a component of global governance theory. It posits that for the UPR, externality is achieved via the role played by civil society and to a lesser degree by reviewing states, whilst also highlighting inherent challenges in terms of the subjective approach that might be taken due to politicisation and regionalism during the reviewing process. It proposes the timeliness of an assessment of the effects of governance structures, partly because of the increase in the number of human rights monitoring mechanisms and activity, and to search out unintended and unanticipated consequences, which as Finnemore observes, are often overlooked because researchers find what it is they are looking for.[431]

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[429] UNHRC A/HRC/RES/5/1 (n 9), paras 5(a) and 5 (b) respectively.
[430] Dawson (n 285) 4 and Martha Finnemore, 'Dynamics of Global Governance: Building on what we know' (2014) 58 International Studies Quarterly 221-224, 222.
[431] ibid Finnemore 221.

Section three closes by citing other conceptual frameworks that can make a useful contribution to this thesis but are not suited as the central theoretical approach. These are new/experimentalist governance and global constitutionalism. In new/experimentalist governance the state no longer plays a central role; it is simply one of several relevant actors. For this reason, new/experimentalist governance does not lend itself to the UPR because the state is firmly rooted as the primary actor. However, of relevance to this thesis is that new/experimentalist governance describes governance as an iterative cycle,[432] which accords with the UPR.

The final section, section 4, presents the concept of a regime complex as comprising a collection of institutions relevant to a particular field. In accordance with the work of Keohane and Victor, institutions of a regime-complex develop over time in response to a variety of factors, including political difficulties, a divergence in state interest, and/or dysfunction of current or previous international organisation.[433] This mirrors the evolution of the entities that comprise what is proposed in the next chapter, chapter 4, as the international human rights regime complex.

Section 4 also reveals pervasive anxieties regarding the expansion and fragmentation of international law because of various regime complexes and the perceived threat this presents to coherence. Chapters 4 and 5 take account of these anxieties in their assessment of the legitimacy and authority of the UPR via a critical application of global governance theory. Whilst regime complexes comprise entities that do overlap and intersect, this does not necessarily give rise to incoherence and fragmentation. As the following chapters illustrate, the UPR operates in a particularly unique way within the proposed regime complex by collating information from a variety of monitoring sources into one space. By doing so, it accommodates a dispersed approach to human rights monitoring whilst offering a space for a regrouping of information and an overall 'stock take' of the human rights position of the SuR at that moment in time.

The risk that the unintended and unanticipated effects of governance structures will go unnoticed because they are not being searched for suggests the role of the scholar is

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[432] Nance and Cottrell (n 380) 285-6, citing Sabel and Zeitlin (2010) (n 384).
[433] Keohane and Victor (n 5) 13-15.

paramount: 'scholars have more freedom to expand their range of vision so their responsibility for alerting us to unintended effects is far greater'.[434] A number of unintended consequences and effects of the UPR have been uncovered during the research process of this thesis. These include a discovery of certain state motivations for engaging with the UPR, how universal engagement with the mechanism was initially secured, and the evolving strategic engagement of civil society.

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[434] Finnemore (n 430) 222.

Chapter 4 - A claim to governance: assessing the UPR's authority, input (source) legitimacy and procedural legitimacy

Introduction

This chapter takes the concept of global governance as manifest by principles of authority and legitimacy and applies them directly to the UPR. To model the UPR as a global governance mechanism it assesses the extent to which the UPR asserts and maintains a global governance function. Taking inspiration from the work of Robert O. Keohane, David G. Victor, and Kal Raustiala on regime complexes,[435] this chapter proposes an 'international human rights regime complex' within which the UPR is situated. This exercise contributes to analysing how the UPR functions in relation to states in crisis, to determine what it is about the UPR that means states in crisis engage with the mechanism when, at first glance, it might appear that neither the UPR has much to offer in terms of resolving crisis, nor states in crisis to offer in terms of meeting the UPR's objectives.

As concluded in the preceding chapter, an entity with a global governance role is one that performs a regulatory function operating at a global level with a number of stakeholders, state and non-state, participating in the process.[436] Regulation has been defined as:

> (…) the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.[437]

As the analysis conducted in the preceding chapter indicates, governance is not about command and control; it is about standard setting, dissemination and persuasion,[438] which correspond with a regulatory approach. Ingredients to secure successful governance include the ongoing authority and legitimacy of the entity performing the governance function, and

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[435] Keohane and Victor (n 5) 5 and Raustiala and Victor (n 5), respectively.
[436] Muckenberger (n 278) and Weiss 'Governance, good governance and global governance' (n 279) 795.
[437] Charlesworth and Larking refer to the regulatory character of the UPR, and cite Julia Black's definition of regulation, Charlesworth and Larking (n 330) 26.
[438] Calliess and Renner (n 295) 22 and Weiss 'Governance, good governance and global governance' (n 279) 796.

its place within the broader context of the 'regime complex' it is situated within, if there is one. The operation of global governance theory manifests itself in a procedural sense and in a functional one. There is evidence of universal state engagement with the UPR's procedure, but the nature of such engagement is varied. This throws into sharp focus the long-term impact on the UPR's legitimacy of those states that persistently engage in a superficial manner. As part of the process of addressing the impact a state's failure to present tangible evidence of follow up and implementation of recommendations has on the UPR's legitimacy and authority, this chapter measures the UPR against key facets of legitimacy primarily by assessing the substantive and process aspects of the UPR in terms of its input (source) legitimacy and procedural legitimacy.[439]

The ongoing legitimacy and authority of the UPR cannot rely solely upon its success as a mechanism that has thus far secured universal engagement and that eschews the selective approach that blighted the Commission. To be credible, the UPR needs to have an effective function for all states that engage with it. If it does not, the success of universal engagement and its non-selective approach will also be its failing. Chapter 5 therefore picks up where this chapter ends by proceeding to evaluate the UPR's output (substantive) legitimacy by discussing what its output might amount to and how it might be measured. Combined, chapters 4 and 5 conclude that implementation is but one measure of the UPR's legitimacy; that output (substantive) legitimacy defined by the implementation of recommendations neither is nor should be the only measure of credibility, and that whilst implementation is a crucial consideration, the nature of the UPR's output varies for different states, particularly those in crisis.

Before analysing input (source) legitimacy and procedural legitimacy, the first section of this chapter progresses this thesis' proposal that there is an 'international human rights regime complex' within which the UPR is situated and plays a significant role. The second section considers the nature of the UPR's authority in the context of global institutions that possess

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[439] Bodansky refers to source-based legitimacy, procedural legitimacy and substantive legitimacy, whilst Zürn refers to input legitimacy, procedural legitimacy and output legitimacy, Bodansky (n 20) and Zürn 'Democratic governance beyond the nation state' (n 22), respectively.

an expanded form of authority, and with reference to the vertical and horizontal dimensions of authority at play.

The third section assesses the input legitimacy of the UPR by reviewing its founding resolutions and the process by which those resolutions and their content were agreed. It concludes that the source of the UPR's founding instruments and their content secures its input legitimacy. In the fourth section, the concept of procedural legitimacy is applied to the UPR. Measuring procedural legitimacy is undertaken by assessing the nature of the mechanism's procedure, evaluating state compliance with the same and gauging the extent to which procedure, both in form and substance, is adhered to by all stakeholders of the governance entity, state actors and non-state actors.

4.1 The UPR within an international human rights regime complex

This section illustrates how the inter-relationship of international human rights institutions, coupled with their procedural independence from each other, can be understood through the lens of global governance theory. It takes the concept of a 'regime complex'[440] and proposes an 'international human rights regime complex'.[441] As noted in the introduction to this study, whilst there has been scholarship and research on regime complexes relating to climate change and plant genetic resources,[442] and reference has been made to 'international human rights regimes' and 'human rights regimes',[443] there is no body of work on the concept and operation of an 'international human rights regime complex'. An indication of the entities that come within the scope of the international human rights regime complex, and the multi-directional relation of each governance entity to another, is identified at appendix 2.

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[440] Keohane and Victor (n 5) 5.
[441] During the research for this thesis, no other reference has been found to the application of this model to international human rights, although reference to an international human rights regime has been made by René Wolfsteller as a generic descriptive term without any explanation of the entities within the regime or its governance function, René Wolfsteller, 'The institutionalisation of human rights reconceived: the human rights state as a sociological 'ideal type', (2017) 21(3) The International Journal of Human Rights 230-251, 232, 234, 235 and very recently in Alison Brysk and Michale Stohl (eds), *Contracting Human Rights: Crisis, Accountability, and Opportunity,* (Cheltenahm, UK, Northampton, MA, USA: Elgar Publishing 2018). In addition, Philip Alston refers to a United Nations Human Rights Regime, Alston (n 1).
[442] Keohane and Victor (n 5) 5, and Raustiala and Victor (n 5), respectively.
[443] Shaffer and Ginsburg (n 6) 25, and 21 citing Moravcsik (n 6) 217.

4.1.1 Function and structure

As discussed in chapter 3, a regime complex has an overarching governance function and brings within its scope and composition multiple institutions with each possessing, to various degrees, a governance purpose.[444] A regime complex has been described as 'an array of partially overlapping and non-hierarchical institutions governing a particular issue-area' whereby 'the rules in these elemental regimes [the individual entities] functionally overlap, yet there is no agreed upon hierarchy for resolving conflicts between rules'.[445] A regime complex thus reflects the disaggregation that characterises international law.[446]

Conversely, the overarching aim of the international human rights regime complex takes a harmonising approach by promoting a universal set of norms to be accepted and adhered to by states, with support from civil society. Writing in the late 1980s Bruno Simma and Philip Alston noted that the:

> (…) prospects for developing an effective and largely consensual international regime depend significantly on the extent to which those institutions are capable of basing their actions upon a coherent and generally applicable set of human rights norms.[447]

The disaggregation in the international human rights regime complex is less about substantive matters and more about how state legal obligations towards rights protection are monitored and the methods employed in seeking to secure substantive state engagement with this process. It would appear therefore that the international human rights regime complex is distinct from other regime complexes; it promotes agreed universal rights norms whereas for other regime complexes the rules developed in one entity may challenge those of another.[448] However, as with other regime complexes, the international human rights regime complex may be perceived by state actors as providing a menu of human rights monitoring mechanisms with engagement with some entities presenting, or being perceived as presenting, a more palatable option than others. As this section

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[444] Keohane and Victor (n 5) 5.
[445] Raustiala and Victor (n 5) 279.
[446] ibid 295.
[447] Simma and Alston (n 40) 82-3.
[448] Raustiala and Victor (n 5) 295.

illustrates, the UPR is preferred by some states because its peer review permits a congratulatory approach between allies,[449] and a 'shielding of friends'.[450]

Although the UPR is a subsidiary of the Human Rights Council, it is presented in the regime complex (at appendix 2) as a separate entity with its own governance function, as well as contributing to the overall human rights governance function of the regime complex.[451] This is a deviation from the parameters set by Keohane and Victor whereby the regime complex is characterised by a lack of hierarchy, but such deviation is necessary given the very particular procedure, actors and interaction of the other entities with the UPR.

The international human rights regime complex encompasses state and non-state actors that operate at a domestic, regional and/or global level. There are eight main institutions within this proposed regime complex: the state, comprising the machinery of the judiciary, legislature and executive; international human rights treaties and the corresponding committee, or treaty body; the Human Rights Council, including Special Procedures and Council regular sessions; the UPR, demonstrating its multi-directional interaction with the other entities in the regime complex; regional human rights conventions and the corresponding court; other treaties that address human rights matters; national human rights institutions (NHRIs); and civil society. Whilst civil society is presented as a single class in that regime complex, it can be sub-divided into categories of domestic or international, and sometimes with reference to specific rights protection. Arguably, civil society refers to a collection of non-state actors within the regime complex rather than a separate institution or regime, however, for illustrative purposes it serves to keep it separate.

As the arrows of figure 2 at appendix 2 illustrate, no single institution operates in isolation and the UPR connects with each of the regime's entities. This connection takes a variety of forms. It includes reports that refer to the work of one or more other mechanisms, for

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[449] Interview CSO 01 and Subedi (n 14) 119.
[450] Charlesworth and Larking (n 330) 14.
[451] As noted in chapter 3, It has been a view held by some for a number of years that human rights institutions possess a governance function Benjamin Mason Meier, Lawrence O. Gostin, *Human Rights in Global Health: Rights-Based Governance for a Globalizing World* (Oxford University Press 2018) 73, citing Alston (n 140), but the author of this thesis has not found an attempt to model this regime as a regime complex and conduct analysis according to the work of Keohane, Victor and Raustalia (n 5).

example, the OHCHR compilation for a state's UPR refers to special procedures, treaties and other key instruments, often with reviewing states then making recommendations that refer to one or other of the regime complex's other entities.[452] Such references work in both directions, with special rapporteurs making direct reference to the UPR in their annual reports.[453]

Other connections within the regime complex at the UPR include recommendations to ratify a particular treaty, or to establish an NHRI, given further consideration in chapter 6 regarding the source of UPR recommendations. As a subsidiary of the Human Rights Council, the UPR's connection to the Council is strong; the Council can pass resolutions that encompass the function and operation of the UPR and the UPR features as a standing item on the Council's regular sessions agenda,[454] under which the outcome and Working Group report for states reviewed during the previous UPR session are adopted.[455] Conversely, the connection between the UPR and domestic courts is indirect and therefore weak;[456] domestic courts function in accordance with national and regional legislation, where applicable, and the connection to the UPR is therefore via the UPR's impact upon that legislation, which as noted in chapter 5, is extremely difficult to account for.

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[452] See for example the recommendation made by Chile to Ecuador during Ecuador's second cycle review that refers to special procedures: 'Address the recommendation made in 2009 by the then Independent Expert on Extreme Poverty and Human Rights, regarding the major efforts to be undertaken to incorporate and coordinate social programmes with a cultural approach and a gender perspective (Chile)', UNHRC 'Report of the Working Group on the Universal Periodic Review: Ecuador', A/HRC/21/4 (05 July 2012), para 135.7.

[453] See, for example, the annual reports of the Special Rapporteur for Cambodia (Rhona Smith, 2015-present), Surya Subedi (2008-2015), including 'Report of the Special Rapporteur on the situation of human rights in Cambodia', A/HRC/36/61, 27 July 2017; A/HRC/33/62 05 September 2016; A/HRC/27/70, 15 August 2014 (the latter is referred to in further detail in section 5.3.4).

[454] UNHRC A/HRC/RES/5/1 (n 9) para 35: 'The Council should have a standing item on its agenda devoted to the universal periodic review.'

[455] Adoption is via the standard wording that the Council 'Adopts the outcome of the review of [the United Kingdom of Great Britain and Northern Ireland], comprising the report thereon of the Working Group on the Universal Periodic Review, the views of the State concerning the recommendations and/or conclusions made, and its voluntary commitments and replies presented before the adoption of the outcome by the plenary to questions or issues not sufficiently addressed during the interactive dialogue held in the Working Group', UNHRC 'Outcome of the universal periodic review: United Kingdom of Great Britain and Northern Ireland' Human Rights Council 36th session, agenda item 6, A/HRC/DEC/36/107 (26 September 2017).

[456] There is no evidence as yet of any direct reference by regional human rights or other courts to the UPR; when approached on this matter, UPR Info was doubtful that there would be, 'because of the nature of the UPR', email Gilbert Onyango to the author, Regional Director for UPR Info Africa, 17 May 2018, on file with the author.

To conclude this section, the model presented in figure 2 at appendix 2 serves to identify and represent the primary domestic, regional and global institutions of the proposed 'international human rights regime complex'. Each regime within the complex has a fundamental role to play in the promotion, protection, realisation and enforcement of international human rights norms and laws, and often the role and function of one regime overlaps, complements and/or is reinforced by the operation of another regime in the complex. The model also serves to visually indicate the multi-directional operation of the regimes within the complex. On balance, the structure and functional nature of this regime complex is robust; across the complex is the promotion of universal human rights norms. This strengthens the regime complex and also means that if a state prefers to engage with some entities and not others, there should still be a measure of norm dissemination and dispersal at a global level in accordance with internationally agreed principles and laws.

4.1.2 Dimensions of a regime complex

Keohane and Victor explore the credibility of a regime complex in terms of its normative justification and propose a model comprising six dimensions to measure credibility, with a variation running from dysfunctional to functional.[457] In assessing the extent to which the UPR forms part of an international human rights regime complex and the credibility of that complex, this subsection briefly appraises the UPR and the broader regime complex against each dimension.

Taking firstly the dimension of coherence: 'a regime whose components are compatible and mutually reinforcing is coherent'.[458] Compatibilities in the climate change regime encourage linkages allowing for an easier channelling of resources from one element of the complex to another.[459] The UPR promotes compatibility by endorsing universal human rights principles promoted by each governance regime within the complex. This is achieved in particular via the recommendations that are sourced from those other entities and that make direct reference to them, as discussed in chapter 6, and also by the content of the OHCHR compilation report. This report draws together information from treaty bodies and other human rights monitoring mechanisms and other relevant UN reports, providing a fertile

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[457] Keohane and Victor (n 5) 16-17, as highlighted in chapter 3.
[458] ibid.
[459] ibid.

source of information as to a state's international human rights situation and cooperation with relevant bodies. As explained in chapter 2, concerns, recommendations and other points of encouragement from these sources are summarised, citing where action has followed.[460] This report is one means of tracking state progress against these matters from one UPR cycle to the next, encouraging coherence in terms of the UPR's function as well as promoting the multi-directional nature of the regime complex it sits within.

The second dimension is accountability; this fosters legitimacy and lowers uncertainty.[461] The regime is accountable to 'relevant audiences' including the state's populace and those that interact with the state as individuals or collectives, NGOs and other states.[462] Within the international human rights regime complex, treaty bodies issue general comments and make recommendations, special rapporteurs produce reports and make representations, NGOs lobby and campaign, but if states dodge efforts by the governance regime to be held accountable and fail to implement recommendations from across the complex, the individual and collective authority of the complex's entities is undermined. Those states celebrated for their good practice, for example, seek to engage in public dialogue ahead of their UPR, and produce a mid-term report.[463] This is a measure of accountability and enhances the UPR's authority. Taking Keohane and Victor's spectrum of

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[460] UNHRC, 'Compilation on the United Kingdom of Great Britain and Northern Ireland: Report of the Office of the United Nations High Commissioner for Human Rights report', A/HRC/WG.6/27/GBR/2 (22 February 2017) paras 41 and 57 referring to measures taken since its previous UPR (Modern Slavery Act 2015 and more inclusive education, respectively). There are no references in Yemen's second cycle OHCHR compilation to UPR recommendations, however there are numerous in Somalia's, UNHRC, '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: Somalia' A/HRC/WG.6/24/SOM/2 (23 November 2015) and UNHRC, '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: Yemen' A/HRC/WG.6/18/YEM/2 (11 November 2013).
[461] Keohane and Victor (n 5) 16-17.
[462] ibid 17.
[463] Including the establishment and activities of a Thai CSO Coalition for the UPR, 6-11, and opportunities offered by the Paraguayan National Mechanisms for Reporting and Follow-up (NMRF) UPR Info 'Butterfly Effect' (n 463) 11-13. For a comprehensive interim report example, see 'Universal Periodic Review of Ireland Interim Reporting Stage: Progress scorecard, government's interim report and NGO stakeholder review', March 2014, 2-11, http://www.rightsnow.ie/assets/33/D33ABD13-E5DA-4A01-8E3B5D67B7E4587D_document/ICCL_UPR_Interim_Stage_compendium_March_2014.pdf last accessed 23 April 2018.

function-dysfunctional, the position of the UPR will vary subject to the SuR and the extent of its engagement and perception of the authority and standing of the UPR.

Determinacy is the third dimension: 'important both to enhance compliance and to reduce uncertainty'.[464] Here the function of domestic and regional courts is key, as well as General Comments issued by treaty committees that determine and clarify state obligations.[465] The extent to which the UPR secures determinacy is subject to how SuRs respond to recommendations and is variable, as addressed in chapters 5 and 6, arguably more closely aligned to 'dysfunctional' than 'functional'. The fourth dimension, sustainability, requires a regime to 'have components that reinforce one another and may also build in redundancy, to withstand shocks'. The multi-directional nature of the regime complex, discussed in section 4.1.1, to some degree functions to support sustainability. However, for Yemen, as chapter 7 shows, there are numerous entities within the regime complex reporting and making resolutions regarding the human rights situation in the country yet little evidence of subsequent action, thereby undermining the authority, power and sustainability of individual regimes.

The penultimate dimension is epistemic quality. This can vary according to the 'consistency between [the regime's] rules and scientific knowledge'.[466] Linking this to the international human rights regime complex, epistemic quality relates most closely to knowledge of the human rights situation within a state, increasingly measured by human rights indicators reliant upon fact-finding and investigation missions. Epistemic quality in this respect may be questionable, as identified in section 5.4, chapter 5.

Keohane and Victor are pragmatic regarding the final dimension, that of fairness, because 'multilateral institutions always reflect disparities of power and interest, they never perfectly reflect abstract normative standards of fairness'.[467] Normative standards of fairness come into question according to state behaviour at the UPR discussed in section 4.4 below despite

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[464] Keohane and Victor (n 5) 16-17.
[465] The African Court on Human and Peoples Rights, The European Court of Human Rights and the Inter-American Court of Human Rights, for example, and CCPR,'General Comment No. 8 Article Right to Liberty and Security of Persons' HRI/GEN/1/Rev.9 (Vol. I) (30 June 1982).
[466] Keohane and Victor (n 5) 17.
[467] ibid.

the UPR conquering to some degree 'disparities of power' through its structural and procedural fair treatment of states. By comparison, the Council has been less successful, for example, provoking polarisation regarding membership and perceived bias.[468]

4.1.3 Reinforcing the state-centric paradigm: the distribution of sovereignty

The international human rights regime complex is populated by international organisations that reinforce a global order based upon a state-centric paradigm, positioning the state as the primary protector and violator of human rights. For this reason, the human rights legal and political, and moral and social, framework has evolved to focus upon the obligations of a nation state towards its subjects and those within its territory or territorial reach.

The protection of human rights and holding state authorities to account increasingly relies upon support from non-state actors, namely civil society but, as discussed in section 1.5, chapter 1, also comes under threat from non-state actors, namely, insurgents, armed rebel groups, and organised terrorism. In the wake of 9/11 the political and media rhetoric moved away from the danger of nuclear and chemical weapons,[469] towards the threat posed by weak and fragile states and their inability to control activities in border and other regions creating 'safe havens' for non-state actor terrorist groups and insurgents.[470] As noted in the

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[468] See above section 2.1, chapter 2.

[469] Although more recently there has been renewed focus on western concerns of the nuclear armament of certain states, namely Iran and the Peoples' Republic of North Korea, for a small selection of recent press, see: Ed Pilkington, 'It will not be very pleasant,' Iran warns, if Trump sabotages nuclear deal' *The Guardian* (22 April 2018) https://www.theguardian.com/us-news/2018/apr/22/it-will-not-be-very-pleasant-iran-warns-if-trump-scraps-nuclear-deal; Julian Borger, 'Iran nuclear deal: sanctions waived as Trump begins countdown to keep US in' *The Guardian* (12 January 2018) https://www.theguardian.com/us-news/2018/jan/12/iran-nuclear-deal-trump-waives-sanctions-but-sets-deadline-for-overhaul; Justin MCurry, 'North Korea halts nuclear and missile tests ahead of planned Trump summit' *The Guardian* (21 April 2018) https://www.theguardian.com/world/2018/apr/20/north-korea-suspends-nuclear-missile-tests; Patrick Cockburn, 'The Iran crisis presents a bigger danger to peace than North Korea now that Trump seems determined to end the nuclear deal' *The Independent* (27 April 2018) https://www.independent.co.uk/voices/iran-nuclear-deal-north-korea-donald-trump-emmanuel-macron-a8326146.html, all last accessed 17 August 2018.

[470] Where the training and planning of terrorist acts in the west as well as across the Middle East dominated the security agenda, prior to the advent of Daesh, see for example, OECD 'Fragile States 2013: Resources Flows and Trends in a Shifting World' 11 http://www.oecd.org/dac/incaf/FragileStates2013.pdf last accessed 23 September 2014; Jeremy M Weinstein, John Edward Porter, Stuart E. Eizenstat, 'On the Brink: Weak States and US National Security', Center for Global Development, 6 August 2004, http://www.cgdev.org/doc/books/weakstates/Full_Report.pdf last accessed 31 August 2018.

introductory chapter to this thesis, insurgent and terrorist non-state actors pose a security threat with a global relevance.[471]

There has been, it is argued, a paradigmatic shift whereby sovereignty is no longer predicated upon 'might is right', but rather 'rightful authority' that depends upon the perceived legitimacy of the actor seeking to exercise authority.[472] The UPR and the international human rights regime complex support this; whilst there is confirmation of state sovereignty, the authority the state commands is under scrutiny where rights protection is concerned. Significantly, and more so than the other entities within the rights regime complex, the UPR reinforces the 'distribution of sovereignty by an international legal order committed to the principle of the formal equality of sovereign States'.[473] This is via the equal treatment of all states at the very heart of its design. As Patrick Macklem also notes, 'the normative value of this principle [equal treatment of states] should not be overstated, but nor should it be understated'.[474] Yet whilst the Council in creating the UPR seeks to promote and secure this principle's continued relevance it remains that the international human rights regime complex is constructed and operates to protect state sovereignty that undermines principles of universality, for example, by allowing derogations and limitations to treaty law at a state level,[475] and by the fact that the power to support or note a UPR recommendation rests with the state.

4.1.4 Coherence and fragmentation

Chapter 3 addressed concerns raised by scholars and international lawyers of the fragmentation and lack of coherence in the field of public international law. Whilst the presence of a regime complex in a particular field might confirm these concerns, certain benefits arise because regime complexes are 'not just politically more realistic but they also offer some significant advantages such as flexibility and adaptability.'[476] A fragmented

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[471] Barry Buzan uses the term 'security complex' in a similar manner to the use here of regime complex but in the sense of discussing patterns of amity and enmity that emanate from a variety of causal factors such as border disputes, ethnically related populations, ideological alignments, and historical links, Buzan (n 73) 190.
[472] *Hamel-Green* (n 391) 430: Held observes that 'Sovereignty has been redefined from 'might is right', a notion that pervaded international law from the sixteenth century to the late nineteenth century', being changed 'from effective power to rightful authority: that is, authority that upholds cosmopolitan principles, democratic standards and human rights standards'.
[473] Macklem (n 47) 49.
[474] ibid 49.
[475] Wolfsteller (n 441) 235.
[476] Keohane and Victor (n 5) 15.

regime complex can allow strategic behaviour on the part of states in terms of those aspects of the regime they choose to engage with and those they do not; in the context of climate change, 'different states can sign on to different sets of agreements making it more likely that they would adhere to some constraints on greenhouse gases'.[477]

Understanding the international human rights framework and its constituent parts as a regime complex helps to address, though not resolve, the challenge of the adoption and application of universal norms and practice.[478] By having a regime complex that includes within it a variety of mechanisms, from treaties to standing invitations for special procedures, from the UPR to commissions of inquiry, and from regional human rights systems to local engagement with civil society, it is more likely that states will choose to engage with some aspect of human rights monitoring and protection, rather than none.

The international human rights regime complex is constructed, intentionally or otherwise, to afford states a degree of autonomy as to which regime(s), or aspects of a particular regime within the complex, it engages with. Viewed in this way, regime complexes do not remedy the lack of a comprehensive unifying regime but present an improvement; although there is 'an absence of an overall architecture or hierarchy that structures the whole set',[479] there is a degree of commonality with each regime's foundation emanating from those principles enshrined in the UN Charter and the UDHR, built upon by subsequent human rights instruments.

4.2 Authority

The authority commanded by the UPR is referred to throughout this chapter and so this separate section makes some succinct and important comments directly relevant to the manifestation of authority at the UPR. The UPR commands authority by having a tight grip on its procedural aspects, however, in order to successfully command authority those stakeholders with a vested interest in the mechanism, civil society, NHRIs, rights holders,

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[477] ibid.
[478] One such challenge is presented by René Wolfsteller with reference to the way that the international human rights regime is constructed to protect the sovereignty of states, by allowing for derogations and limitations, over the rights of individuals, Wolfsteller (n 441) 235.
[479] Keohane and Victor (n 5) 8.

etc., need to continue to be persuaded of the UPR's legitimacy. If this fails, the UPR will struggle to maintain authority.

In chapter 3, two facets of authority were identified: one that is commanded on normative grounds, *having* the right to rule, the other on sociological grounds, widely *perceived* as having the right to rule.[480] The UPR does not 'rule' as such, and so in this respect authority is treated as referring to the right to operate. The normative ground of the UPR's authority is explored in section 3 of this chapter regarding its mandate under its founding instruments. Sociological grounds for its authority are more challenging; the fact of a state's engagement with the UPR does not necessarily reflect wider perceptions of the UPR's right to exist, although civil society's proactive engagement may do.

Section 3.2.2, chapter 3 considers the sharing of a persuasive legal authority 'horizontally' between state-centred constitutional structures and the building of new 'vertical' hierarchies of authority, through standard setting, outside these structures. It initially appears that authority at the UPR exists both vertically and horizontally. Horizontal authority is present through peer review and takes on a persuasive form akin to soft power that informs the intricate web of intra-state regionalism and diplomacy, see chapter 5. There is the weight of legal authority to those recommendations that cite a state's failure to comply with its legal obligations under ratified treaty law and request action to rectify the matter.

Vertical authority is asserted through the auspices of the Working Group report. However, given this report is little more than a collation and grouping of the recommendations made to the SuR during peer review, with some self-preserving pruning and editing undertaken at the behest of reviewing states and SuRs,[481] this is in fact a repackaged form of horizontal authority. The UPR thus accommodates a more liquid form of authority,[482] without denying that rigid traditional forms of authority are relevant and to be adhered to. In this respect, the UPR errs towards the postmodern, whereby the rigid structures and certainty of modernity are simultaneously rejected and reasserted.[483]

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[480] Buchanan and Keohane (n 20) 405.
[481] Interview with CSO 07, changes made at Syria's request to how the government should be referred to in a recommendation by Ireland.
[482] Nico Krisch, 'Authority, solid and liquid, in postnational governance', in Cotterrell and Del Mar (n 31) 25-48.
[483] 'Difference is asserted and then buried in an assumption of universal harmony; a gesture which no more than repeats the central paradoxical supposition in postmodernism of radically decentred identities in a world

State engagement with the UPR, even in its most diluted form of attendance at the Working Group in Geneva, bestows some authority and thus credibility on the mechanism. Yet ultimately it is the state that chooses when and how to act in response, further demonstrating the relevance of an expanded concept of authority to the UPR that stands in contrast to the command-based enforcement of vertical authority.

4.3 Input (source) legitimacy

Input (source) legitimacy in the context of the UPR is secured via the organ that created the UPR acting within its mandate, and having the perceived and/or actual authority of those subject to it to do so. It also refers to the method by which the UPR was created, namely the relevant resolutions and their source.   For these reasons, this section assesses the powers vested in the relevant organs, their standing and power to design institutions and pass instruments that led to the UPR's creation. Given chapter 2 presented the UPR's principles and objectives, this section tracks the source of the relevant resolutions, but does not rehearse their content.

As we know from chapter 3, democracy in the context of input legitimacy has been described as consisting of two components: a democratic principle and a deliberative principle.[484] Although it has been said that the modelling of political institutions as democratically legitimate 'becomes incoherent' at the level of global governance because there is no guarantee of a connection between those that establish norms and those that are affected by them,[485] there is, however, some evidence of the deliberative principle being met with regard to the UPR's conception and formation. This is on the basis that it was the result of various proposals, discussion and debate by those that were to be subjects of it, namely, state representatives, civil society and civil servants.[486] There is some evidence of the satisfaction of the democratic principle on the basis that it was state representatives that actively participated in debates informing the ultimate decision to create the UPR, and state

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of instant and unprecedented technical connection', Peter Brooker, 'Introduction: reconstructions', in Peter Brooker (ed) *Postmodernism / Modernism* (London and New York: Pearson Education Limited 1992, republished Routledge 2014) 13.

[484] Zürn 'Democratic governance beyond the nation state' (n 22).

[485] Wheatley (n 302) 97.

[486] Kofi Annan 'In larger freedom' (n 29); Alston (n 1); Schrijver, (n 1); Freedman (n 1).

representatives that voted on the relevant General Assembly and Human Rights Council resolutions.

The deliberative principle dictates that 'any decision should be backed by arguments committed to values of rationality and impartiality'.[487] This is similarly achieved by states agreeing and then voting upon the content of a given resolution. The method by which an institution has been created influences its acceptance and perceived legitimacy by those that fall within its remit and scope as well as those with the power to input and interact with the institution. Such acceptance by both categories of actors, those subject to a process and those that contribute to the process, is crucial; without it, state and non-state actors may fail to be persuaded of the value of the mechanism and vote with their feet by disengaging.

In terms of relevant organs having the mandate and authority to conceive of the UPR, article 7, paragraph 1, of the UN Charter provides for a General Assembly to be established as a principal organ of the UN.[488] Paragraph 2 of the same article states: 'Such subsidiary organs as may be found necessary may be established in accordance with the present Charter'. Article 22 provides that: 'The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions'. In accordance with these powers, the Human Rights Council was established as a subsidiary organ of the General Assembly with its origins in resolution 60/251.[489]

General Assembly resolution 60/251 is the founding resolution of the Human Rights Council. Pursuant to that resolution, the Council is obliged to 'undertake universal periodic review of the fulfilment by each state of its human rights obligations and commitments'.[490] The Council therefore proceeded in Resolution 5/1 'Institution-building of the United Nations Human Rights Council', to establish its institutions and their scope, processes, methods,

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[487] Zürn 'Democratic governance beyond the nation state' (n 22) 186, citing Jon Elster 'Introduction' in Jon Elster (ed) *Deliberative Democracy* (Cambridge University Press 1998) 8 and Rainer Schmalz-Bruns *Reflexive Demokratie: Die demokratische Transformation moderner Politik* (Baden-Baden: nomos 1995).
[488] Charter of the United Nations, article 7 (1): There are established as principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat.
[489] UNGA A/RES/60/251 (n 143).
[490] ibid para 5(3).

membership, principles, etc., of which the UPR was one.[491] Council resolution 5/1 is further

evidence of the UPR's source legitimacy and follow up resolutions seek to maintain that

legitimacy. Human Rights Council resolution 16/21, for example, reported a review of the

work and functioning of the Council conducted by an open ended intergovernmental

working group to supplement resolution 5/1 and confirmed the UPR's process and

modalities.[492]

To conclude, if the process of negotiation, drafting and voting upon proposed resolutions of

the General Assembly and Human Rights Council is accepted as being legitimate being

rational and informed by principles of democracy and deliberation, the input legitimacy of

the UPR is to all intents and purposes secured. This section confirms the source legitimacy of

the UPR, as such its legitimacy is not solely defined by its non-selective process and equal

treatment of all UN member states, although these are important aspects of its procedural

legitimacy. Procedural legitimacy of the UPR very much depends upon the nature of state

practice during the process and motivations for that practice.

4.4 Procedural legitimacy

There is an argument that the fact of universal state engagement with the UPR at a basic

level, see figure 3, appendix 3, levels of state engagement, means the UPR's procedural

legitimacy is secure. However, compliance with process is not of itself a sufficient measure;

universal engagement comes at a price. The nature of state compliance with procedure in

terms of the substance and extent of state engagement is a key concern, and there is a risk

that some states treat engagement with the UPR as sufficient in terms of international

reporting obligations.[493] Whilst the UPR's conception in the context of the Commission's

demise is relevant, an obsession with the ills the UPR was designed to assist in fixing skirts

over the challenges it faces as well as the potential it has.

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[491] UNHRC A/HRC/RES/5/1 (n 9), other mechanisms established within the Human Rights Council in this
resolution were: Special Procedures (section II), the Human Rights Council Advisory Committee (section III),
Complaint Procedure (section IV), the agenda and framework for the Human Rights Council's work (section V),
the Council's methods of work (section VI) and its rules of procedure including regular and special sessions
(section VII).
[492] UNHRC A/HRC/RES/16/21 (n 201).
[493] As highlighted by one interviewee quoted in chapter 5, sub-section 5.3.2: Acculturation.

The UPR's procedural legitimacy can be contested on various grounds that fall into three areas: one, that politicisation is rife leading to recommendations that are driven by political, regional and other affiliations; two, that compliance with routine procedural aspects rather than substantive compliance with recommendations is translated into compliance per se; three, that global human rights institutions encourage the bureaucratisation, institutionalisation and legalisation of human rights.[494] This section considers each matter in turn, although the matter of politicisation is addressed only briefly here being addressed in greater detail in chapter 5.

4.4.1 Politicisation and the UPR

Politicisation happens in an international organisation following 'the introduction of unrelated controversial issues by countries seeking to further their own political objectives'.[495] As Rosa Freedman notes, 'overt and subtle forms of politicisation are both capable of affecting a body's ability to fulfil its mandate'.[496] Politicisation and regionalism is inevitable when a body comprises representatives from a state's government as opposed to individuals that are independent and non-governmental.[497] Given that state diplomats with a political mandate make UPR recommendations, politicisation is not surprising.

The Syrian delegation's opening statement at its first UPR in 2011 was overtly political;[498] it declared its commitment to universal human rights and the building of a democratic society but stated it was only willing to accept advice from certain African, Asian and Latin American countries.[499] In its view, Western countries had no right to provide human rights advice given their role in conflicts in Libya and Iraq and their colonial legacy.[500] Syria's interactive dialogue occurred during the height of the Arab spring, related to this the US condemned the Syrian government for committing gross violations of human rights against its own

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[494] Oberleitner *Global Human Rights Institutions* (n 23) 14, whereby global human rights institutions 'seek to translate the concerns of human rights – upholding human dignity, protecting the vulnerable, empowering the powerless, remedying wrongdoing – into processes and procedures'.

[495] Freedman (n 1) 11 citing G.M. Lyons, D.A. Baldwin and D.W. McNemar, 'The "Politicization" Issue in the UN Specialized Agencies', (1977) 32(4) Proceedings of the Academy of Political Science 89.

[496] Freedman (n 1) 12.

[497] Alston (n 1) 189.

[498] The content of this paragraph and the paragraph that follows is based upon Riches (n 8) 173.

[499] Discussion of the ongoing civil war in Syria and related matters of international law is the scope of this thesis; this example is by means of simple illustration.

[500] UNHRC, 'Report of the Working Group on the Universal Periodic Review, Syrian Arab Republic', A/HRC/19/11, 24 January 2012, paras 7 and 10.

citizens in the form of 'mass arrests, arbitrary detentions, torture and targeted killing' that 'continued unabated', and called for President Assad to step down immediately.[501] Cuba made a point of order that the US's approach was entirely unacceptable because neither the Council nor any other UN forum was the appropriate environment for such a request. It fell to the President of the Council to restore order and remind all representatives to continue the process 'in the customary climate of respect'.[502] This reveals the potency of the UPR in terms of the space it creates for the playing out of the political dynamic between states.

The approach of the Syrian government and its supporters might simply reflect a denial of violation, or may hark towards a justification for action during a state of emergency. Alternatively, decisions may be deemed legitimate in the broader context of the US's current and historical human rights abuses outside of its own territory as being indicative of acceptable norms of unilateral state behaviour (for example, Guantanamo Bay and the US's use of military unmanned aerial vehicles, particularly in parts of the Middle East). By comparison, rather than being based on a normative approach, the US's request for the resignation of the Syrian government might have been determined by legal principles, with the US perceiving the interpretation of Syrian national law by the Syrian government, and its actions towards its citizens, as fundamentally incompatible with international human rights law, regardless of the US's own previous and current actions.

Writing in 2017, this thesis' author hypothesised that regionalism and politicisation could prompt an SuR to accept and move towards implementation of a recommendation from an ally in order to maintain good relations.[503] Findings published by Rochell Terman and Erik Voeten in 2018 support this hypothesis.[504] Following their quantitative study of the 41,066 first and second cycle recommendations, Terman and Voeten found that states 'are less likely to criticize their friends' and 'are more lenient towards their strategic partners in the peer-reviewing process'.[505]

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[501] ibid.
[502] ibid.
[503] Riches (n 8) 172-173.
[504] Terman and Voeten (n 2) 1-23.
[505] ibid 1.

Realpolitik permeates the UPR; politicisation and regionalism is inevitable when a body comprises representatives from a state's government as opposed to individuals that are independent and non-governmental.[506] Furthermore, regionalism is at the heart of the UN's structure divided as it is into five regions with the UPR providing a space for states wishing to engage in 'ideological warfare' against Western states, states such as Cuba,[507] and Syria.[508] The need to resist politicisation and maintain the UPR's credibility was expressed by the President of the Council in his opening remarks at the UPR's 18th Working Group. He reiterated that recommendations made must focus only on human rights in order to 'maintain and "beef-up" the credibility of the UPR system' and that the SuR must respond to all recommendations.[509]

Civil society representatives have expressed similar views, betraying a lack of confidence in the UPR in this respect:

> (…) in our opinion it is a peer review and it's even worse in a way than a peer review because it's a review of Saudi Arabia by Egypt for example and I don't think anyone is really in a position to criticise one another's human rights records…. I don't think it ever can [be a success] so long as it remains a review of states by states because it's never going to be independent or impartial. It's going to be driven by politics and by interest and, you know, a state that has good relations with another state is not going to make really tough comments or concerns / recommendations. You know it's going to be 'we welcome the efforts made by Saudi Arabia'.
>
> In our opinion, I guess it has remained the same, there is no point [to the UPR], it's never going to be an independent review. I don't think, I don't feel, that states feel bound this process. I don't think states at the end of the review really feel like, 'Ok, I have accepted this one hundred recommendations, and I have to go back home and I have four years to implement them'. Maybe for some European or some Western countries this is how it works, but in this Arab region I can tell you 100% that states could not care less about implementing UPR recommendations.[510]

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[506] Alston (n 1), 189.
[507] Tomuschat (n 137) 619.
[508] As discussed in this section above.
[509] Author's own notes of comments made by Baudelaire Ndong Ella, Human Rights Council President during observation of the opening of the UPR working group 18th session (n 241).
[510] Interview CSO 01.

This is a damning indictment. However, there is evidence that allies do not entirely shy away from passing criticism and when they do criticise their contribution may be more effective because 'their recommendations are accepted more often than substantially identical recommendations emanating from other states with fewer strategic ties'.[511] Reasons for accepting recommendations out with the content of the recommendation can also be conceptualised according to Joseph Raz's second order reasons for action, considered in section 5.3.1, chapter 5.[512]

Analysis of recommendations made during the first and second cycles of the UPR reveals that the political nature of the UPR means it can operate with a 'strong but informal influence'.[513] Further, its political nature has also been seen as a key lever in its success: '…countries are on the world stage during their review. No one wants to look bad'.[514] In a similar vein, a Bangladeshi government official commented that '…not wanting to be seen to be doing poorly creates a sort of competition to see who has done the most'.[515] That said, some civil society actors remain sceptical of the approach of some states to the UPR process of making recommendations:

> (…) largely speaking, or in many instances… recommendations are not rigorous, critical, grounded in human rights principles and obligations but rather a reflection of the human rights priorities of the recommending state together with their perceived national, political, economic, security and other interests and so the sometimes congratulatory and overwhelming positive, constructive nature of the UPR is something that appeals to diplomats.[516]

This scepticism was shared by a number of interviewees, expressing concern that 'powerful countries and their allies come together to shield themselves from scrutiny' so that the UPR is '…very often a filibuster of praise where those that make it on the speakers list are those that want to draw attention away from the actual violations in the country'.[517] There was evidence of this during Working Group of China in 2013. The Syrian Mission to the UN, for

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[511] Terman and Voeten (n 2) 1.
[512] Raz (n 44) 16-18.
[513] Terman and Voeten (n 2) 1.
[514] McMahon 'The UPR: A Work in Progress' (n 127) 13.
[515] ibid 13.
[516] Interview CSO 06.
[517] Interview CSO 05.

example, applauded China's 'open' state report and recommended it continue to play an active role in the Council's work and continue to contribute to solving issues relating to human rights in a fair, objective and non-selective manner.[518] Russia also welcomed China's human rights achievements, whilst the UK expressed concern regarding restrictions on freedom of expression and association and urged greater transparency over the use of the death penalty.[519]

4.4.2 Compliance with routine procedural aspects of the UPR

The above sub-section addresses some aspects of motivation for state compliance with the UPR's processes and procedure in a substantive manner. This sub-section refers to evidence of compliance and deviation from procedure as a means to further measure procedural legitimacy. An agreed procedure that is considered to be adequate and fair has a legitimising effect.[520] Compliance with a mechanism's procedures signals to stakeholders that an entity is authoritative, fostering a positive perception of that entity and encouraging stakeholder commitment to it.

In terms of the more routine aspects of the UPR process, procedural legitimacy follows when an institution's relevant actors make their submissions in the relevant timescale and format, and attend and contribute to reviews as appropriate. The Council took a detailed and prescriptive approach in modelling the UPR process, as described in section 3, chapter 2, aware that securing universal engagement from the outset was going to be a key factor contributing to the UPR's perceived success. A senior member of the OHCHR, interviewed as part of the research for this study, explained that the calendar of reviews for the first UPR sessions was complex and constructed so that those states that were members of the Council were scheduled first, followed by Council non-member states. To this end commitment was made by those states elected as members of the Human Rights Council to present themselves to the UPR.[521] Those states due to come to the end of their Council

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[518] UNHRC, 'Report of the Working Group on the Universal Periodic Review, China (including Hong Kong, China and Macao, China)', A/HRC/25/5, 4 Dec. 2013, para. 165.
[519] ibid paras 135 and 176.
[520] Wolfrum (n 335) 2041.
[521] UNGA A/RES/60/251 (n 143) para 9.

membership soonest were in the first tranche of reviews, the remaining of the 47 members immediately followed. The interviewee explained:

> When you reach the 48th state and you are the first one that doesn't want
> to come, you look seriously bad. Small, big or whatever, political,
> whatever reason, you look absolutely bad. So no one dared to say we
> cannot come. They all came and that was a major success.[522]

At the time of writing, no state has failed to attend its review during the first, second or third cycle.[523] Analysis reveals that all those states scheduled for the first session of the third cycle had submitted national reports for all three cycles, with all reports for these states over the three-cycle period appearing to have been submitted ahead of the Working Group, save for two.[524] Crucially, no UPR report has gone unwritten. Compliance with procedure in terms of the submission and processing of UPR reports is exceptionally high; that the UPR does not suffer the backlog that characterises the work of so many treaty committees and overdue reports is quite remarkable and sound evidence of its procedural legitimacy.[525]

There has, however, been the occasional procedural irregularity. Israel was scheduled for its second cycle review on 29 January 2013, however it failed to submit a national report when it was due in October 2012, and did not attend its review in Geneva as per the timetable.[526] This was related to Israel having suspended its involvement with the Council in May 2012;[527] its UPR absence was widely criticised and concerns were raised at the time that Israel's

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[522] Interview UN 01.

[523] Whilst the United States announced in June 2018 its withdrawal from the Human Rights Council, Allen and Alexander and others (n 184) it is not due for its third cycle UPR until April-May 2020 by which time the matter may be resolved.

[524] See appendix 1, Figure 1: 'Compliance with UPR reporting – third cycle sample – 27th session (April – May 2017).

[525] UNGA 'Status of The Human Rights Treaty Body System: Report of the Secretary-General', A/71/118, 18 July 2016, Section C, Backlog, paras 29-38.

[526] UPR Info 'Israel absent from its own UPR', 30 January 2013, https://www.upr-info.org/en/news/israel-absent-its-own-upr last accessed 16 April 2018.

[527] 'Israel ends contact with UN Human Rights Council' *BBC News Online,* 28 March 2012, http://www.bbc.co.uk/news/world-middle-east-17510668, citing the reason as the decision to by the Human Rights Council to send an international fact-finding mission to investigate Jewish settlements in the West Bank. Tovah Lazaroff, 'Israel agrees to return to UN Human Rights Council' The Jerusalem Post (27 October 2013), http://www.jpost.com/Diplomacy-and-Politics/Israel-agrees-to-return-to-UN-Human-Rights-Council-329888 citing the reason for the suspension of engagement with the Council as being, amongst others, in response to a motion under Human Rights Council agenda item 7 that member states debate Israeli human rights violations at each regular session of the Council, and the exclusion of Israel in Geneva from the Western and Other Group (of which it is included in New York).

actions might 'set a dangerous precedent' for the UPR.[528] However, Israel had contacted the Council's President in January 2012 and requested a postponement of its second cycle review, evidence of a temporary cessation only and presumably deemed not sufficient to take action under paragraph 38 of Council Resolution 5/1 on the grounds of non-persistent cooperation.[529] The review was rescheduled for the 17th Working Group (21 October - 1 November 2013) and Israel engaged accordingly,[530] although ties with the Human Rights Council were reportedly re-established only 48 hours before its rescheduled review.[531]

Another procedural irregularity relates to the UK and it changing its previously stated position regarding certain second cycle recommendations shortly before its third cycle. It changed its position in relation to some recommendations from supported to noted, reducing the number of supported recommendations from 95 to 66.[532] As UPR Info observes, seeking to change its position, particularly on the eve of a subsequent review, suggests the UK was avoiding accountability for implementation of previously accepted recommendations.[533] For this reason, and to preserve the success thus far with procedural compliance, this practice should not be permitted.

Nonetheless, as Christian Tomuschat notes, 'the UPR is founded on an almost irreproachable base as far as the fairness of the proceeding is concerned'.[534] The result is that all states have the option to pass comment and make recommendations to others, regardless of any rights violations past or present. The fact that all states have this opportunity has been met with criticism in some quarters,[535] yet the UPR's inclusive nature remains fundamental to its credibility as a mechanism premised upon equal treatment. That said, it is Western states that are most active at the UPR; this requires further attention to ensure the UPR evolves to

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[528] Citing Pakistan, on behalf of the Organisation of the Islamic Conference; Gabon, on behalf of the African Group, and Turkey, *Israel absent from its own UPR* (n 526).
[529] UNHRC A/HRC/RES/5/1 (n 9).
[530] UPR Info 'Israel absent from its own UPR' (n 526).
[531] Lazaroff (n 527).
[532] UPR Info 'The UK changes its position on recommendations received at previous review', Press Release, 25 May 2017, https://www.upr-info.org/en/news/the-uk-changes-its-position-on-recommendations-received-at-previous-review last accessed 05 April 2018.
[533] According to UPR-Info, the recommendations it sought to alter its position in relation to included (but were not limited to) ratification of international treaties and lifting reservations to others, human rights protection and detention, children's rights, gender equality, non-discrimination, welfare rights, migrants' rights, and women's rights, ibid.
[534] Tomuschat (n 127) 610.
[535] Interview CSO 01.

foster engagement that is truly global.[536] A further cause for concern, expressed by some interviewees, is that some states might view the UPR as the forum for discussion of country specific matters rather than the Human Rights Council regular sessions.[537] If this view were to become widespread it might prompt disengagement by states with the Council's regular sessions, undermining the Council and placing a heavy and unrealistic burden on the UPR.

Benjamin Gregg refers to thin norms and thick norms, stating proceduralism is a thin norm easily adopted by many.[538] In the same vein, he suggests there are rights that are normatively thin and those that are normatively thick. He presents the latter, rights that are normatively thick, as being more particular, relevant to a smaller set of people and less likely to be apt for universal adoption, while those that are normatively thin are, conversely, of broader appeal and more likely to be adopted universally. Procedurally, the UPR operates as a normatively thin mechanism: the inclusion of all states, its cooperative approach, and there lack of formal enforcement mechanisms give it wide appeal.

The UPR does not therefore contribute to what Zürn flags as a 'legitimation problem' for global governance whereby 'central decision makers within international institutions are their secretariats and, more importantly, the executive representatives from the most powerful nation states'.[539] The downside is that the UPR is not perceived by powerful states as a means of leverage and so holds less attraction than those international organisations premised upon hierarchies that 'institutionalize [*sic*] inequality between states'.[540] With regard to the dissemination of international norms and rights protection, the UPR is largely normatively thin, promoting rights with wide appeal. However, when reviewing states challenge the status quo of an SuR by making recommendations that seek to alter what are often entrenched social, cultural or religious norms that flout principles of international human rights law, such as the death penalty, female genital mutilation and child marriage, the UPR operates as a normatively thick mechanism.

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[536] Tomuschat (n 127) 618-9 for example, Denmark, Norway, Sweden, Czech Republic, Slovakia, and Slovenia, France, Germany, Italy, and the United Kingdom and Japan.
[537] Interview CSO 03 and CSO 06 respectively.
[538] Benjamin Gregg, *Human Rights as Social Construction* (Cambridge University Press 2012), 69.
[539] Zürn *A Theory of Global Governance* (n 284) 10.
[540] ibid.

The role of international law and human rights norms reveals a complex interaction with sovereignty based upon systemic and dynamic dimensions of the distribution of sovereignty.[541] The distributional reach of international law envelopes all states and underpins its systemic dimension, whilst new political developments, majority and minority rights, and the evolving inclusion of certain minority rights that were previously excluded, for example, indigenous rights, inform international law's dynamic character.[542] The systemic and dynamic dimensions of the distribution of sovereignty are at the heart of the UPR: in the three and a half hours of the Working Group of an SuR there is sharp and succinct focus on the essence of the human rights challenges a state faces via the recommendation process and the documents upon which the UPR is based. It is wise, however, to treat the content of the national report with some degree of caution, which by its nature is less candid. The narrative of the national report varies; some states present what appears to be a frank assessment of the challenges faced in terms of implementing recommendations and the progressive, incremental nature of such a task.[543]

From a socio-legal perspective, the UPR process is inclusive in terms of state and non-state actors and its capacity to contribute to the creation and maintenance of networks and communities of practice by the creation of formal and informal networks, thereby further enhancing the UPR's procedural legitimacy.[544] In particular, and as chapter 7 explores, communities of practice linked to the UPR have been emerging within civil society. As discussed in chapter 3, the socio-legal perspective perceives the practice and experience of authority 'as empirical social phenomena' that 'does not need conclusive, timeless definitions of authority and legitimacy but only ways of understanding these ideas that can help in provisionally identifying relevant social practices'.[545] Communities of practice are

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[541] Macklem (n 47) 46-7.
[542] ibid, these points are made by Macklem in defence of international law as a legitimate legal order, distinct from that of national orders, 42-43 and 47-9.
[543] Of the eighteen pages that form the main part of Argentina's first cycle report, half outline the challenges and limitations on the part of the state and a summary of action taken and action proposed. This includes details of issues in prisons and detention centres in 2004, and measures that have been taken by the state to ensure compliance with UN minimum standards for the treatment of prisoners and a monitoring committee, as well as an account of matters relating to pre-trial detention, indigenous peoples, women, adolescents, children and social exclusion, UNHRC, 'National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1: Argentina' A/HRC/WG.6/1/ARG/1 (10 March 2008).
[544] As noted in chapter 3, communities of practice, or networks of communal practice, are those that
[545] Cotterrell (n 277) 262 - 263.

those that are subject to the 'power' that claims authority and, by being subject to that power, confer upon it its legitimacy.[546] By engaging with the UPR process both before and after a state's review, those actors that comprise the community of practice legitimise the UPR process; it is worthy of their time and effort.

This social practice links with Homi Bhabha's work on the 'Third Space', which can be a literal or metaphorical space, in which binary distinctions are dissolved in a bid to understand cultural knowledge and cultural performance not as something that is homogenous, original or pure, but rather as a process of translation and negotiation.[547] This dynamic process is very much at the heart of the UPR where myriad cultures interact and intersect, negotiating, sharing and disseminating international human rights norms within a particular defined territory.[548] Communities of practice include networks emerging from the composition of the internal machinery of the UN, for example, diplomatic state missions to the UN, the membership of the Human Rights Council, the working group troika of the UPR, as well as those parties external to the UN, such as civil society. Thus, networks both transcend the formal boundaries of the sovereign state and reinforce those boundaries.

As with any such regulatory or advisory mechanism, there is the risk of a culture of tacit engagement developing in some quarters that proceeds unchecked in the short term. If this persists, it will undoubtedly undermine the UPR's credibility and legitimacy.[549] The interaction of state representatives with civil society, before, during and after a state's review provides a means of exposing repeated tacit engagement. To mitigate the risk of superficial compliance with process there should be a requirement for substantiated evidence in the national report of consultation by government officials with civil society and NHRIs. A requirement for the SuR to provide a formal document detailing follow up against

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[546] CA Thomas, *The Concept of Legitimacy and International Law,* LSE Legal Studies Working Paper 12/2013 (London, London School of Economics, 2013) 22 and Katharina P Coleman, *International Organisations and Peace Enforcement: The Politics of International Legitimacy* (Cambridge University Press 2007), 22 both cited by Cotterrell (n 277) 263 and 264.
[547] Homi K. Bhabha, 'Cultural Diversity and Cultural Differences', in ed. B. Ashcroft, G. Griffiths, H. Tiffin, *The Post-Colonial Studies Reader*, (Routledge, New York 2006) 155–157.
[548] The concept of the space created by the UPR and pluralism, legal and normative, is a related field of study explored in Riches (n 8) 161-181; there is scope to further conceptualise the UPR thus, although it is outside the scope of this thesis.
[549] Emilie M. Hafner-Burton, *Making Human Rights a Reality* (Princeton and Oxford: Princeton University Press 2013) 94, expresses a similar view, that 'lower compliance erodes legitimacy'.

supported recommendations would further promote substantive engagement, see appendix 4, Matrix for Implementation.

4.4.3 Bureaucratisation, institutionalisation and legalisation of human rights

Taking firstly the concern that human rights monitoring mechanisms reduce human rights protection to a process of bureaucratisation, institutionalisation and legalisation.[550] The codification of individual rights protection has indeed mushroomed during the latter part of the twentieth century and into the twenty-first.[551] Michael Elliott observes there is a decoupling between the codification of principles at an international level that promotes universality, and protection at the domestic level, which depends upon the state as both protector and aggressor.[552] Elliott argues that whilst this decoupling further institutionalises human rights, such institutionalisation is an integral part of the move towards individual rights definition and protection via articulation and particularisation.[553]

Other recent scholarship similarly challenges the negative connotations of the institutionalisation narrative. René Wolfsteller observes that human rights norms are embedded in social practice precisely by the conditions of their institutionalisation.[554] Wolfsteller seeks to construct a framework for the operation of an 'ideal type human rights state' based on Max Weber's notion of the 'ideal type' and by reconceptualising Benjamin Gregg's normative political theory of the human rights state as expressed in his earlier work.[555] Gregg proposes withdrawal from the international human rights regime to a focus on the nation state and local protection of rights, which also combines a refocus away from exclusionary practices adopted by states, whereby citizens of the nation state are given

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[550] Oberleitner *Global Human Rights Institutions* (n 23) 14, whereby global human rights institutions 'seek to translate the concerns of human rights – upholding human dignity, protecting the vulnerable, empowering the powerless, remedying wrongdoing – into processes and procedures'.

[551] Namely, UDHR (1948), ICCPR (1966), ICESCR (1966), ICERD (1965), CEDAW (1979) and OP-CEDAW (1999), CAT (1984) and OP-CAT (2006), CRC (1989) and its optional protocols (2000), ICMW (1990), ICRPD (2006), ICPED (2006), http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx last accessed 05 April 2018. See also, Michael A Elliott, 'The Institutionalization of Human Rights and its Discontents: A World Cultural Perspective' (2014) 8(4) Cultural Sociology, 407-425, 413, for a graph showing the number of human rights instruments drafted each year for the period 1863-2003.

[552] ibid 408.

[553] ibid 414 - 416.

[554] Wolfsteller (n 441) 230-251, Wolfrum (n 335) makes a related point, 2040-2041.

[555] ibid 231, citing Max Weber (trans. ed. Edward Shils and Henry Finch), *The Methodology of the Social Sciences* (New York: Free Press 1968) 90, the 'ideal type' being used by Weber to 'characterise the conceptualisation of typifications in the historical and social sciences, compared to the typifications in the natural sciences', 241 and 236, with reference to *Gregg* (n 548).

preference, to a focus on the individual whether they be from outside the sovereign territory of the state or not.[556] Wolfsteller uses this model to demonstrate that protection at the local level is at its best when rights are institutionalised and legalised as positive state-based law, emphasising the structural conditions of rights realisation.[557] Whilst Michael Elliott states that the fact of institutionalisation increases attempts at norm dissemination,[558] Benjamin Gregg argues that although human rights are constructed and institutionalised, they will ultimately only be valid for those communities that embrace them.[559] In a similar vein, Sally Engle Merry observes that 'over time, a gradual expansion of norms creates institutional structures, leading to norm cascade as the ideas of human rights become widespread and internalized [*sic*]'.[560]

Nonetheless, the bureaucratisation of the UPR process and of state engagement risks the legitimacy of the UPR, as one interviewee, reflects:

> The risk is now that this process may become a bit bureaucratised.
> States may lock themselves in a situation where they send a delegation
> just for the reason of sending a delegation here, responding to
> questions, getting recommendations and not even considering them at
> all. And so we may lose a sense of purpose if we do not manage, and
> that is the main challenge with the third cycle, to transform this into a
> good implementation tool. And that is far from happening, this is far
> from happening so I'm not absolutely optimistic now.[561]

These are potentially dark prophecies for the UPR from an interviewee that was part of the discussions of the architecture of the UPR and has been closely involved with it since that time. That said, Alison Brysk finds there is a simultaneous expansion and contraction of the human rights regime: expansion being via the regime 'introducing new actors, claims, mechanisms, and proposed responsibilities', whilst contraction occurs dues to 'various

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[556] Wolfsteller (n 441) 236 with reference to Gregg (n 548).
[557] ibid 232.
[558] Elliott (n 551) 407-425.
[559] Gregg (n 548) 3.
[560] Sally Engle Merry, *Human Rights and Gender Violence: translating International Law into Local Justice* (Chicago and London: Chicago University Press 2006) 221.
[561] Interview UN 01.

shortfalls in the social contract at all levels', including the rise of popular democracy and its contradiction with international human rights norms.[562]

What emerges is the sense that, given the structure of the global political landscape and the creation of systems that operate on an inter-national basis primarily at the behest of the UN, some degree of bureaucratisation, institutionalisation and legalisation is inevitable. It is unavoidable that the UPR is similarly characterised, and no doubt consciously so, as part of its search for legitimacy and acceptance by the 'international community'. Whilst bureaucratisation, institutionalisation and legalisation of human rights at the UPR, and across the international human rights regime complex, will not necessarily prevent human rights norm dispersal and protection and, in some instances, will enhance it, there is also the risk that motivations underpinning bureaucratisation, institutionalisation and legalisation will foster ritual and ritualism.

Ritualism has been defined as the 'acceptance of institutional means for securing regulatory goals, while losing all focus to achieving the goals or outcomes themselves'.[563] One interviewee expressed concern in relation to the UPR and ritualism in the following terms:

> I think there is a real risk of the UPR descending, or descending even further into ritualism. I mean we already see some evidence of that with states arranging for their allies to applaud their human rights progress and record. States like Cuba and China have many other states make laudatory comments about their human rights situation in those countries. And accepting recommendations that in many instances they have no intention of implementing, or alternatively, where they claim that their national policy and practice already complies with that implementation [*sic* - recommendation].[564]

Similar concerns were expressed by another interviewee suggesting an element of game playing at the UPR, observing that:

> (...) they [state's] use it as a bit of a game. So, The Philippines is coming up for review and in three of the sessions I've attended this week,

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[562] Brysk and Stohl (n 441) 1-2.

[563] J Braithwaite, T Makkai and V Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid*, (Cheltenham, UK, Northampton, MA, USA: Edward Elgar 2007) 7, cited by Etone (n 3) 261.

[564] Interview CSO 06.

they've given no recommendations, just praise to the country that's under review. I mean, it could just be that they don't have recommendations for those three particular states, but your first thought would be is it because they have their own review coming up next week. It's kind of like a politeness, a quid pro quo.[565]

As discussed in section 3.2, chapter 3, Charlesworth and Larking debate the presence of ritual in the UPR process.[566] They define ritual/s as those 'ceremonies or formalities that, through repetition, entrench the understandings and the power relationships that they embody' and a risk an 'embodied performance' that overshadows the significance of a process and its requirements in terms of regulation, or governance.[567] They posit that the UPR's ritual character is reinforced via its cyclical nature and its process, which is 'intricately managed and highly formalised'.[568] This may be so, but there is a sound rationale for such intricacy as chapter 2 in particular illustrates. Further, the UPR is not unique in its cyclical nature; treaty monitoring is also cyclical, although not as closely managed as the UPR. Charlesworth and Larking suggest a counterbalance comes in the form of 'positive information-sharing and coalition-building among diverse NGOs' and collaborations between the OHCHR Secretariat and in-country NGOs and NHRIs, particularly in the Pacific, as well as via the media by promoting 'wider public engagement mobilisation'.[569]

Other evidence to suggest that ritualism has not taken a stronghold relates to the approach of reviewing states to determine what recommendations to make to an SuR. The response given by a Permanent Mission to the UN of a state in crisis when asked 'How do you decide what countries you're going to make recommendations to, and secondly, what recommendation you then make?', indicates that state practice in this respect is informed by UPR documentation:

> That's a good question. We check the list first, of the countries that made us recommendations. We (…) then read their national report of what they did and the United Nations report and of the stakeholders.

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[565] Interview CSO 05.
[566] Charlesworth and Larking (n 330) 9.
[567] ibid 8-9.
[568] ibid 9.
[569] ibid 17, referring to Sarah Joseph's chapter in the same collection, 'Global media coverage of the UPR process'.

And we see what are they recommending, what are the general recommendations. And we take from them one or two.[570]

Whilst the indication here is that recommendations are sourced from the UPR documents, namely the OHCHR compilation and the stakeholder summary, this reply also reveals reciprocity; to determine which countries to make recommendations to, the reviewing state starts by looking at which states it has previously received recommendations from. If this were the only means by which states determined which states to make recommendations to, the UPR would be at risk of ritualism. Yet there are some positive consequences of reciprocity in this form; it encourages engagement with the human rights situation in a particular state at a diplomatic level. It is the UPR's strength that it fosters inter-nation diplomatic engagement in this fashion and also in a way that encompasses non-state actor stakeholders. Furthermore, representatives of states in crisis are looking at the situation of another country and able to take note of good practice. The process of states engaging with the substance of UPR documentation, regardless of the motivation, is a form of norm dispersal and an assertion of the UPR's legitimacy.

The practice of making recommendations is not limited to reciprocity; states with a poorer human rights record receive more recommendations than those states with a better record,[571] which accords with the analysis in chapter 6 that states in crisis receive more recommendations than stable states, and from a higher number of recommending states.[572] There is, therefore, a greater diversity of states making recommendations to those states most in need of improving the human rights situation in their country.

There are certain unifying aspects of ritual that should not be lightly dismissed, of which social consensus is one; engaging in ritual offers a means of 'enacting a social consensus' that can function to reduce contestation and indicate that 'a way of thinking or being has achieved some degree of permanence and importance'.[573] This is an important aspect of the UPR. Now that the third cycle is under way, the UPR's capacity to trade off its novelty is greatly diminished. It is reasonable to expect states to be more aware of their UPR

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[570] Interview UN 03.
[571] Milewicz and Goodin (n 127) 522.
[572] See Tables 2 – 6 inclusive in chapter 6 of this thesis for evidence and analysis of this.
[573] Charlesworth and Larking (n 330) 9.

obligations, aided by the provision of more specific guidance and support in terms of preparation and follow up and the need to consult with civil society and interested parties.[574] By appropriating aspects of ritual and ritualism, it may be possible that state commitment to the UPR process is developed which in turn leads to normative change. The constructivist view is that social pressure is far more likely to have an impact if the state concerned wishes to be a member of such a club,[575] and this may well influence state practice at the UPR.

Furthermore, a state delegation attending the Working Group in Geneva has time away from the domestic setting, presenting an opportunity to focus and reflect upon pertinent human rights issues. Furthermore, for states in crisis, such a ritual can affirm statehood and relay a message of strength and commitment to the international community and a willingness to work towards a stronger performance of statehood.[576] When questioned about the role of the UPR in supporting the performance and validation of statehood for states in crisis, one interviewee agreed, observing that '… depending on circumstances, even the worst case scenario, even Yemen, they may want to show some elements of implementation to show they are not a failed state.'[577]

Conclusion

Whilst there is an emerging body of work on the UPR analysing its successes and its challenges, there has been no evidence of a broad assessment of the UPR's governance function and how that relates to its legitimacy and authority. With this in mind, this chapter has undertaken a broad and critical assessment of the dynamic, the achievements, and the challenges related to the UPR's input (source) legitimacy and its procedural legitimacy. A similar assessment in relation to output (substantive) legitimacy follows in chapter 5.

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[574] Etone (n 3) 264-5, notes that concerns were raised about South Africa's lack of consultation prior to its review in both the first and second cycle.
[575] Cofelice (n 138) 244, citing T Flockhart, '"Complex Socialization": a framework for the study of state socialization', (2006) 12(1) European Journal of International Relations 89-118, 97 and Milewicz and Goodin (n 127) 514 citing Gunnar Myrdal as founding secretary of the Economic Commission for Europe, that participants at meetings form a 'club' and that 'not upholding an agreement is something like a breach of etiquette in a club', 8 and 20.
[576] Interview CSO 03, CSO 07 and UN 01.
[577] Interview UN 01.

Section 1 illustrates that the presiding international human rights framework is suited to be conceptualised as a global governance 'international human rights regime complex'. Despite certain tensions, the UPR largely supports a functional, rather than dysfunctional, operation of the regime complex in terms of the six dimensions outlined by Keohane and Victor. It is evident from section 1 that the UPR occupies a unique position within this multi-directional regime complex and has the capacity to provide in one place and space a spectrum of detailed and complex information.

The proposed international human rights regime complex provides a degree of harmonisation by the promotion of universal rights, principles and norms in comparison to anxieties expressed elsewhere of international law's fragmentation and incoherence. Yet difference within the regime complex is also maintained; each body retains a separate function and identity from the focus of the UPR on persuasion and promotion to provoke action, to treaty bodies having a far more detailed rights-specific approach premised upon states' legal obligations and for some a mandate to hear individual complaints, and those entities that function to enforce rights, such as domestic and regional courts.

The UPR reinforces a state-centric paradigm of international law, as does the international human rights regime in general. The primary actors during the Working Group are peer-reviewing states. As discussed in section 2, whilst the Working Group report might appear to suggest vertical authority, it is in fact a repackaged form of horizontal authority referring as it does to recommendations made during the peer review process of the interactive dialogue. There is no binding higher authority that an SuR is subject to, linking with the concept of a more liquid form of authority.[578] In tracing the UPR's formation via resolutions made by the General Assembly and the Human Rights Council, both in terms of the UPR's inception and its ongoing development, the UPR is shown in section 3 to have a strong claim to input (source) legitimacy. The democratic principle and the deliberative principle both have a role to play in securing the source legitimacy of an entity although there is inevitably some difficulty in applying these principles in their purest forms to international organisations, including the UPR.

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[578] Kirsch (n 513) 25-48.

Regarding state compliance with procedure, on the face of it, the UPR's procedural legitimacy is ostensibly secure; all states have engaged with the review process by producing a national report and by sending a delegation to appear as part of the Working Group in Geneva.[579] Furthermore, all states are treated equally and fairly in terms of the structure of the UPR, combined with its soft powers of regulation, the UPR is unlikely to induce anxiety in states in terms of threatening sovereignty.[580] As with other regime complexes, state actors will choose to engage with those entities they perceive to present a more palatable option but universal engagement with the UPR since its inception suggests it is the preferred mechanism within the regime complex.

Concerns of procedural compliance prevailing over substantive outcomes are legitimate. Two recommendations for improvements to the UPR can go some way towards mitigating the risk of superficial compliance with process. The first is a requirement to include substantiated evidence in the national report of genuine consultation with civil society and NHRIs in the preparation of the report. The second, that there should be a formal document the SuR is required to complete with concise but specific information regarding follow up against each of the recommendations accepted at its previous review, an example matrix is provided at figure 4, appendix 4.

Nonetheless, the unique character of the UPR should not be swiftly dismissed; all states can pass comment upon the human rights challenges and achievements of other states, regardless of their size or power, or their own human rights record. As discussed, this brings to the UPR a bureaucratisation, institutionalisation and legalisation of rights of which there are positive consequences as well as negative ones. At its best, the pertinent human rights issues and failings of the SuR are relayed on the world stage, the status quo challenged, the support of the international community pledged and critical recommendations from allies may prompt action that might otherwise not occur.

At its worst, the UPR risks a zombie-like form of engagement whereby a delegation is sent, recommendations accepted and little importance is attached to the process because of a

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[579] During the first cycle, South Africa was the only state reported as having failed to submit its report prior to the Working Group in Geneva, instead submitting it on the day of its review, Etone (n 3) 264.
[580] Eyal Benvenisti, *The Law of Global Governance*, (Hague Academy of International Law 2014) 17, suggests that global governance entities such as the WTO may be cause for state's concern.

lack of intent to implement. The sentiment expressed here chimes with scholarship on ritual and ritualism, which this chapter addresses both in terms of the risks it poses and its benefits. Whilst ritual may give rise to an 'embodied performance', for states in crisis, the ritual of the UPR can affirm a willingness to work towards strengthening state institutions and infrastructure to better promote and protect human rights and contribute to a positive demonstration of statehood and a reaching out to the international community for assistance. Similarly, although reciprocity was revealed during interviews for this study as a motivating factor for reviewing states to make recommendations, there are also positive implications to this approach. One is diplomatic engagement with another state's human rights matters that supports norm dissemination and dispersal in deliberative and non-threatening, non-partisan manner.

As this chapter has demonstrated, there are a number of measures of legitimacy that do not depend upon output; output is not the sole indicator of the UPR's successful functioning although it is an important measure. Given the legacy of the Commission that the Council and the UPR were designed to counter, it is hardly surprising that the UPR has been structured to involve all states, with states conducting a peer review. It is, however, time to draw the UPR away from the shadow cast by that legacy and for it to be judged on its own merits. The iterative and cyclical nature of the UPR reveals those states whose actions repeatedly fail to reflect their words. There may be scope for these matters to be directly addressed in the regular sessions of the Human Rights Council at the point of the Working Group Report being adopted.[581]

As we move into chapter 5, how the output of the UPR is defined and measured and what successful output looks like is pertinent to a fuller comprehension of the UPR's authority and legitimacy. This further clarifies the UPR's role and its conceptualisation as a global governance mechanism, with the objective of mitigating a loss of credibility in the long term, particularly where states in crisis are concerned.

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[581] UNHRC A/HRC/RES/5/1 (n 9) para 35: 'The Council should have a standing item on its agenda devoted to the universal periodic review', see further in section 5.6, chapter 5.

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Chapter 5 – A claim to governance: assessing the UPR's output (substantive) legitimacy

Introduction

As set out in section 1.3 of chapter 1, the start of the third UPR cycle has seen a renewed focus on follow up and implementation.[582] There is a growing sense that functioning as a vehicle for commitment without corresponding compliance is no longer feasible for the future success of the UPR, as one interviewee pessimistically commented, 'the future of the UPR is very much like the past of the UPR and the present. Limited in effect and impact'.[583]

In relation to 'follow up', Human Rights Council Resolution 5/1 states variously that: 'The outcome of the universal periodic review, as a cooperative mechanism, should be implemented primarily by the State concerned and, as appropriate, by other relevant stakeholders', with the review in the next cycle focusing on 'the implementation of the preceding outcome'.[584] In addition, 'the international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance, in consultation with, and with the consent of, the country concerned' and 'the Council will decide if and when any specific follow-up is necessary'.[585]

In light of this aspect of the UPR's founding resolution, it is evident that the substantive engagement of some states with the UPR falls short. It is given that 'after exhausting all efforts to encourage a State to cooperate with the universal periodic review mechanism, the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism'.[586] One question that arises is the meaning and interpretation of 'persistent non-cooperation' and whether in the future this could encompass those states that fail to make tangible progress against recommendations, namely those that are action oriented. To date there is no evidence of the Council having taken action against a state and it may be

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[582] HRC General Debate on the UPR (n 35); UNHRC Concept Note (n 36).
[583] Interview CSO 01.
[584] UNHRC A/HRC/RES/5/1 (n 9) para 33.
[585] ibid paras 3 and 37, respectively.
[586] ibid para 38.

that cooperation by way of a national report and attending the Working Group is deemed sufficient.[587]

Continuing with the modelling of the UPR as a global governance mechanism situated within an international human rights regime complex, this chapter addresses dilemmas that have been more broadly grappled with in the field of both international law and international relations in terms of state practice and compliance with international human rights.[588]

The first two sections of this chapter consider what amounts to UPR output and the extent to which state compliance with recommendations informs the substantive legitimacy of the UPR, and the move towards a focus on UPR implementation. Taking an inter-disciplinary approach by referring to concepts and theories informed by international law and international relations the remaining sections each explore: the motivations for states to engage and make recommendations; the challenges posed by the proliferation of the assessment of compliance and rights protection by indicators; the nature of the recommendations made; and how to determine state action and substantive compliance as a result. The primary emphasis of this chapter is a general consideration of the UPR's output legitimacy; chapter 6 goes into more specific detail by analysing the UPR's output for Yemen as a state in crisis, with reference to sample comparator states.

5.1 Defining Universal Periodic Review output

The overarching determinant of the UPR's output legitimacy is the extent to which its objectives are achieved. These are set out in Council Resolution 5/1 as:

> (*a*) The improvement of the human rights situation on the ground;

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[587] ibid para 38. It is recommended in chapter 8 as part of the conclusion to this thesis that the Council provide guidance as to what 'cases of persistent non-cooperation' might include.

[588] See for example, Philip Alston and Sarah Knuckey (eds) *The Transformation of Human Rights Fact Finding*, (Oxford, New York: Oxford University Press 2016); David H. Bearce and Stacy Bondanella, 'Intergovernmental Organizations, Socialization, and Member-state Interest Convergence' (2007) 61 International Organization, 703-733; Abram Chayes and Antonia Handler Chayes, 'On Compliance' (1993) 47(2) International Organization, 175-205; Goodman and Jinks (n 119); Hafner-Burton 'Making Human Rights a Reality' (n 549); and James Harrison and Sharifah Sekalala, 'Addressing the compliance gap? UN initiatives to benchmark the human rights performance of states and corporations' (2015) 41 Review of international Studies, 925-945; and Tomuschat (n 127). For scholarship on state motivations to commit to human rights, see Hathaway 'Why do Countries Commit to Human Rights Treaties?' (n 58).

(*b*) The fulfilment of the State's human rights obligations and commitments and assessment of positive developments and challenges faced by the State;

(*c*) The enhancement of the State's capacity and of technical assistance, in consultation with, and with the consent of, the State concerned;

(*d*) The sharing of best practice among States and other stakeholders;

(*e*) Support for cooperation in the promotion and protection of human rights;

(*f*) The encouragement of full cooperation and engagement with the Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights.[589]

Objectives (c) – (f) are pursued actively during the interactive dialogue, via advance questions and also through UPR documentation namely the OHCHR compilation of UN information and the OHCHR stakeholder summary. It is the first two objectives, (a) and (b), that are the most challenging in terms of measuring fulfilment. How to assess the human rights situation on the ground and measure improvement or failings, and the methods by which a state's fulfilment of its human rights obligations and commitments are determined, is fraught with difficulty.

It is an accepted principle of international law that treaties are legally binding; as Chayes and Chayes highlight, the principle of *pacta sunt servanda* (treaties are to be obeyed) is born out in Article 26 of the Vienna Convention on the Law of Treaties.[590] There is the view that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.[591] However, improvement on the ground and fulfilment of obligations and commitments are not the only objectives of the UPR; as suggested in chapters 3 and 4, whether strict compliance in terms of implementation is necessary to evidence its legitimacy is questionable. In a similar vein, it has been said that 'the treaty regime as a whole need not and should not be held to a standard of strict compliance but to

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[589] UNHRC A/HRC/RES/5/1 (n 9), paragraph 4.
[590] Chayes and Chayes (n 588) 185.
[591] Louis Henkin, *How Nations Behave* (2nd ed., New York: Columbia University Press 1979) 47; and Louis Henkin, 'International Law: Politics, Values, and Functions: General Course on Public International Law,' (1989) 261, *Recueil Des Cours*, 1-416, 69, emphasis in the original, as cited by Chayes and Chayes (n 588) 176.

a level of overall compliance that is "acceptable" in the light of the interests and concerns the treaty is designed to safeguard',[592] and we might say the same of the UPR.

As chapter 3 illustrates, an institution that issues or supports recommendations as part of its governance function is not within the realm of rule making and enforcement. The UPR is not a rule making body, UPR recommendations refer to rules and principles agreed and adopted elsewhere. There is an argument therefore that strict compliance with UPR recommendations is not mandatory; a recommendation is merely that, neither an instruction nor a demand, merely a suggestion, albeit a powerful one, that serves to communicate a recommending state's endorsement of the relevant human rights principle or norm. Writing in the context of global governance and security, Nance and Cottrell consider the view that focusing on compliance '…underestimates the difficulty of verifying noncompliance and overestimates the likelihood that enforcement alone can address the problem'. This is on the basis that 'even under the most intrusive monitoring arrangements, concrete evidence of noncompliance is extremely difficult to detect and verify.'[593]

In identifying the output of the Council, Freedman cites its policy programmes, operational activities and information activities.[594] There is no direct reference here to state compliance or response to those programmes and policies. With this in mind, two UPR output categories can be discerned, firstly, those that are commitment and statement oriented and, secondly, positive change in state practice.   By supporting a recommendation it receives, a state's response is placed upon a spectrum: it might reflect a principled acceptance of the substance of the recommendation; an indication of the will to act; or a commitment to adhere to the norm with a firm intent to act. These are important factors to take into account regarding the UPR's governance function, particularly in relation to states in crisis that may have the will but lack capacity and technical expertise to follow up and implement recommendations.

The first output category identified above, which is commitment and statement oriented includes various facets such as: the number of states that have undergone UPR (all states, equating to success); the number of states that make recommendations – which

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[592] Chayes and Chayes (n 588) 176.
[593] Nance and Cottrell (n 380) 281.
[594] Freedman (n 1) 114 – 118.

demonstrates commitment to the UPR process (across the first and second cycles, only 22 countries made no recommendations);[595] the volume of recommendations made and, comparatively, the volume of recommendations supported by states under review as well as the nature of the recommendations made and supported (including by which states and to whom). These matters can be assessed on a quantitative basis, although the content, themes and action required by recommendations is often not unique to the UPR as section 6.7, chapter 6, demonstrates.

The second category, positive change in state practice, is evidenced by a combination of the state's own declared progress against recommendations, the view of civil society and evidence provided by other human rights institutions in the international human rights regime complex. Progress is often corroborated by data that has been collated into human rights indicators. Depending upon indicators as a means to measure human rights progress and violations presents a challenge, particularly for states in crisis regarding the availability and nature of data and its collection. Other issues relate to whether data is aggregated or disaggregated and its currency, in terms of how 'old' the data is, coupled with the fact that human rights fact-finding is often politicised.[596] In addition, the self-reported progress by states needs to be treated with caution in respect of bias and over-inflated statements of action and achievement.[597] These and related matters are returned to in section 5.4 below.

5.2 Implementation and the third cycle

There is some consensus of a dearth of empirical evidence to answer in a systematic fashion why legal commitments to international law are made by governments, and the concomitant effect of that commitment on state action.[598] Equally, there is some agreement that

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[595] In the first cycle a total of 39 states did not make any recommendations, in the second cycle there was a reduced total of 25, the global total of states that have not made any recommendations is stated as 22, UPR Info: Statistics of Recommendations (n 126).

[596] Harrison and Sekalala (n 588) and Alston and Knuckey (n 588).

[597] Interview CSO 01.

[598] Asher Alkoby, 'Theories of Compliance with International Law and the Challenge of Cultural Difference' (2008) 4(1) Journal of International Law and International Relations, 151; Chayes and Chayes (n 588); Beth A Simmons, 'International Law and State Behavior: Commitment and Compliance in International Monetary Affairs' (2000) 94(4), *American Political Science Review,* 819-835; Joel P Trachtman, 'International Law and Domestic Political Coalitions: The grand theory of compliance with international law' (2010) 11(1) The Chicago Journal of International Law, 127-158; F.R. Castro, 'Rawls and Kant on Compliance with International Laws of Justice', in A. Faggion, A. Pinzani and N Sanchez Madrid (eds), *Kant and Social Policies* (Palgrave Macmillan 2016).

democratic states with a strong civil society are more likely to comply with international law.[599] Whilst it is difficult to attribute change directly to the UPR when a state appears to have taken action, it is not implausible.[600] As one interviewee commented:

> (…) what they [states] will tell you is that if they make changes, they will link it to the UPR, but in all fairness, it is not linked to the UPR, it is just someone in an office like this one saying, "oh, we can say this is linked to the UPR".[601]

Given the work being undertaken by civil society in terms of UPR follow up, discussed in chapter 7, and the renewed focus on implementation for the third cycle, traction emanating from the UPR, or being attributed to it as this comment suggests, is increasingly likely. That said one interviewee was less hopeful about the prospect of tangible progress having observed some repetition in the third cycle of recommendations previously made because of the SuR having so far failed to follow up.[602]

Yemen's second cycle national report, considered in January 2014, cited a number of examples presented as action on the state's part to address the human rights situation in the country. This included a national human rights conference in December 2012, a 'national dialogue', a Bill to establish an NHRI, the establishment of a National Committee to Combat Human Trafficking, which had subsequently drafted a Bill on Human Trafficking and the enactment of various Acts relating to matters indirectly relevant to human rights protection.[603] These are all matters that reflect progressive action but little in terms of substantive improvement; there was no evidence of the outcomes of the national dialogue

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[599] Goodman and Jinks (n 119) 3, citing Simmons (n 110); Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?', (2005) 49 Journal of Conflict Resolution, 925; Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?' (1999) 36 Journal of Peace Research 95.

[600] Damian Etone states that the backlog of overdue reports that South Africa has at the time of its first cycle UPR was significantly reduced following its second cycle review when in November 2014 'it submitted to the various UN human rights committees 12 of its 14 outstanding treaty body reports'. However, Etone notes that 'it is difficult to establish a causal relationship between engagement with the UPR and compliance with treaty body reporting obligations' but that it is 'plausible that the former has had an impact on the latter' Etone (n 3) 265. This is particularly so in light of the fact that according to the UPR Info database, in the first cycle of the UPR 828 of the recommendations made, amounting to approximately 4% of the total recommendations made to states under review, referred to compliance with treaty obligations, UPR Info: Statistics of Recommendations (n 126).

[601] Interview UN 01.

[602] Interview CSO 05.

[603] UNHRC, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Yemen' A/HRC/WG.6/18/YEM/1 (08 November 2013) paras 10, 7-8, 27 and 29 respectively.

having been implemented and only talk of drafting a new constitution.[604] Whilst the conflict

in Yemen has been cited as having understandably stalled progress against UPR

recommendations,[605] it did not fully take hold until March 2015, some 14 months after

Yemen's second cycle review by which time action towards implementing change could have

been actively pursued.

Yemen is not unique as a state whose claims to make progress fall well short of

implementation.[606] The question thus arises as to whether such a failure threatens the

legitimacy and credibility of the UPR. During a debate held as part of the Council's 34th

regular session in March 2017, a number of states spoke of the need to enhance focus on

follow up and implementation of accepted recommendations.[607] The UK was unequivocal in

asserting that:

> The beginning of the third cycle meant it was time to focus on the
> sustainable implementation of recommendations. Many
> recommendations remained imprecise, and States under review had a
> responsibility to provide a clear response to each
> recommendation. Technical assistance was important to help States
> implement recommendations.[608]

Other states expressed similar sentiments, for example, Switzerland indicated that

'additional efforts would be needed to follow-up the implementation of recommendations'

urging the international community not to 'rest on its laurels; good practices included

formulating quantifiable recommendations and following up on the recommendations'.[609]

Sierra Leone highlighted a challenge for states in crisis in terms of implementation by

stressing 'the need for technical assistance to countries which had the political will but

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[604] ibid paras 25-35, and UNHRC 'Stakeholder summary: Yemen' A/HRC/WG.6/18/YEM/3 (n 17).
[605] Interview UN 03.
[606] UNHRC, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Somalia', A/HRC/WG.6/24/SOM/1 (28 October 2015) which provides little evidence of tangible follow up, reporting it is 'currently initiating', 'is implementing', and 'legislation that must be enacted', paras 7, 11, and 17 respectively. By comparison, the national report of Iraq for the second cycle is more specific, naming domestic policies and laws enacted and referring to statistics as evidence of improvement, for example, in relation to infant mortality and specific examples of efforts to empower women and protect women and children, para 24, UNHRC, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21: Iraq', A/HRC/WG.6/20/IRQ/1 (22 August 2014).
[607] HRC General Debate on the UPR (n 35).
[608] ibid.
[609] ibid.

lacked the technical or financial capacity to implement Universal Periodic Review recommendations'.[610] Statements made by other stakeholders point to the same overall opinion of success being driven by implementation: 'Beyond numbers and promises, the success of the third cycle … will inevitably be measured against its ability to deliver sustainable implementation of UPR recommendations'.[611]

At the opening of the UPR's third cycle on 01 May 2017, the President of the Human Rights Council affirmed the third cycle presented an opportunity to take stock of implementation and follow up processes.[612] Further, the importance attributed to implementation is reflected in a newly created OHCHR overview of the UPR that encourages states to draft an implementation plan by giving a set date on which such a plan is due.[613] Currently the provision by a state of an implementation plan (or mid-term report) is voluntary and has emerged over the course of the UPR's lifetime. As set out in section 2.3.3, as of July 2018 mid-term reports relating to the first and second cycles of the UPR had been submitted by a total of 71 member states, of which 55 related to the first cycle and 34 to the second cycle, within these figures, only 18 states had submitted for both cycles.[614] Granted, not all states have reached their mid-term point between the second and third cycles and so it is too early to conclude whether the evolving practice of producing such a report has increased. The submission of mid-term reports by NGOs as of July 2018 totals only total eleven.[615]

As the third cycle progresses, more specific direction for follow up and implementation has been issued. Within this, states are encouraged to establish a specific national mechanism tasked with reporting and follow-up, alongside an acknowledgment of three particular challenges: the resources demanded by increased reporting obligations for states; the need for sustainable technical expertise at the national level to ensure timely and quality reporting; and effective follow-up and implementation by government ministries nationally and at the local level.[616] OHCHR guidance proposes that a national mechanism could take

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[610] ibid.

[611] UPR Info, 'Butterfly Effect' (n 441), iv.

[612] Mr Joaquin Alexander Maza Martelli opening the first Working Group of the third UPR cycle, the review of Bahrain, at the United Nations, Palais Des Nations, Geneva, on 01 May 2017, from author's own notes, taken whilst in attendance.

[613] OHCHR UPR third cycle (2017-2021/22) (n 38)

[614] OHCHR 'UPR mid-term reports' (n 258).

[615] ibid, one submission for Bangladesh, two for China, two for Denmark, one for Germany, one for Honduras, one for Lebanon, one for Singapore, and two for the United States.

[616] OHCHR 'National mechanisms for reporting and follow up' (n 262) 2.

the form of a standing/permanent governmental structure, with a commensurate budget and a stable staffing.[617] It is stated that this approach would be comprehensive in two respects, firstly, by covering all human rights mechanisms and, secondly, by having a comprehensive legislative and policy mandate, and ascribing it four key 'capacities': engagement, coordination, consultation and information management.[618]

This guidance is sensible in terms of bolstering the legitimacy and authority of the UPR; a national mechanism of this ilk would assist in increasing engagement with the voluntary and emerging state practice of submitting to the OHCHR an interim plan summarising progress against accepted recommendations from the previous review, but does not guarantee it. If a national mechanism along these lines is to succeed in those states whose populations most require protection, it needs to be coupled with comprehensive support and technical assistance given states in crisis are most lacking in terms of human rights infrastructure and therefore least likely to commit to creating such an government that in turn functions effectively.

It was acknowledged at the time of the first cycle that additional support for UPR engagement and follow up would be required; a request to the UN Secretary-General was made to establish a voluntary trust fund 'to facilitate the participation of developing countries, particularly least developing countries' and for a Voluntary Fund for Financial and Technical Assistance.[619] The terms of reference for the fund were not agreed until some time after, in 2009.[620] This fund has been employed to provide field-based briefings to member states to assist with the national report.[621] As of 24 February 2012, sixty-six requests had been made to the Voluntary Fund for Participation in the UPR, but the funds available remain modest.[622] Whilst no subsequent and specific records for this fund are

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[617] ibid 5.
[618] ibid 6-10.
[619] UNHRC, Establishment of funds for the universal periodic review mechanism of the Human Rights Council, HRC/res/6/17, 28 September 2007.
[620] UPR Trust Funds, http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRTrustFunds.aspx last accessed 10 August 2018.
[621] OHCHR 'Voluntary Fund for Participation in the Universal Periodic Review Mechanism, Field-based briefings to Member States in the preparation of their national report, 2008 – 2011', http://www.ohchr.org/Documents/HRBodies/UPR/2011SummarizedTable-Trainings.pdf accessed 05 March 2018.
[622] OHCHR 'Requests for financial assistance under the Voluntary Fund for Participation in the UPR Mechanism' http://www.ohchr.org/EN/HRBodies/UPR/Documents/VPUFinancialRequest.pdf last accessed 10 August 2018.

available, it is evident that workshops on UPR participation have been supported as recently as April 2018 in Uganda.[623] In addition, the OHCHR has supported regional meetings, however the information available refers to 2010-2011.[624]

The renewed emphasis on UPR implementation and the desire to bolster the relationship between civil society and state actors, and other agencies, is further evidenced by an annual Human Rights Council high-level panel discussion that in 2018 had the UPR as its specific focus.[625] During his statement at this event, Zeid Ra'ad Al Hussein, the then UN High Commissioner for Human Rights, referred to UNCTs better engaging with human rights mechanisms including the UPR and implied a role for UNCTs in terms of follow up and working with civil society in their relevant posting,[626] no doubt as part of efforts to mainstream human rights throughout the UN.[627]

An innovation for the third cycle has been the High Commissioner for Human Rights sending a letter to the head of the state's UPR delegation following a state's Working Group, requesting the state draft a national human rights action plan 'to achieve concrete results in the areas contained in the annex [to the High Commissioner's letter]'.[628] The annex summarises pertinent human rights matters referred to in both the OHCHR compilation and the OHCHR summary of stakeholder submissions.[629] The letter is adapted to make specific

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[623] OHCHR 'UPR Fund for Participation' https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRTrustFunds.aspx last accessed 10 August 2018.
[624] OHCHR '2010 – 2011 (planned)– OHCHR Regional/Subregional meetings to share experiences on follow-up to UPR outcomes and implementation of recommendations (with the participation of State representatives, NHRIs, civil society groups and UN agencies and programmes)', https://www.ohchr.org/Documents/HRBodies/UPR/2010-2011_list_regional_meetings_March2011.pdf accessed 10 August 2018.
[625] UNHRC Annual high-level panel discussion (n 36).
[626] Zeid Ra'ad Al Hussein, the then United Nations High Commissioner for Human Rights, '…members of UNCTs will have the opportunity to develop stronger relationships with national institutions and civil society movements focused on human rights. Their contributions and expertise can powerfully improve the pertinence and impact of the work of the UN on the ground' Statement, OHCHR, 'Promotion and protection of human rights in light of the UPR mechanism; challenges and opportunities', 37th session of the Human Rights Council (26 February 2018) http://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22708&LangID=E accessed 09 May 2018.
[627] United Nations Development Group Human Rights Working Group, established in 2009, http://undg.org/human-rights/undg-human-rights-working-group/ last accessed 11 July 2018.
[628] For third cycle documents, see Cycles of the Universal Periodic Review: third cycle, column headed: Letters by the HC to the Foreign Ministers of member States http://www.ohchr.org/EN/HRBodies/UPR/Pages/CyclesUPR.aspx
[629] ibid, for example, the letter to the UK refers to the announcement that there are no plans to withdraw from the ECHR post-Brexit; the letter to Brazil refers to the fight against all contemporary forms of slavery, for

reference to issues directly relevant to the particular SuR being addressed. By way of example, the High Commissioner wrote to Bahrain's Assistant Minster for Foreign Affairs on 29 September 2017,[630] subsequent to Bahrain's review on 02 May 2018 and the adoption of its Working Group Report by the Council during its 36th regular session on 21 September 2018,[631] referring specifically to matters raised in the OHCHR compilation and summary of stakeholder submissions. At the time of writing, it remains to be seen if this convention will be continued by the new High Commissioner for Human Rights, Michelle Bachelet Jeria.[632]

A personal letter such as this is a matter of high diplomacy; it further reinforces the governance function of the UPR within the international human rights regime complex, sourcing information as it does from treaty bodies, special rapporteurs and civil society. Some CSOs have been urging the OHCHR to take a more active role in coordinating reporting of implementation,[633] believing that the OHCHR recognises 'an information gap in terms of critical and objective assessment of implementation and that without such an assessment there is a much greater risk of ritualism'.[634] The approach of the High Commissioner in sending a personal letter implicitly acknowledges an 'information gap' and reflects efforts to pursue implementation in a more direct manner.

This section has explored some of the methods by which states are being encouraged to progress implementation and bolster reporting on follow up, from making more specific action-oriented recommendations to guidance as to which themes and recommendations should be treated with priority. Implicit is the view that the UPR's legitimacy fragility, or deficit, can be addressed through procedure and through output, the latter of which, it

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Bahrain there is reference to amendments to the Bahraini Citizenship Act to recognise children of women married to non-Bahraini men as Bahraini citizens, accessed via Letters by the HC to the Foreign Ministers of member States (n 655).

[630] UNHRC Letter from Zeid Ra'ad Al Hussein, the then High Commissioner for Human Rights, to Assistant Minster for Foreign Affairs H.E. Mr Khalid bin Ahmed Al Khalifa, http://lib.ohchr.org/HRBodies/UPR/Documents/Session27/BH/BahrainHCLetter.pdf accessed 17 April 2018.

[631] UNHRC Outcome of the universal periodic review: Bahrain, A/HRC/DEC/36/101, 26 September 2017, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/281/78/PDF/G1728178.pdf?OpenElement accessed 17 April 2018.

[632] OHCHR, ˊMichelle Bachelet Jeria' Press Release https://www.ohchr.org/en/aboutus/pages/highcommissioner.aspx last accessed 07 September 2018.

[633] Interviews CSO 03 and CSO 06, respectively.

[634] Interview CSO 06.

appears from the views expressed by states and the OHCHR is defined in terms of follow up and implementation.

5.3 Motivations for state engagement and compliance

This section addresses the fact that the motivations for states to participate as a reviewing state and as an SuR are varied and often not directly related to a desire to improve human rights protection and promotion in the SuR. The analysis in this section illustrates that reliance upon naming and shaming to prompt compliance may be waning but that politicisation and reciprocity remain powerful. It also demonstrates that social and cultural influences linked to acculturation and the desire to take action that is non-partisan are relevant considerations.

5.3.1 Political reasons for action

Some scholars pursue the narrative that states are prompted to take action to effect human rights norms because the state's own failings have been highlighted, often by adversaries, through a process of applying pressure via naming and shaming, which of itself is a political act.[635] As noted generally and in particular in section 1.1, chapter 1 as an intergovernmental mechanism politicisation is bound to play a role at the UPR, despite the declaration that it should be 'conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicized [*sic*] manner'.[636] Whilst some states may use the UPR as an opportunity for political retaliation others, such as those in receipt of aid, may feel silenced when it comes to speaking openly about the human rights failings of donor states.[637]

For those states with little intention of implementing recommendations, the motivation to engage is politically driven. An interviewee with an international NGO considered that:

> I think it's a cost benefit analysis for them, you know, 'is my loss of
> not showing up [at the UPR] bigger than the possible gains for

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[635] Emilie M Hafner-Burton, 'Sticks and Stones: Naming and shaming and the human rights enforcement problem' (2008) 62(4) International Organization, 689-716, 694-5. See also Elvira Dominguez-Redondo, 'The Universal Periodic Review: is there life beyond naming and shaming in human rights implementation' (2012) New Zealand Law Review 673.
[636] UNHRC, A/HRC/RES/5/1 (n 9) Para 3(g)
[637] Alston (n 1) 189.

showing up?' Despite the embarrassment and the naming and shaming that would occur during a review it's still a fairly easy way for them to... a fairly safe way for them to show they are serious about human rights.[638]

Naming and shaming suggests confrontation, but the UPR is largely cooperative; a cooperative approach and political affiliation does not preclude success. In certain circumstances, it is precisely because of political affiliation that a human rights norm presented for acceptance in a particular recommendation is more palatable; Dominguez-Redondo argues that 'a non-confrontational and non-selective country mechanism may be the optimum strategy, or at least a reasonable strategy, to promote and protect human rights', suggesting that criticism received from an ally can be powerful in nudging the recipient into action.[639] Inter-state politics and allegiances have the potential therefore to aid human rights protection on the ground. As noted in chapter 4, whilst Rochell Terman and Erik Voeten 'find strong evidence that states spare their strategic partners in the review process, giving less severe commentary on average', this is countered by the discovery that 'when friendly states do offer criticism, their recommendations are more likely to be accepted by the state under review compared to substantively identical recommendations coming from other countries'.[640]

It is possible that when an SuR supports and then acts upon a recommendation, it does so because of what Joseph Raz presents as 'protected reasons for an action'.[641] Applied to the UPR, this would mean a state supports and acts upon a recommendation not because it believes action should follow in accordance with legitimate principles of international human rights law, but because of a different 'protected reason', that is not immediately obvious from the decision / action taken. In the context of the UPR, the protected reason might be the desire to forge or maintain harmonious political, trade, cultural, or other relations with the recommending state.

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[638] Interview CSO 05.
[639] Dominguez-Redondo (n 635) 674.
[640] Terman and Voeten (n 2) 2.
[641] Raz (n 44) 16-18.

In theorising sources of authority, normative power, and reasons for action, Joseph Raz defines normative power as the ability to change the protected reason for action.[642] He firstly gives the example of a positive second order reason to act being a father instructing the son to obey the son's mother and wear his coat, the son having refused to act upon the mother's instruction because he does not like the coat – both father and mother have the authority to instruct the son. Raz explains that a negative second-order reason would be the father instructing the son not to do as the mother asks; by following his father's instruction, the son achieves the outcome he desires without revealing his true position, his own reason for action is thus protected.[643]

Normative power here would operate to change the son's attitude towards the coat. In the context of the UPR, success in this respect would be achieved by an SuR accepting recommendations and taking action not because of the identity of the reviewing state, but rather because of a change in attitude towards the substance of the recommendation made.[644] The challenge arises in investigating when such normative change has taken place, and why. One possibility is that normative change over the course of a number of UPR cycles may occur as a result of acculturation.

5.3.2 Acculturation

In their work on state compliance, Ryan Goodman and Derek Jinks refer to scholarship that identifies material inducement and persuasion as the two factors that motivate and drive state compliance, finding that such scholarship provides 'an indispensable but plainly incomplete framework'.[645] In their view, material inducement 'fails to grasp the complexity of the social environment within which states act', whilst persuasion 'fails to account for many ways in which the diffusion of social and legal norms occurs'.[646] Their solution is to outline a third factor that motivates compliance, that of 'acculturation', meaning 'the general process by which actors adopt the beliefs and behavioral [*sic*] patterns of the

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[642] ibid.
[643] ibid 16-18.
[644] ibid 18-19.
[645] Goodman and Jinks (n 119) 4.
[646] ibid 4, referring to 'a rich cluster of empirical studies from different academic disciplines document particular processes that socialize states in the absence of material inducement or persuasion' but do not cite the studies.

surrounding culture' which includes 'microprocesses' such as 'mimicry, identification, and status maximization'.[647]

Goodman and Jinks do not dismiss the influence of material inducement and persuasion out of hand, being of the view that material inducement, persuasion, and acculturation are 'likely to have distinct implications along a number of dimensions including the durability of norm adherence, patterns of adoption, and modes of contestation'.[648] Nor are they overly optimistic about the solution they propose. They note that theirs is an exploration of a sociological process in the context of international law and that because sociological processes are inherently recursive in nature, underpinned by multiple actors and roles, and overlapping influences and preferences, as well as the enactment of 'multiple highly legitimated scripts for social action', it is not always possible to fully make sense of the role of a normative system in the acculturation process.[649]

Nonetheless, the concept of acculturation strikes a chord with the findings of this thesis in terms of evolving state and non-state actor interaction with the UPR, and subsequent state and non-state actor practice, the latter being explored in chapter 7. It also echoes the themes of ritual and ritualism, explored in section 3.2, chapter 3 and section 4.4.3, chapter 4,[650] and state engagement to be part of a 'club', section 4.4.3. Acculturation is evident via the recursive nature of the UPR process and its position within the international human rights regime complex, particularly as a subsidiary mechanism within the machinery of the Human Rights Council and the explicit means and methods by which the Council, with support for and from other entities, continues to seek to shape and influence state and non-state actor engagement and practice, as noted in the conclusion section of this chapter below.

Acculturation also occurs because states attend the UPR to seek and receive advice and support, as the Permanent Mission to the UN for Yemen, explained:

> When we listen to the different representatives from different
> countries, what their concerns are, what they see Yemen needs, we
> accept that, we learn from other countries how to improve our human

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[647] ibid 4.
[648] ibid.
[649] ibid 5.
[650] Charlesworth and Larking (n 3).

rights system in Yemen. How we can develop some new measures in Yemen, how we protect children, women, the community in general, journalists, political activists. This is most important. We learn from them. And we are keen to improve the situation in Yemen.[651]

This view is also shared by an INGO representative:

> (…) looking at that broader situation, on the one hand the UN, but also the international community, what is it that that community can do to put pressure, to encourage, to help, to assist, whatever form the engagement can take to try and improve the human rights situation on the ground and improve adherence to its human rights obligations.[652]

The presence and contribution of civil society in terms of influencing state practice contributes to the process of acculturation; prior to the Working Group, NGOs and INGOs will lobby participating states to make certain recommendations, with the lobbying of smaller, less powerful states reportedly being more successful.[653]

Conversely, there are those states that seemingly engage with the UPR as means to absolve their responsibility to other international human rights monitoring mechanisms, as one interviewee revealed:

> I've seen myself in some closed door meetings with some Arab permanent missions saying, 'the UPR is so much better than the committees', because we were discussing treaty bodies and late submissions by states and there was someone from an Arab permanent mission who said 'well we just did our UPR and it went great so we don't see why we would need to submit our report to the Human Rights Committee or the Committee against Torture', so it's also an argument to sort of say, look our human rights situation has already been reviewed so we don't need a review by this bunch of independent experts who are just going to say the truth about the situation on the ground.[654]

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[651] Interview UN 03.
[652] Interview CSO 02.
[653] Author's own notes of informal discussions with an INGO representative, 18th UPR Working Group, 28 January 2014.
[654] Interview CSO 01.

Whilst this reveals a somewhat flippant attitude of some states to the UPR, the reporting burden placed upon states that are parties to numerous treaties risks disengagement due to lack of resource, capacity and reporting fatigue.

5.3.3 State practice according to legal and normative behaviour

The UPR is a site of both legal and political contestation. Tomuschat suggests it has the potential to provide clarification of the legal human rights obligations of states under the UN Charter.[655] He refers to the ICJ's advisory opinion in the *Namibia* case as acknowledging the Charter as 'a source of genuine legal obligations',[656] but that whilst 'commitments deriving from the Charter have increased in depth and breadth (…) no absolutely reliable and uncontroversial inference can be drawn as to their specific substance'; his hope is that it 'is precisely the practice under the UPR which may shed a helpful light on this issue', although he refrains from suggesting how this might be achieved.[657]

UPR recommendations are rooted in both legal and political normative behaviour.[658] In part, normative change emanates from the development of legal principles and the process of standard setting in terms of the expressive function of law.[659] Here, the law functions as a means to say something, to dictate action to conform to a social norm or aspire to an emerging norm and, therefore, operate in a symbolic manner.[660] The primary means by which international human rights are promoted is by encouraging states to commit to international human rights treaties and to introduce and implement domestic legislation accordingly. The UPR, however, promotes human rights principles and protection via other non-legal normative orders that may provide a more palatable basis for a state to base

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[655] Tomuschat (n 127) 612-3.
[656] ibid 612, citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1970] ICJ Rep 1971, 16–57, para 131.
[657] ibid 612-3.
[658] Human rights can be understood from both a legal and a sociological perspective. In legal terms, the modern cannon of human rights law can be traced over the last seventy years from the Universal Declaration of Human Rights in 1948 onwards, but in sociological terms it has been argued that international human rights law only began to exercise influence in the 1970s, Eric A Posner, *The Twilight of Human Rights* Law (Oxford University Press 2014), 19 citing Samuel Moyn, *The Last Utopia: human rights in history* (The Belknap Press, Harvard University Press 2010) in relation to the influence of human rights in sociological terms.
[659] The points made in the reminder of this subsection are taken from Riches (n 8) 173-4.
[660] N.S. Arnold 'Postmodern Liberalism and the Expressive Function of Law', (2000) 17(1) Social Philosophy and Policy 87-109 and C.R. Sunstein 'On the Expressive Function of Law' (1996) 144 University of Pennsylvania Law Review 2021.

subsequent action upon. A state may prefer, for example, to accept a recommendation made by an ally with whom it already shares certain cultural and/or moral norms. Compliance can thus be justified in accordance with a non-legal normative order, rather than a legal one that the receiving state might perceive as a reinforcement of Western hegemony.[661]

A primarily legalistic stance is evident in the US's recommendation to Yemen during Yemen's first cycle review that the state 'step up enforcement of laws protecting women from rape and violence, criminalize spousal rape and treat honour killings no differently than murder'.[662] After postponing a response and examining the issue, during a subsequent Council session Yemen submitted it accepted the recommendation with the qualifying statement that:

> (…) what the recommendation calls "spousal rape" does not exist. All
> marriages are concluded based on consent between the two partners,
> and a wife who wishes to separate from her husband on her own motion
> is entitled to file for divorce and for dissolution of the marriage in
> accordance with the Islamic sharia and the applicable Personal Status
> Act.[663]

This interpretation of national law and custom does not align with the US's position, or a Western approach, to the issue raised. Yemen's statement, however, suggests it considers its domestic law sufficient and fit for purpose. Remarkably, the Council appears not to have pursued the matter further. The exchange highlights the plurality of norms underpinning domestic law and the extent to which custom and religious practice informs this. It also exposes the Council's passive approach in this matter, the result being that a conflict with norms at the international level remains unresolved, one of the weaknesses of the pluralism that characterises the UPR. One explanation is that the UPR reflects the view of some that the current age of globalization has seen a move away from the age of modernity, which was characterized by a primacy of law, and a return to the primacy of norms that prevailed in the

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[661] Riches (n 8) 173.
[662] UNHRC 'Report of the Working Group on the Universal Periodic Review, Yemen' A/HRC/12/13 (5 June 2009) para 93.13.
[663] Recommendation 13, UNHRC 'Report of the Working Group on the Universal Periodic Review, Yemen, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review', A/HRC/12/13/Add.1 (23 September 2009).

pre-modern age.[664] In this context, action that might otherwise be unlawful, for example under international law, might be justified as legitimate in accordance with, for example, a moral or cultural norm.[665]

5.3.4 Holding states to account

As referred to in section 4.4.2, chapter 4, shortly before its third cycle review took place the UK sought to change its position to 'noted' in relation various recommendations it had previously supported.[666] This change was reportedly related to recommendations regarding the ratification of international treaties; the lifting of treaty reservations; to human rights protection and detention; children's rights; gender equality; non-discrimination; welfare rights; migrants' rights; and women's right.[667] One of the affected recommendations had been made by Mexico to the UK and Mexico was quick to address this via the medium of advance questions.[668]

At the time of the UK's second cycle review, Mexico had 'expressed its appreciation for the United Kingdom's outstanding tradition on human rights and its contributions to the rule of law and the legal framework for the protection of the person' and had made recommendations 'about the implementation of human rights rulings, and the indefinite detention of migrants'.[669] In its advance questions, Mexico expressed concern for the UK's substantial change in position with no motivation for the change being presented in the national report for the third cycle and reminded the UK that the UPR is based upon transparency, asking the UK to elaborate on its motivations for changing its position and going into some detail regarding relevant domestic legislation and policy in the UK.[670] This is

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[664] Touko Piiparinen, 'Exploring the Methodology of Normative Pluralism', in Jan Klabbers and Touko Piiparinen (eds), *Normative Pluralism and International Law,* (Cambridge University Press 2012) 36, citing Ramesh Thakur, *The Responsibility to Protect: Norms, Laws and the Use of Force in International Politics* (Routlegde 2011) 3, although it is acknowledged that the primacy will alos depend upon the particular level, for example, at the local level societal norms will be most prevalent, whereas at the national level legal norms may dominate.
[665] Jan Klabbers and Touko Piiparinen explore NATO's intervention in Kosovo in 1999 which was deemed unlawful under international law, as it lacked a security council resolution, but was argued by many as legitimate on ethical grounds, thus highlighting the potential for the moral normative order to pervade in a decision making process, Jan Klabbers and Touko Piiparinen, 'Normative Pluralism: an exploration', ibid 14-15.
[666] UPR Info 'UK changes its position' (n 532).
[667] ibid.
[668] OHCHR 'Advance Questions to the United Kingdom of Great Britain And Northern Ireland (Second Batch)', accessed via http://www.ohchr.org/EN/HRBodies/UPR/Pages/GBIndex.aspx last accessed 15 May 2018.
[669] ibid.
[670] ibid.

tangible evidence of state practice on the part of Mexico in accordance with the UPR's objectives; it demonstrates a reviewing state seeking to hold an SuR to account in no uncertain terms. This is to be encouraged amongst reviewing states as a means of strengthening the UPR's authority and legitimacy.

Concerns were raised that whilst states should indicate their response to recommendations in line with the Council's requirement to support or note them, this should not be used as a smokescreen to accountability for follow up and implementation.[671] The UK's change in position mirrors an emerging trend of a reduction by some SuRs in the proportion of recommendations supported, the UK included. During the first cycle the UK accepted 22 recommendations out of the 35 received, amounting to a 63% acceptance rate (the low number of recommendations received is explained in chapter 6). In its second cycle review, it received 137 recommendations, of which it accepted 91, amounting to a 66% acceptance rate. In the third cycle, the UK's acceptance rate fell to 42%, and has attracted criticism.[672]

A similar trend can be seen regarding the Netherlands and the Philippines.[673] This is not universal though; during the third cycle, Brazil is reported to have accepted 98% of its recommendations, Morocco and Finland 78%, and South Africa and Algeria 77%.[674] Nor is this practice unique to the third cycle; as the then Special Rapporteur for Human Rights in Cambodia detailed in his 2014 annual report, between the Working Group in January 2014 and the adoption of the Outcome of the Working Group, Cambodia had changed its position from supported to noted in relation to eight recommendations.[675] The Special Rapporteur

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[671] UPR Info 'UK changes its position' (n 532).
[672] Letter to Dr Phillip Lee MP, Parliamentary Under Secretary of State for Youth Justice, Victims, Female Offenders & Offender Health Ministry of Justice, 21 September 2017, signed by 63 mainly domestic UK NGOs https://www.bihr.org.uk/civil-society-letter-on-upr-recommendations-21-sept-2017; Jamie Doward, 'Britain faces rebuke over its refusal to back more than 100 UN human rights targets', The Observer, 16 September 2017, which makes reference to those recommendations the UK refused to support and a joint statement of concern by domestic NGOs including the British Institute of Human Rights, the Children's Rights Alliance for England, the Runnymede Trust and Just Fair https://www.theguardian.com/law/2017/sep/16/britain-un-human-rights-brexit both last accessed 11 July 2018.
[673] Lorna McGregor, 'Are States Racing to the Top in the Third Cycle?' Universal Human Rights Group (09 October 2017) https://www.universal-rights.org/blog/by-invitation/states-racing-top-third-cycle-upr-view-uks-equality-human-rights-commission/ accessed 23 April 2018.
[674] ibid.
[675] UNHRC, 'Report of the Special Rapporteur on the situation of human rights in Cambodia', A/HRC/27/70 (15 August 2014) para 64.

stated he believed this reflected the 'reluctance of the Government to accept and therefore commit itself to act on important human rights issues'.[676]

Conversely, a move by a state to reduce the number of recommendations it supports may prove to be a positive development in terms of the UPR's credibility; if a state supports fewer recommendations, it may reflect the state is taking the commitments it makes in the Working Group report more seriously coupled with a firm intention to substantively engage by implementing those recommendations that it does support.

5.4 The challenge of human rights indicators

Notwithstanding the complex forces at play in relation to state practice when it comes to making, supporting and responding through practice to recommendations, there remains the fraught matter of how to measure compliance. The renewed focus at the start of the third UPR cycle on implementation makes this matter all the more pertinent: if a key aspect of the UPR's legitimacy depends upon the implementation of human rights recommendations, how will such implementation and the human rights performance of a country be assessed, and what issues / problems does such assessment give rise to?

How recommendations are implemented will vary from one state to another and this may be perfectly legitimate, particularly when we consider the margin of appreciation permitted under the European Convention of Human Rights. This derives from the French 'marge d'appréciation', and 'is more helpfully translated as 'margin of assessment/appraisal/ estimation'',[677] affording states a degree of flexibility in terms of interpretation and fulfilment of obligations in accordance with diverse cultural practice and tradition. Increasingly, however, the human rights record of a state is determined with reference to quantitative data, disaggregated and/or aggregated, and processed into a statistic to indicate a state's performance and progress. Indicators are also used as a comparative tool, for example, in assessing a country's position on the UN Human Development Index,[678] or its

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[676] UNHRC, Report of the Special Rapporteur: Cambodia, A/HRC/27/70, (n 675).

[677] Sreveb Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, (Council of Europe Publishing 2000), https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf last accessed 10 August 2018.

[678] United Nations Human Development Index: indicators include life expectancy at birth, expected years of schooling, mean years of schooling and gross national income per capita to then give a ranking, UNHDI http://hdr.undp.org/en/composite/HDI last accessed 23 April 2018.

position on the fragile states index,[679] although human rights indicators do not appear as yet to be used to compare one state against another.[680]

A human rights indicator has been defined as 'a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation',[681] and is 'essentially a proxy for determining the level of fulfillment of human rights' obligations'.[682] The OHCHR defines human rights indicators as:

> (…) specific information on the state or condition of an object, event, activity or outcome that can be related to human rights norms and standards; that addresses and reflects human rights principles and concerns; and that can be used to assess and monitor the promotion and implementation of human rights.[683]

For Sally Engle Merry, human rights indicators are:

> (…) a named collection of rank ordered data that purports to represent the past or projected performance of different units. The data, in this simplified or processed form, are capable of being used to compare particular units of analysis (such as countries or institutions or corporations), synchronically or over time, and to evaluate their performance with reference to one or more standards.[684]

The use of indicators *per se* has developed over the last two centuries, initially in the context of labour and then, during the 20th century, in the field of economic and financial auditing.[685] Social indicators gained currency in the 1970s, particularly in the United States, followed by

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[679] 'Human rights and the rule of law' including civil and political rights; civil and political freedoms, violation of rights, openness, justice and equality, Fragile States Index (n 62).

[680] Harrison and Sekalala (n 588).

[681] Maria Green 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement' (2001) 23 Human Rights Quarterly, 1062–1097, 1065.

[682] S. Kalantry, J. E. Getgen, and S. ArriggKoh, 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR', (2010) *Human Rights Quarterly*, 32, 254-310, 257.

[683] OHCHR 'Human rights indicators: a guide to measurement and implementation' (2012) 16 http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf last accessed 09 May 2018.

[684] Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence and Sex Trafficking* (University of Chicago Press 2016) 12.

[685] W. Clifford and C. Rixford, 'Lessons Learned from the History of Social Indicators', (Redefining Progress Publication, Los Angeles, 1998) and Michael Power *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press 1997), which refers to an 'audit explosion' in Britain which is cross-sectional and not limited to Britain alone, being transnational, preface.

the use of development indicators by the UN during the 1990s, which continues apace.[686] Relatively speaking, human rights indicators are 'a more recent invention', with various treaty bodies inviting states to develop human rights indicators and benchmarks in order to monitor their (the state's) compliance with its human rights obligations under the relevant treaty.[687]

There is some consistency across sectors increasingly reliant upon indicators and audits to measure and determine performance and related success. This is a dualism that, on the one hand, welcomes an evolving culture of dependency on indicators and audits as a key element of regimes of governance whilst,[688] on the other, expresses concern that indicators lead to processes that are counter-productive and can foster mistrust.[689] The latter results in dysfunctional behaviour driven by a focus on indicators and targets rather than the conceptual rationale underpinning the perceived need for the indicator in the first place.[690]

Todd Landman has written positively of the contribution of measuring human rights performance, finding there is a 'continued need for and use of meaningful, valid, time-series measures of human rights protection' in order to bridge the gap between proclamations of human rights rights protection and actual implementation.[691] He formulates four functions of human rights measurement, namely:

> (1) contextual description, monitoring, and documentation of violations;
>
> (2) classification of different types of violations;
>
> (3) mapping and pattern recognition of violations over space and time; and
>
> (4) secondary analysis that provides explanations for violations and policy solutions for reducing them in the future.[692]

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[686] Gauthier de Beco, 'Human Rights Indicators for Assessing State Compliance with International Human Rights', 77 (2008) Nordic Journal of International Law 23, 25.
[687] ibid 35.
[688] Todd Landman, 'Measuring Human Rights: Principle, Practice, and Policy' (2004) 26(4) Human Rights Quarterly 906-931.
[689] As a result of the desire to audit, measure and quantify Marilyn Strathern, 'The Tyranny of Transparency', (2000) 26(3) British Educational Research Journal, 309-209.
[690] Cris Shore and Susan Wright, 'Audit Culture Revisited Rankings, Ratings, and the Reassembling of Society' (2015) 56(3) Current Anthropology 421-444, 421 and 424 and Merry 'Seductions of Quantification' (n 684).
[691] Landman (n 688) 907-8.
[692] ibid 909.

Landman argues in favour of a form of standardisation in terms of human rights investigations and the gathering of material, particularly given the reliance upon such evidence in courts and tribunal hearings. These are important matters to address but as Frederic Megret explains, whilst fact-finding is 'witnessing a new popularity, particularly in the context of human rights', coupled with indicators and benchmarks, facts are not always as they seem.[693] Whilst facts might be used to increase legitimacy or in pursuit of a claim to authority, they are 'part and parcel of discursive strategies', so that fact-finding is a form of power.[694] Although the fact-finding mission may be driven by impartiality, those finding facts may be 'norm-entrepreneurs', which Megret posits as being trained to promote human rights, rather than find 'facts'.[695] Further, the language of fact-finding is informed by 'the labels that the law has given us'; [696] it is not simply a case of discovering what happened but also what crimes have been committed.

Philip Alston and Colin Gillespie seek to provoke 'vibrant debate' as to the most appropriate means by which to gather and share human rights information recognising the limitations inherent in any human rights reporting process.[697] Alston and Gillespie sensibly note that past proposals to create a 'single authoritative record' for each country were critically received due to a lack of a single 'truth'; a pursuit for such singular truth is futile - reporting is influenced by the perceptions, values and judgements of those collating data and diverse approaches with regard to the information collected and the interpretations made has some value.[698] Furthermore, those organisations collecting data do not do so in a comprehensive manner, and the variety of actors collecting data are often not aware of others working in close proximity.[699] This gives rise to the issue of 'dispersed information' where information

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[693] Frederic Megret, ''Do facts Exist, Can They Be "Found," and Does It Matter?', in Alston and Knuckey (n 588) 27.
[694] ibid 28.
[695] ibid 31.
[696] ibid 34.
[697] Their discussion is situated in the context of extra-judicial killings and focuses on the information gathered by four different entities: NGOs comprising Amnesty International and Human Rights Watch; the Special Rapporteur on Extrajudicial Killings; Governments – with specific reference to the US State Department Reports; addressing the number of references by those entities to Commissions of Inquiry (CoIs), Philip Alston and Colin Gillespie, 'Global Human Rights Monitoring, New Technologies, and the Politics of Information', (2012) 23(4) European Journal of International Law 1089, 1094.
[698] ibid 1098.
[699] ibid, with reference to CoIs and institutional shortcomings, failing to properly take account of information available within a state and failing to provide a public report, risking calls for a CoI in close proximity to a failed one (the example given is Ethiopia), 1104.

is held by a wide range of actors and those actors are not in effective communication with one another.[700]

The UPR has some capacity to address this dispersal by bringing data, both quantitative and qualitative, into one arena. It has been suggested that states are more willing to collect data for development indicators, aligned to support a state's requests for aid, rather than collect and collate data relating to human rights indicators, the findings of which may well provide ammunition with which to criticise the aid-seeking government.[701] That said, the apparent willingness to favour development indicators may be due more to received practice rather than resistance; the collation of data for this purpose is better established,[702] with human rights indicators 'still in their infancy'.[703] Further, there is some evidence at the national level of states using indicators to report upon UPR progress.[704]

A recent culmination in the increasingly widespread use of indicators is an OHCHR guide produced to promote their use in measuring implementation.[705] The OHCHR conceptualises human rights indicators as structural, process and outcome, which can be aligned, respectively, with respecting, protecting and fulfilling rights, reflecting a state's evolutionary progress through the scope of its human rights obligations.[706] Whilst the use of structural, process and outcome indicators form the spine of the OHCHR's 2012 publication, it had published on the matter some four years previously in a report that had been commissioned in 2006, stating:

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[700] ibid 1093.

[701] de Beco (n 686) 35, citing T. Hammarberg, 'Searching the Truth: The Need to Monitor Human Rights with Relevant and Reliable Means', (2001) Statistical Journal of the United Nations ECE 18, 136.

[702] AnnJanette Rosga and Margaret L. Sattherwaite, 'The Trust in Indicators: Measuring Human Rights' (2009) 27(2) Berkeley Journal of International Law 253-315, 266-268.

[703] Harrison and Sekalala (n 588) 935.

[704] Brazil has been reported as having committed to devising a national system of human rights indicators and using statistics to assess racial inequalities between white and Afro-descendent people using disaggregated socioeconomic statistics, indicating the high rate of homicide in the country, particularly among children, Brazil state report A/HRC/WG.6/1/BRA/1, paras 26 and 81, as cited in OHCHR 'Human Rights Indicators' (n 683) 26.

[705] OHCHR 'Human Rights Indicators' (n 683).

[706] ibid.

> (…) structural indicators refer to the ratification and adoption of international treaties and the institutional structures and mechanisms within a state that facilitate the resolution of human rights matters. [707]

Measuring structural indicators is a relatively straightforward process and, on the face of it, reflects the first stage in a state's realisation of its declared aspiration to commit to the promotion and protection of human rights. The Inter American Court of Human Rights (IACtHR) is of the view that structural indicators should be used to indicate the extent of domestic law compliance with international obligations.[708] Along similar lines, Kalantry, Getgen and ArriggKoh propose that an appropriate approach would be to limit the use of structural indicators for measuring the extent to which a state's laws reflect, incorporate, and implement its international treaty obligations, with the focus being on process indicators to account for the extent to which the state has, or has not, 'created appropriate institutions and taken additional implementation measures to fulfill its obligations'.[709]

Process indicators are those that refer, for example, to institutions, policies and measures, the receipt of complaints and the timescale to address the same.[710] Therefore, although outcomes indicators relate to attainment they may be reflective of success in terms of a process indicator, one example provided by the OHCHR being life expectancy and mortality rates (outcome) as related to immunization (process).[711] Outcome indicators monitor the extent to which a state is actually realising, promoting and protecting a given right 'on the ground', focusing on the results of efforts made by states with regard to process indicators.[712]

Whilst the overriding sentiment of the OHCHR is to support the use of human rights indicators, having declared its commitment to them as a means to 'provide concrete,

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[707] 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights' HRI/MC/2008/3 6 June 2008 http://www2.ohchr.org/english/issues/indicators/docs/HRI.MC.2008.3_en.pdf accessed 12 October 2016.

[708] D.A. Gonzalez-Salzberg, 'Do States comply with the compulsory judgments of the Inter-American Court of Human Rights? An empirical study of the compliance with 330 measures of reparation', (2014) Revista do Instituto Brasileiro de Direitos Humanos, 13.

[709] Kalantry, Getgen and ArriggKoh (n 682) 282.

[710] OHCHR 'Human Rights Indicators' (683) 36.

[711] ibid 37. By way of further example, the number of mothers attended by medical personnel at birth provides evidence of a process indicator, whereas the outcome indicator related to that process might be the number of infants that survive the first three months of life, Green (n 685) 1075.

[712] de Beco (n 686) 43.

practical tools for enforcing human rights and measuring their implementation',[713] there is passing acknowledgement by the OHCHR that in some quarters there is:

> (…) limited capacity to collect and compile information on appropriate indicators, their periodicity, analytical techniques, the institutional arrangements required for undertaking human rights assessments, lack of adequate resources and political indifference to human rights.[714]

This is of particular alarm if indicators are being used to inform budget allocation, as is suggested by the OHCHR.[715] Disquiet regarding credibility of data and findings is said to arise due to a limited group of Western organisations and governments leading the way in terms of methodology and on the ground collation, and the unintended consequence of budget allocation according to indicators acting as an incentive for states to under-report progress in order to evidence need for financial and other support operating.[716]

There is a significant risk that human rights indicators present unreliable evidence. The recording and collecting of data in a country such as Yemen is sporadic, may be prone to duplication and is therefore not sufficiently reliable in terms of drawing concrete conclusions.[717] What emerges is a process that is more art than science; as Brian Root, the Quantitative Analyst at Human Rights Watch states, 'human rights fact-finding is largely a qualitative affair, and researchers will always rely on the narrative interviews as a key source of information and evidence'.[718] In addition, as de Beco observes, complaints in repressive states are less frequent due to the absence of redress mechanisms and, when they do exist, there is a lack of trust in their value and effectiveness.[719] The fact of a lower number of complaints does not reflect a better human rights situation. This is all the more reason to

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[713] OHCHR 'Human Rights Indicators' (683) 2.

[714] ibid 103.

[715] ibid 125.

[716] Brian Root, 'Numbers are only human: Lessons for human rights practitioners form the quantitative literacy movement', in Alston and Knuckey (n 588); Harrison and Sekalala (n 588) 927, citing Hafner-Burton (n 549) 84.

[717] Economic, Social and Cultural Rights 'Report submitted by the independent expert on extreme poverty, Anne Marie Liz in Addendum, Mission To Yemen' E/CN.4/2004/43/Add.1 (08 January 2004), 2, citing issues relating to duplication of records, to the cost of issuing identity documents resulting in the poorest people not receiving any, which in turn limits the capability of those people from accessing public services and being recorded as such.

[718] Root (n 716) 356.

[719] de Beco (n 686) 39.

rely on qualitative data in tandem with the quantitative information revealed by structural, process and outcome indicators.

Human rights indicators are generally used to determine progress within a specific country rather than by comparing the performance of one country, unlike the use of indicators when measuring development.[720] In the view of the OHCHR, this is because 'human rights are absolute standards that all societies have to strive towards; this aim cannot be diluted by creating relative performance benchmarks based on cross-country comparisons'.[721] However, the OHCHR suggests some indicators may be used for comparison between countries, but that 'such use is bound to be confined to comparing performance on a few specific human rights standards at a time' referring to the right to education or right to life (or aspects of these rights) and 'not the entire gamut of human rights'.[722] Yet there is no indication as to why comparison across countries for some indicators and not others might be acceptable and what purpose it might serve.

Engle Merry describes indicators as 'knowledge creation', warning that knowledge is often restrictive and contingent and relies heavily upon translation and commensuration.[723] David McGrogan draws parallels between the human rights indicator project and a 'strong rationalist propensity'; the rationalist perspective is that technical knowledge, rather than practical knowledge, is supreme, with the sovereignty of technique encouraging and pushing for universal use of human rights indicators, but not universal agreement as to what those indicators should or should not be. His view is that:

> (…) whilst there may never be a complete set of universal indicators, it
> is nonetheless the case that what has been advocated is the universal
> use of indicators and a universal framework for their use. Uniformity
> and certainty, in other words, manifest themselves not at the level of
> direct implementation but, rather, at the level of conceptualization
> [*sic*].[724]

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[720] Kalantry, Getgen and ArriggKoh (n 682) 257.
[721] OHCHR 'Human Rights Indicators' (n 683) 30.
[722] ibid.
[723] Merry 'Seductions of Quantification' (n 684) 27-8.
[724] David McGrogan, 'Human Rights indicators and the Sovereignty of Technique', (2016) 27(2) European Journal of international Law, 385-408, 396.

It is in this spirit that structural, process and outcome indicators form the spine of the approach advocated by the OHCHR.[725] However, if technique reigns over substance, there is a risk that nuance and particularity is lost; the desire to conceptualise, measure, and assess, means that 'the unpredictable, ungovernable, chaotic nature of changing social norms, which may seem dormant for decades before undergoing dramatic shifts, is lost amid the need to demonstrate structure, process and outcome'.[726] In a similar vein, Engle Merry critically assesses the value of quantification; she accepts there is worth in the gathering of statistical data in terms of comparisons that can be made on a national / international scale but notes that much of the detail and context is lost in this endeavour.[727] The result is a disparity between 'qualitative, locally informed systems of knowledge production and more quantified systems with global reach'.[728] One danger is that quantification provides knowledge that is 'decontextualized, homogenized and remote from local contexts of meaning [sic]' but that nonetheless goes on to inform policy.[729]

To help understand the limitations associated with indicators, Merry refers to the potential impact of the use of indicator data / findings with reference to 'knowledge effect': statistical knowledge may be accepted as non-political, objective and scientific, even though the collection methods may not be; and 'governance effect': decisions regarding aid, intervention, etc. being determined by a country's individual performance against a set of indicators.[730] In reporting on her ethnographic study, Merry concludes that:

> (…) the way indicators are constructed and used shows that they
> reflect the social and cultural worlds of the actors and organisations
> that create them and the regimes of power within which they are
> formed.[731]

This suggests the framework will be biased towards a particular agenda or set of norms, that an objective assessment of the performance of one institution against another, one region against another, or one state against another, will be essentially impossible. Other concerns

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[725] OHCHR 'Human Rights Indicators' (n 683) 34-43.
[726] McGrogan (n 724) 402.
[727] Merry 'Seductions of Quantification' (n 684) 3.
[728] ibid 3.
[729] ibid 3.
[730] ibid 4.
[731] ibid 4-5.

arise, rather than 'objective representations of the world, such quantifications are social constructs formed through protracted social processes of consensus building and contestation'.[732] Therefore, if the construction and use of indicators is driven by the regimes of power within which they are formed, careful consideration ought to be given to those actors involved in the forming process in order to avoid the creation of a neo-imperialist and/or neoliberal vehicle that validates bias, policy and practice favoured by a particular elite.

This chimes with Merry's coining of the phrase 'expertise inertia' whereby those setting indicators are the 'experts' meaning that the inexperienced and the powerless are excluded.[733] At their worst, rather than improve the human rights situation on the ground in a given country, human rights indicators can have negative consequences by entrenching the power of the political elite at the expense of those most in need of rights protection. There is a risk that instead of reviewing the situation on the ground, the result is masking and misleading.[734]

Given the scepticism surrounding reliance upon human rights indicators, one might be forgiven for a sense of despondency when it comes to any attempt to monitor state compliance and progress against UPR recommendations. Yet, no system of assessment is ever foolproof and a key measure of the UPR's success sits outside the realms of human rights indicators, being rooted in specific state practice when it comes to interaction with the UPR as an international organisation with a global governance function, in particular a state's role in making recommendations and how it responds to the recommendations it receives.

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[732] ibid 5.

[733] ibid (n 718) 6-8, for example, see her discussion of the genealogy of indicators and her example of being present at a meeting in Geneva in 2009 regarding violence against women, with people of Canada, Italy and the US explaining how surveys measuring violence against women had worked in their countries to representatives from developing nations yet to engage in such an undertaking.

[734] An 'explosion' of rights and procedures does not lead to state compliance, and there is the risk that states would be better served by a focus on core rights rather than an array of rights, not knowing which to give priority to, Hafner-Burton (n 549) 5-6.

5.5 Output (substantive) legitimacy of the UPR: making and responding to recommendations

The nature of recommendations made to states under review and how those states respond to those recommendations are two important aspects of the UPR's output. This section explores a system for codifying UPR recommendations according to action category and theme undertaken by Edward McMahon, working with UPR Info.[735] This exploration is conducted as a means to interrogate whether the output in respect of recommendations varies between stable states and states in crisis as a means to further investigate the governance function of the UPR generally, and particularly where states in crisis are concerned. It also addresses some of the motivations for states implementing UPR recommendations and the potential role of domestic state parliaments in encouraging and supporting this.

Under McMahon's methodology,[736] each recommendation is coded according to one of five categories based on the nature of the action recommended as follows: 1 - minimal action; 2 - continuing action; 3 - considering action; 4 - general action; and 5 - specific action. Category 1 recommendations are the softest in terms of the demands they make and include the verbs such as 'call on, seek, share'. Category 2 emphasise continuity in actions and/or policies, with key action verbs being 'continue, maintain, persevere, pursue'. Category 3 comprises recommendations that consider change and include verbs such as 'analyse, consider, envisage, envision, explore, reflect upon, revise, review, study'. Categories 1-3 refer to recommendations that are easier to implement because of their minimal demands of the SuR.

Recommendations within category 4 refer to action that is more focused and specific, yet still erring towards the generic, containing verbs such as 'accelerate, address, encourage, engage with, ensure, guarantee, intensify, promote, speed up, strengthen, take action, take measures or steps towards'. Again, these recommendations may be received more favourably being relatively simple in terms of follow up but are more difficult to assess in terms of tangible progress. Category 5 recommendations require specific action and are

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[735] McMahon 'The UPR: A Work in Progress' (n 127) 14-15.
[736] The information in this and the following paragraph is taken from McMahon 'The UPR: A Work in Progress' (n 127) 14-15.

therefore the most demanding of the SuR. These recommendations commonly include the verbs to 'conduct, develop, eliminate, establish, investigate, undertake as well as legal verbs: abolish, accede, adopt, amend, implement, enforce, ratify'. Such specificity means these are the clearest recommendations with 'the most potential to impact the human rights situation because these recommendations leave the least amount of room for window dressing of the human rights efforts taken by the state'.

The action-category of the recommendation relates to output as it has a direct bearing on the ability to measure tangible follow up and implementation. A state can easily report implementation against those recommendations that require minimal action, continuing action, general action or that action be considered without having, for example, undertaken any change in law, policy or practice, or ratified a particular treaty.[737] For action category 5 recommendations, evidence of implementation may be presented but action may not be directly attributable to the UPR, particularly if the recommendation links with a treaty committee recommendation, or that from another international human rights mechanism. That said, if the UPR has performed a reinforcement role in terms of norm dispersal and dissemination, that of itself is a measure of success. Aggregated global data regarding implementation of the ten most cited issues for those states in the first half of the first UPR cycle revealed the vast majority of recommendations were not implemented.[738]

Other coding approaches are, of course, possible. Elvira Dominguez-Redondo highlights, for example, that human rights obligations 'are commonly classified under the generic rubric of "promotion and protection"'.[739] Such a rubric could be used to codify UPR recommendations, for example, according to those that seek to offer encouragement, support and assistance (promotion) and those that are more directive and coercive (protection). However, this presents a binary approach that does not account for the array of

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[737] Tomuschat (n 127) 613, referring to: recommendations to Fiji to preserve freedom of expression and the independence of the judiciary pursuant to its obligations under the ICCPR; many European governments being urged to ratify the Convention on Migrant Workers; and that Cuba, Iran and the DPRK as examples of states that refuse to support recommendations to ratify the optional protocol to the Convention against Torture.
[738] All recommendations made during the first six sessions are included. The rationale for this is that noted recommendations reflect the views of the international community, and there is evidence of noted recommendations being implemented, potentially because the subject matter may be more comfortably considered in a domestic setting with support from civil society, rather than in the international forum of the UPR, CSO 07.
[739] Dominguez-Redondo (n 635).

recommendation type. Given the sheer number of UPR recommendations, as attested below, the pragmatic approach is to utilise the coding and extensive sorting of the thousands of recommendations that has already taken place.

If action category 5 recommendations are those that require the most of states in terms of action, and are therefore more likely to prompt positive impact in terms of rights protection, as well as being more reliable in terms of evidencing compliance, it follows that reviewing states should be encouraged to make more, or only, category 5 recommendations.

Table 1 Overall recommendations statistics: category 5

Cycle	No. Recns		Specific action (category 5)				No. reviewing states
			No.	%	% Variance		
1st cycle	21355		7364	34.5	N/A		154
2nd cycle	36331		13404	36.9	+2.4%		168

During the UPR's first cycle, a total of 21,355 recommendations were made, of which 7,364 (34.5%) contained specific action (category 5). Thirty-nine countries made no recommendations at all during the first cycle. [740] A greater number of recommendations were made over the course of the second cycle, amounting to 36,331 (an increase of 14,976, amounting to just over 70%). Of those 36,331 recommendations made, 13,404 (36.9%) were action category 5. Despite the significant increase in the overall number of recommendations made in the second cycle, the ratio of specific action recommendations made was similar, keeping the figure at just over a third of all recommendations for both cycles (34.5% / 36.9% respectively).

Many of the commitments made by an SuR during its UPR refer to legislative action, indicating a state's parliament has a central role to play. This has been the subject of a OHCHR report, which notes the:

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[740] Data in this section has been extracted from UPR Info statistics and processed accordingly. The database does not identify the 39 countries, UPR Info: Statistics of Recommendations (n 126).

(…) importance of the active participation of parliaments in the follow-up process, as one of the key national stakeholders, also bearing in mind that more than 50 per cent of universal periodic review recommendations require or involve parliamentary action.[741]

The report recommends that states establish a permanent parliamentary human rights committee,[742] and engage parliaments as relevant stakeholders in the consultation process for the UPR national report.[743]

5.6 The Human Rights Council regular sessions: supporting the UPR's governance function

The regular sessions of the Human Rights Council, which take place three times each year, play a crucial role in the UPR governance process via standing item number 6 on the regular session agenda,[744] and have the potential to contribute to the UPR's substantive legitimacy. Item 6 includes the adoption of the outcome of the UPR for those countries reviewed during the preceding UPR session and space for general, although time-limited, debate on the UPR. In the event that a state had 'noted' a recommendation at the time of the Working Group, the state is at this stage required to provide an update regarding its position.

During the adoption of the Working Group report at the Council's regular session, the SuR, reviewing states, and civil society have the opportunity to pass comment upon the particular state's review and the outcome document. Mozambique, for example, explained it had framed the majority of the recommendations received during its review in its 'Five-Year Programme of the Government'.[745] This indicates the commitment of some states in terms

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[741] OHCHR 'Contribution of parliaments to the work of the Human Rights Council and its universal periodic review: Report of the Office of the United Nations High Commissioner for Human Rights' A/HRC/38/25 (17 May 2018) para 11.

[742] ibid para 62. See, for example, Joint Committee on Human Rights, Joint Select Committee (UK), https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/; the statement by Georgia reporting it had entrusted Parliament with the task of reporting on the implementation of recommendations, HRC General Debate on the UPR (n 35), both last accessed 23 June 2017; and the work of the Inter-Parliamentary Union, an international NGO that promotes the role of Parliament in human rights matters and has worked in West Africa, https://www.ipu.org/our-work last accessed 10 July 2018, and Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliament and Human Rights: Redressing the Democratic Deficit* (Bloomsbury 2015).

[743] UNHRC 'Contribution of parliaments' (n 741) para 16.

[744] UNHRC A/HRC/RES/5/1 (n 9) para 35: 'The Council should have a standing item on its agenda devoted to the universal periodic review.'

[745] UNHRC Report of the Human Rights Council on its thirty-second session, A/HRC/322, advance unedited version (14 November 2016) para 593, the 32nd session having taken place 13 June – 1 July 2016.

of capacity, resources and/or will to take a comprehensive approach to follow up and implementation for UPR recommendations. Belgium reported being committed to 'a systematic manner through internal consultations on an administrative level every six months' with consultation to also take place at a political level. For Belgium, implementation was not limited to UPR recommendations but included those recommendations made by treaty bodies and the Council of Europe, and was to involve the participation of civil society.[746]

Whilst this is evidence of the co-ordinated human rights governance approach being pursued by the Human Rights Council and its institutions, and of the multi-directional nature of the international human rights regime complex, the acceptance of the Council by the state's position in response to a noted recommendation does not always advance its governance function, as illustrated above in section 5.3, in relation to Yemen and the US's recommendation regarding spousal rape. A state's review remains a live issue; both the specific comment on a state's outcome and the general debate at the regular session demonstrates that the UPR process is not limited to the shelf life of the Working Group.

The regular session of the Council soon follows an SuR's review being three to five months after the most recent UPR session. With each cycle now lasting five years, this indicates that a further formal process for reporting on progress and implementation is required, rather than the informal practice that has evolved and is being supported. Equally, it is not always the formal processes that prompt action, as illustrated by an anecdote shared by one interviewee that explained that one country's Vice Minister for Foreign Affairs had requested some project ideas it could pursue with the UNDP (UN Development Programme) in relation to the UPR.[747] Therefore, during a visit to that country prior to its second cycle review, the interviewee had provided the Vice Minister with a list of possible human rights programmes that could be pursued by the government with suggestions covering persons with disability, or issues relating to sexual orientation, and that others might include the administration of justice, torture and freedom of expression.

The interviewee expressed that he was 'totally sceptical' of any of the programmes being

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[746] ibid para 734.
[747] Interview UN 01.

adopted and pursued. He saw the Vice Minister at the UN the following year for the country's UPR, and discovered the Vice Minister had proceeded to implement programmes on persons with disability and torture. When asked why these programmes had been adopted in preference to others, the interviewee was informed it was on the basis they related to 'technical' matters and not 'political' ones. When asked how the distinction between the two was made (because the interviewee considered torture to be a very political issue), he was told that a review of all the UPR recommendations revealed that all states had received recommendations relating to the matter of persons with disabilities and relating to torture. On the basis that such recommendations had been made to all states, they were not biased or targeted by one grouping of states against another, and that made them acceptable.

Whilst this was shared during an interview as an anecdote, one important revelation is the rational and forensic approach of a state in deciding what to focus their efforts and resources on in terms of improving rights protection. Further, the measure of that which is technical and that which is political, approached in this way, could be shared to encourage more action at the domestic level on projects that do not suggest bias towards a particular recommending state/s and, thirdly, that it is possible for a coordinated approach at state level that unites the objectives of the UPR and the UNDP. Although much of the concept and content of human rights is Western in terms of historical foundation,[748] 'they are currently important for social justice movements in many parts of the world'.[749] In order to speak to those nations whose ruling elite denotes an anti-Western sentiment, recommendations at the UPR need to relinquish a partisan approach. One way of achieving this is to ensure that WEOG recommending states make recommendations that are similar in terms of their substance to states in their own group as well as those in others.[750]

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[748] Duncan Kennedy, 'The Critique of Rights in Critical Legal Studies', in Wendy Brown and Janet Halley, *Left legalism/left critique* (Duke University Press 2002) 178-227.

[749] Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' 108(1) American Anthropologist, 38-51, 38.

[750] This is also noted in more detail in chapter 7 of this study.

Conclusion

This chapter illustrates that the output of a state's UPR includes the nature of the recommendations it receives and its response of either supporting or noting recommendations, and the message that response relays in terms of norm acceptance and dissemination. This is neatly illustrated by the backlash the UK faced in supporting fewer recommendations at its third cycle review compared to the previous cycles, and seeking to change its previous position regarding certain supported recommendations.

By being present at the interactive dialogue and listening to the recommendations by a multitude of states, state delegations are exposed to prevailing international human rights norms and required to give careful consideration to whether to accept and support those norms, or not. Whilst there are various factors that influence whether recommendations are accepted, not all of which are born of a desire to improve the human rights situation, the national delegation is nonetheless making a powerful declaration on the world stage of the country's position, which civil society and citizens of the state can then refer to when seeking to hold the government to account, as discussed in chapter 7.

Even so, the primary focus of the UPR's substantive legitimacy is undoubtedly moving towards follow up and implementation. This in turn begs the question of state engagement with international human rights, from ratification of treaties to compliance with the commitments made, that has occupied the minds of the academy of international lawyers.[751] It has been illustrated throughout this chapter that there are a number of factors that influence state practice such as politicisation, the 'club' mentality, reciprocity, acculturation and being held to account through naming and shaming. However, it is almost impossible to know at a given time what particular factor has determined state action. As one anecdote shared as part of the research for this thesis revealed, even the most experienced of UN personnel can be surprised with the approach taken by states to determine what to act upon and what not to.

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[751] See, for example, Hathaway (n 58); Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance*, (New York: Cambridge University Press 2014); Risse et al *The Persistent Power of Human Rights* (n 46).

Some important points to note surface from the analysis conducted throughout this chapter. It is evident the political reasons for taking action during the UPR process are not always coupled with negative connotations; that states respond more positively to recommendations from their allies nonetheless goes towards fulfilling one of the UPR's objectives of the improvement of the human rights situation on the ground, even when recommendations made by allies are critical. Nonetheless, there remains the issue, as this research reveals in section 5.3.1 above, that the UPR provides a vehicle via which known abusers of human rights congratulate one another on their human rights progress, particularly in the Arab region.

Acculturation has surfaced as a useful way of conceptualising the longer term motivations for state compliance and the nature of state engagement with the UPR, particularly for states in crisis whereby the UPR presents an opportunity to learn from the practice of other states as well as seek advice and support for the future. Output in this respect can be defined according to two categories, one is a state making a commitment to act by supporting a recommendation, demonstrating an acceptance of the relevant human rights principle, norm, or other governance mechanisms in the international human rights regime complex. The other is positive change in state practice. This also feeds into state practice according to legal and normative behaviour and state behaviour according to protected reasons for action, taking note from the work of Joseph Raz and applying those thoughts to the UPR dynamic.

A state's inaction against accepted recommendations can be indicative of one or more different factors. Inaction may be symptomatic of an historic disdain toward human rights protection that has little to do with the UPR, although a symptom of such disdain is that the UPR's credibility, and that of the international human rights regime complex, is compromised. It may also be evidence of the progressive nature of the human rights movement and the time it takes to address and adjust state practice. There may be very specific country-related circumstances that have prevented progress, the war in Yemen being a case in point addressed in the following chapter, or a state being in a post conflict transitional phase whereby there is the will but there remains a lack in terms of means and infrastructure, for example, Somalia. Conversely, it may be possible for a state to present a more positive picture of implementation than reality on the ground would suggest due to

low action category recommendations, or aggregated data that masks more fundamental matters that remain stagnant.

Ultimately, the governance function of the UPR is at its most successful when it facilitates state action that complies with recommendations made across the international human rights regime complex. As illustrated in section four above, the most effective recommendations are those that require specific action. It is also the case that these are also the most easily identified and measured in terms of compliance. However, category 5 type recommendations, which are relevant to this point, account for an average of just over 35% of all recommendations made across both the first and second cycles.

There are a number of practical steps being adopted by the OHCHR to further promote follow up and implementation and these have been set out above. These include embedding in to the UPR cycle a date by which states reviewed in a particular session are due to submit an implementation plan and a letter from the High Commissioner for Human Rights to those states recently reviewed. That the High Commissioner for Human Rights has at the start of the third cycle adopted the practice of sending a personal and tailored letter to each state delegation following its review to encourage the devising of a national implementation plan and making specific reference to follow up steps to take, is a matter of high diplomacy, as noted in section 5.2. To better track a state's view of its progress against implementation, specific guidance in terms of structuring subsequent national reports and the state's presentation at the start of the Working Group is required. As one interviewee observed on the second day of the start of the third cycle:

> (…) what I'm missing is that the country immediately starts by presenting a
> report reflecting on the recommendations which they previously had and
> they say, ok this has been implemented, and they are still lax, we need help,
> we need assistance and these things, this awareness.[752]

Finally, section five of this chapter explored the way on which the Human Rights Council supports the governance function of the UPR via standing item 6 on the agenda of the Council's regular sessions, however, this observation comes with a word of warning; the Council needs to be mindful of allowing inadequate responses provided by states under

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[752] Interview CSO 03.

review to noted recommendations that undermine the UPR's legitimacy and the principle of universal rights protection.

Potentially the most brutal assessment of the substantive legitimacy of the UPR is to ask what would be lost if there was no UPR. This is a question that stumped some interviewees and offended others.[753] This is picked up at the close of chapter 8 as final thoughts on this thesis' findings. With this in mind, chapter 6 turns to focus purely on the governance function of the UPR in relation to states in crisis by assessing the nature of the recommendations made to such states and their response.

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[753] Interview CSO 01 and CSO 02.

Chapter 6: The UPR and states in crisis – recommendations

Introduction

As discussed and explained in the introductory chapter, Yemen is the primary state in crisis this study focuses upon. A small 'sample', Somalia and Iraq as other states in crisis, and the UK and New Zealand as stable states, is included by way of comparison and illustration, as detailed in the introduction, section 1.5. In investigating the governance function of the UPR for states in crisis, this chapter addresses the mechanism's operation by tracking the number and nature of the recommendations Yemen receives compared to the sample states, and the number of states making those recommendations. This is to discover if there is any discernible difference or pattern for states in crisis compared to stable states. This chapter also assesses the response of Yemen to recommendations, that is, the number and nature of the recommendations it supports against those it notes.

The UPR is not designed as a mechanism to respond and take action in situations of immediate crisis and/or emergency; that role falls to the UN Security Council and other UN institutions, subject to the nature of the situation.[754] Nor can the UPR resolve deep-seated discord and fragmentation of the type that characterises Yemen.[755] The matter of the significant and far reaching impact of the current war in Yemen on the most basic of human rights has been addressed over the last few years by a number of UN institutions including the Human Rights Council, the Office of the High Commissioner for Human Rights and the Security Council.[756]

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[754] For example, the United Nations Disaster and Assessment Coordination, http://www.unocha.org/legacy/what-we-do/coordination-tools/undac/overview, the United Nations Refugee Agency, UNHCR (High Commissioner for Refugees), http://www.unhcr.org/uk/emergencies.html both last accessed 21 May 2018.

[755] Safa AlAhmad, 'Meeting the Houthis - and their enemies', BBC News (17 March 2015) http://www.bbc.co.uk/news/magazine-31907671 last accessed 18 May 2018, referring to, for example, the desire in certain quarters for secession of the South from the North and the competing interests and pursuit of power by a triumvirate of the Houthis, forces loyal to the Hadi government, and Al Qaida in the Arab Peninsula (AQAP).

[756] As a result of the request made to the High Commissioner for Human Rights in UNHRC 'Technical assistance and capacity-building for Yemen in the field of human rights', A/HRC/RES/30/1 (30 September 2015) the then High Commissioner presented his report on 04 August 2016, UNHRC 'Situation of Human Rights in Yemen: Report of the High Commissioner for Human Rights', A/HRC/33/38 (04 August 2016), para 1. Other reports are cited in this chapter.

Given the multi-agency involvement in the human rights and security situation in Yemen, the question arises of the function of the UPR for a state such as this. The purpose and success of the UPR can only be measured relative to the situation on the ground for each SuR, a situation that is a complex mélange of law and politics as determined by broader domestic economic, social, religious and cultural conditions, often with regional and global geopolitical dynamics operating as a significant factor, as this chapter will discuss.

As this thesis has illustrated, the UPR Working Group provides a forum within which the adoption of, and commitment to comply with, international human rights obligations and norms is encouraged, capacity building considered, and technical assistance requested or offered. These are pertinent matters for states in crisis; whilst the engagement of a state in crisis during the interactive dialogue is important, the human rights failings Yemen faces are now so entrenched in the country's conflict that any recommendations reviewing states make in terms of improving progress (against structural, process or outcomes indicators) will prove particularly challenging in terms of compliance whilst the conflict is ongoing.

Nonetheless, the UPR continues to have an important governance role to play where Yemen is concerned both in terms of regulation and the setting of standards. Importantly, the UPR creates a space and forum within which the international community will centre solely upon Yemen's human rights issues. Yemen's third cycle review is scheduled for January 2019. This review will focus global attention on the serious human rights failings and violations in Yemen that are directly linked to the ongoing conflict and that also predate it in terms of historic, civic, political, cultural, social and economic rights violations. There is the potential for state actors to be further mobilised to offer support and resources in terms of current and future rights protection, and Yemen can engage in dialogue and make specific requests. The Working Group will provide a space for the state delegation to appeal to the international community for assistance in rebuilding the fabric of Yemeni society. Preparations for the Working Group will allow civil society and other entities within the international human rights regime complex to (re)present allegations and evidence of

conflict and non-conflict related violations that also encompass international humanitarian law breaches by all parties to the war.[757]

The ongoing war has created a complex geopolitical situation in terms of the warring parties and the support / provision of resources by their allies, the Saudi and UAE-led coalition with weapons and military support from the US and the UK, and the Houthis in receipt of support from Iran; despite the large scale humanitarian crisis in Yemen, media coverage has been sparse and often biased.[758] Attempts to broker peace have not succeeded.[759] Nonetheless, the Yemeni government, state missions to the UN, global and domestic civil society, and those playing a part in the war,[760] will each have the opportunity to contribute to Yemen's UPR. In making their recommendations, reviewing states may well reveal their own view of

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[757] For evidence presented by civil society in relation to human rights and humanitarian law violations by all parties to the war see, for example: Human Rights Watch 'World Report: Yemen events of 2017' https://www.hrw.org/world-report/2018/country-chapters/yemen; Mwatana Organization for Human Rights, Annual Report 2017 http://mwatana.org/annul-report-2017/; Amnesty International 'Yemen: Three years on, US and UK arms supplies to Saudi Arabia-led coalition are devastating civilian lives' (28 March 2018), https://www.amnesty.org/en/latest/news/2018/03/yemen-three-years-on-us-and-uk-arms-supplies-to-saudi-arabia-led-coalition-are-devastating-civilian-lives/ all accessed 21 May 2018; Mwatana Organization for Human Rights and Columbia Law School Human Rights Clinic 'Submission to the United Nations about the Universal Periodic Review of Saudi Arabia' (29 March 2018) http://mwatana.org/en/submission-to-the-united-nations/ last accessed 10 August 2018.

[758] Compare, for example, the tone and focus of Peter Welby, 'Yemen's Houthi Rebels should be treated like ISIS' *The Times* (25 June 2018) https://www.thetimes.co.uk/article/yemen-s-houthi-rebels-should-be-treated-like-isis-7bzqzrqfl to Owen Jones, 'Saudi Arabia and Israel are killing civilians and Britain is complicit' *The Guardian* (10 August 2018) https://www.theguardian.com/commentisfree/2018/aug/10/saudi-arabia-israel-civilians-britain-yemen-palestinian-arms both last accessed 10 August 2018. For a non-Western journalistic view of the nature of the reporting, or lack of, in the world press of the war in Yemen, see 'What the US and the UK won't tell you about the war in Yemen', and accompanying film from The Listening Post, Al Jazeera, 25 June 2018, https://www.aljazeera.com/programmes/listeningpost/2018/06/uk-media-won-war-yemen-180624152733811.html last accessed 10 August 2018.

[759] Martin Griffths, United Nations Envoy to Yemen, has been trying secure to the first peace talks in two years, having taken up position in March 2018 after 'two predecessors quit in frustration over the gnawing conflict that attracts few headlines and scant attention from the great powers', James Reinl, 'Who is Martin Griffths, UN's new envoy to Yemen?' *Middle East Eye* (23 February 2018) https://www.middleeasteye.net/news/who-martin-griffiths-yemens-new-un-envoy-1120969214; 'De-escalation of fighting in Hodeida is key to 'long-overdue' restart of Yemen peace talks: UN envoy', United Nations News, 28 June 2018; Patrick Wintour, 'UN Envoy confirms first peace talks in two years: negotiations to resolve civil war due to be held in Geneva in September' *The Guardian* (02 August 2018) https://www.theguardian.com/world/2018/aug/02/un-envoy-yemen-peace-talks-civil-war-houthis both last accessed 10 August 2018; peace talks due to take place in Geneva on 6 September did not go ahead, Patrick Wintour, 'Saudis admit error over deaths of second group of Yemeni children' *The Guardian* (06 September 2018) https://www.theguardian.com/world/2018/sep/06/yemen-campaign-hit-civilians-saudi-coalition-admits last accessed 08 September 2018.

[760] As at August 2016, the coalition consisted of 'all the states members of the Gulf Cooperation Countries (with the exception of Oman), as well as Egypt, Jordan, Morocco, Senegal and the Sudan', UNHRC 'Situation of Human Rights in Yemen: Report of the High Commissioner for Human Rights' UNHRC A/HRC/33/38 (n 756) para 10.

the situation, potentially committing to working with relevant parties and agencies to assist in rebuilding public infrastructure and stability in Yemen. Any commitments of assistance made during Yemen's UPR will be recorded and will provide civil society with a basis upon which to return to when approaching reviewing states to follow up offers of support. Therefore, despite there being severely limited prospects, if any, on the part of Yemen's state delegation in the third cycle being in a position to report follow up to second cycle recommendations, the governance function of the UPR will be maintained. This will be achieved in accordance with the source and procedural legitimacy of the UPR, as discussed in chapters 3 and 4, with relevant state and non-state actors making an active contribution to the process, although the extent of civil society's contribution will be hampered, as addressed in chapter 7.

Even so, ahead of the third cycle review, Yemen has said it will engage with civil society in anticipation of preparing its national report.[761] The second cycle national report was reported to have been written in consultation with civil society,[762] however there are now particular challenges in that respect as activity by CSOs is vastly reduced coupled with concerns of politicisation and influence by the faction in control of the area in which the organisation or personnel is based.[763] Furthermore, given the allegations of violations by all sides to the conflict being made by civil society, it is yet to be seen how the government will manage engagement with groups making allegations against it.

The first part of this chapter provides a brief contextual background to the current political situation in Yemen and its impact upon human rights promotion, protection and violation. The second section presents the recommendations statistics for Yemen's first and second cycle reviews against those for the sample states. This process reveals certain UPR trends relating to states in crisis, namely that they receive a higher number of recommendations, generally from a higher number of reviewing states, but that the proportion of those

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[761] Email from United Nations Permanent Mission of Yemen in Geneva to Louisa Riches, 03 June 2018, on file with the author.

[762] '…there was very good cooperation, and they made workshops and they contacted each other. Also, in the second cycle of the UPR they worked together to prepare the national report. It was a very good indication that the government would like to improve their relations with the NGOs', Interview UN 03.

[763] '…But after, in the war situation, they [CSOs] divided. Some of them are in the area where the Houthis are supporting them and the others are in the area of the government, they support the government. In fact, it is politicised now, their work', Interview UN 03.

recommendations that require specific action is consistent across all states considered. The third section explores the multi-directional interaction of actors in the international human rights regime complex with the UPR. It does so by tracking the nature of recommendations made by civil society and by other human rights mechanisms in the regime complex compared to those made by reviewing states. The final section provides some critical assessment of those recommendations that are supported compared to those that are noted and the process by which the SuR and the Human Rights Council deals with noted recommendations.

6.1 Contextual background and current position: Yemen

The presence and operation of various UN agencies in Yemen is complex,[764] as is the political situation and ongoing conflict. Much of the unrest, violent conflict and crises that have engulfed Yemen for the last decade and a half (and that predate the current civil war) have been attributed to '…underlying problems of unequal access to power and resources.' [765] Such conflict is stated as including:

> (…) fighting within the Sa'ada Governorate since 2004; a separatist movement in the southern governorates; the active presence of Al-Qaida in the Arabian Peninsula, including in open confrontations with government forces in the south; conflict between pro- and anti-government groups and contenders to the presidency (e.g. tribal and military factions) in Sanaa, Taiz and Aden; and sustained demonstrations and sit-ins by youth and other sections of the population, which have often met with violence. [766]

This was the case at the time of the report's writing in 2012 and the situation has deteriorated further. Following the 'Arab spring' and so-called 'youth revolution', a multi-dimensional framework was created, referred to as the Joint United Nations Framework to Support the Transition in Yemen (2012-2014),[767] and an OHCHR country office was opened in

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[764] UNDP and the UN system: Yemen, http://www.ye.undp.org/content/yemen/en/home/operations/undp_un.html last accessed 05 June 2016.
[765] UNDP 'Joint United Nations Framework to Support the Transition in Yemen, 2012-2014: A multi-dimensional framework to support a peaceful and inclusive transition' (30 March 2012) http://www.ye.undp.org/content/dam/yemen/Leadership/Docs/Joint%20UN%20Framework%20Yemen.pdf last accessed 05 June 2016.
[766] ibid 4.
[767] Ibid.

Yemen in 2013.[768] The adverse implications for human rights promotion and protection are significant, contributing to the high rate of poverty and malnutrition suffered by a large proportion of the country's population (the World Bank estimates 75% (22.2 million people) need humanitarian aid[769]), its almost chronic under-development,[770] and the impact of a cholera outbreak in the midst of the country's health system facing 'near collapse'.[771] Yemen faces challenges not only in terms of its internally displaced population but also as a result of refugees coming into the country from the horn of Africa.[772]

Having previously been cited as having a 'vibrant and diverse but highly fragmented civil society',[773] the capacity of national civil society has since declined significantly, although reports are still being produced.[774] In February 2016, Human Rights Watch with a coalition of NGOs submitted a joint letter to the Human Rights Council reiterating requests made during the 30th regular session of the Council for the creation of an international mechanism to investigate the allegations of serious violations of international humanitarian law and

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[768] UNHRC 'OHCHR Compilation: Yemen', A/HRC/WG.6/18/YEM/2 (n 460) para 17.

[769] 'The World Bank in Yemen', 16 April 2018. It also estimates that 17.8 million are food insecure, 8.4 million people are severely food insecure and at risk of famine, 16 million lack access to safe water and sanitation, and 16.4 million lack access to adequate healthcare, http://www.worldbank.org/en/country/yemen/overview, last accessed 27 August 2018.

[770] Joint United Nations Framework (Yemen) (n 765) 4.

[771] 'Yemen crisis: Fighting the world's largest outbreak in cholera' The World Health Organization, 07 May 2018, http://www.who.int/emergencies/yemen/en/ last accessed 21 May 2018.

[772] In 2012, more than 300,000 people were reportedly living as displaced by past conflict in northern Yemen and more than 150,000 people displaced by recent fighting in the south, and hundreds of thousands of refugees from the Horn of Africa, Joint United Nations Framework (Yemen) (n 765) 4. People have continued to arrive as refugees coming into Yemen, and leaving Yemen, see Rachel Savage and Mohammed Ali Kalfood, 'All roads lead to Djibouti as refugees flee Yemen even as migrants head there', *The Guardian* (23 May 2016) https://www.theguardian.com/global-development/2016/may/23/all-roads-djibouti-refugees-flee-yemen-civil-war-migrants-head-there; Sophia Akram, 'Yemen's other refugee crisis' *Al Jazeera* (17 March 2017) https://www.aljazeera.com/indepth/features/2017/03/yemen-refugee-crisis-170307094750333.html; and Tom Gardiner and Charlie Rosser, 'Deadly journeys: how despair drives young Ethiopians to flee to Yemen', *The Guardian* (09 May 2018) https://www.theguardian.com/global-development/2018/may/09/young-ethiopians-poverty-yemen-the-gulf all last accessed 14 May 2018.

[773] World Bank 'Yemen Civil Society Organizations in Transition: A Mapping and Capacity Assessment of Development-Oriented Civil Society Organizations in Five Governorates' (Washington, DC. 2013) https://openknowledge.worldbank.org/handle/10986/16638 last accessed 14 May 2018.

[774] Nadia al-Sakkaf, 'the Tragedy of Yemen's Civil Society' *The Washington Institute* (29 February 2016) http://www.washingtoninstitute.org/policy-analysis/view/the-tragedy-of-yemens-civil-society Saba Albess, 'Two years of war: supporting Yemeni Civil Society's path to peace' *Safer World,* https://www.saferworld.org.uk/resources/news-and-analysis/post/219-after-two-years-of-war-it-is-time-to-step-up-support-to-yemeni-civil-society all last accessed 22 May 2018 Human Rights Watch 'World Report: Yemen 2017' (n 757); Mwatana 'Annual Report 2017' (n 757).

abuses of international human rights law committed by all parties to the conflict.[775] It was only in September 2017 that a Council resolution was passed to establish an international panel of independent experts, considered further below.[776]

Access to basic human rights, including clean water and food, is being denied for a significant proportion of the Yemeni population as a direct result of the conflict.[777] Multiple human rights violations and violations of international humanitarian law have been documented by Amnesty International, Human Rights Watch and others as having been committed by all parties to the war in Yemen, including unlawful airstrikes, indiscriminate artillery attacks, targeting of civilian objects such as electricity and water treatment works, the use of cluster munitions, arbitrary detentions, and torture and enforced disappearances.[778] The military offensive led by Saudi Arabia and the UAE to take the country's key port of Hodeidah from Houthi control has exacerbated the situation by interfering with the flow of aid and medical supplies into the country.[779]

Whilst there appears to have been a European sea change in attitude towards arming the Saudi-led coalition, with reports of Finland, Germany, Greece and Norway halting sales of arms as a result of their use in the conflict in Yemen,[780] the UK is not following suit,[781] nor

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[775] 'Joint letter to HRC: Create an International Investigating Mechanism for Yemen', 23 February 2016, Amnesty International, Cairo Institute for Human Rights Studies, CIVICUS: World Alliance for Citizen Participation, Human Rights Watch, International Federation for Human Rights (FIDH), https://www.hrw.org/news/2016/02/23/joint-letter-hrc-create-international-investigating-mechanism-yemen accessed 10 October 2017.

[776] 'Human rights, technical assistance and capacity-building in Yemen' Human Rights Council Resolution 36/31, passed on 29 September 2017, A/HRC/RES/36/31, 03 October 2017, para 12 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/289/51/PDF/G1728951.pdf?OpenElement accessed 21 May 2018.

[777] Peter Beaumont, 'A cynical PR exercise': critics round on $3.5bn plan to allay Yemen suffering' *The Guardian* (01 March 2018) https://www.theguardian.com/global-development/2018/mar/01/saudi-arabia-plan-yemen-cynical-pr-exercise accessed 14 May 2018.

[778] Amnesty International 'Yemen: Three years on', Human Rights Watch 'World Report: Yemen 2017' (n 757); Mwatana 'Annual Report 2017' (n 757).

[779] 'Houthis: 22 children killed by air raids on Yemen's Hodeidah' Al Jazeera, 24 August 2018, https://www.aljazeera.com/news/middleeast/2018/08/houthis-saudi-uae-air-raids-kill-dozens-including-22-children-180823181946517.html last accessed 27 August 2018.
Patrick Wintour, 'Yemen: Saudi-led coalition begins battle for vital port' *The Guardian* (13 June 2018) https://www.theguardian.com/world/2018/jun/13/yemen-saudi-led-coalition-begins-battle-for-vital-port last accessed 18 June 2018.

[780] Patrick Wilcken, 'Britain and the US must stop fuelling the bloody Saudi war on Yemen' *The Guardian* (20 March 2018) https://www.theguardian.com/commentisfree/2018/mar/20/yemen-arms-saudi-arabia last accessed 14 May 2018.

[781] Saudi Arabia: Arms Trade: written questions – 139052, addressed to the Secretary of State for Foreign and Commonwealth Affairs by Dan Carden, MP for Liverpool, Walton, on 27 April 2018, which indicates that there is no evidence of discussions by the UK Secretary of State for Foreign and Commonwealth Affairs with his

the US.[782] Legal action has been in progress since early 2016 led by Campaign Against Arms

Trade (CAAT) in the form of an application for judicial review of the UK's decision to continue

to licence the sale of arms to Saudi Arabia.[783] A Court of Appeal hearing to determine

whether to grant permission to CAAT to appeal against an earlier High Court ruling

dismissing its application took place on 12 April 2018 with judgment being given on 04 May

2018.[784] CAAT was granted permission to appeal on three of the four open grounds of

appeal and on all three of the closed grounds of appeal, with the case due to be heard by the

Court of Appeal in April 2019.[785]

Arguably, these are matters that go beyond the capacity of the UPR to address, but given the

basis of the UPR includes reference to 'applicable international humanitarian law' it may not

be beyond the UPR's scope to operate as a forum in which to raise such matters with the

UK.[786] That said there is no evidence of comment or question to the UK during its third cycle

review in May 2017 regarding the matter.[787] This may reflect a concern that if states

thought they might come under fire for matters regarding security and broader international

relations, they would most likely disengage with the UPR.[788] Saudi Arabia is due to be

reviewed in November 2018 and, as referred to in chapter 7, the Yemeni NGO Mwatana has

made a stakeholder submission that refers directly to Saudi Arabia's part in the war and

allegations of international humanitarian law violations.[789] It remains to be seen if reviewing

states make reference during Saudi Arabia's UPR to its involvement in Yemen.

German counterpart of Germany's 2017 decision, https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-04-27/139052 accessed 14 May 2018.
[782] Saeed Kamali Dehghan, 'Nearly half of US arms exports go to the Middle East' *The Guardian* (12 March 2018) https://www.theguardian.com/world/2018/mar/12/nearly-half-of-us-arms-exports-go-to-the-middle-east last accessed 08 September 2018.
[783] *R (on the application of Campaign Against Arms Trade)* (n 477). For documents made public before the first hearing that took place on 7 and 8 February 2017, see https://www.caat.org.uk/resources/countries/saudi-arabia/legal-2016/before-hearing last accessed 08 September 2018.
[784] *R (on the application of Campaign Against Arms Trade)* [2018] EWCA Civ 1010.
[785] Expected date for listing on file with the author, email from CAAT to the author, September 2018.
[786] '…given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the review shall take into account applicable international humanitarian law.', UNHRC A/HRC/RES/5.1 para 2.
[787] UNHRC Report of the Working Group on the Universal Periodic Review: United Kingdom of Great Britain and Northern Ireland, A/HRC/36/9 (14 July 2017).
[788] Informal conversation between the author and a permanent mission to the United Nations, and between the author and an INGO representative, January 2014.
[789] Mwatana and Columbia Law School Clinic UPR Submission (n 757).

The third cycle reviews of both Yemen and Saudi Arabia are timely and will serve to focus the attention of the international community on a matter that has suffered from under-reporting.[790] In addition, the international panel of independent experts appointed in September 2017[791] recently completed its mission to the country.[792] It published a report of its investigations in August 2018 that alleges potential war crimes by all parties to the conflict and highlights the role of the UK and the US in advising and supporting the Saudi-led coalition, requesting the international community to refrain from providing arms that could be used in the conflict.[793] It is anticipated that the report and its recommendations will inform the substance of some of the comments and observations both during Saudi Arabia's UPR in October 2018 and Yemen's in January 2019.

Yemen's third cycle UPR will be observed closely by civil society and other interested parties in terms of the nature of the recommendations made and by which states. When asked if Yemen will be sending a delegation to its third review in January 2019, the UN Permanent Mission for Yemen responded that a delegation will be present that 'will be competent to present the challenges facing Yemen and what the government hopes to fulfil its human rights obligations'.[794] When questioned how the UPR could function most effectively for Yemen, the response was that it 'will be effective if it focuses on issues that are appropriate to the current conditions in Yemen such as protecting civilians and facilitating the access of food and medicine to them'.[795] The reply also stated the need to protect the rights of

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[790] Yemen conflict: UN accuses the world of ignoring crisis', BBC News online, 06 December 2016, http://www.bbc.co.uk/news/world-middle-east-38220785; Owen Jones, 'Britain is at war with Yemen, so why does nobody know about it?' *The Guardian* (28 January 2016) https://www.theguardian.com/commentisfree/2016/jan/28/britain-war-yemen-saudi-arabia-military-advisers all last accessed 20 May 2018.
[791] UNHRC A/HRC/RES/36/31 (03 October 2017) (n 786); 'Yemen: Zeid appoints group of eminent international and regional experts', OHCHR press release, 04 December 2017, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22483 last accessed 21 May 2018.
[792] Conversation between the author and a member of the investigating team at Cambridge International Law Journal 7th Annual Conference, University of Cambridge, 04 April 2018, who had just returned from Yemen having undertaken investigations there.
[793] UNHRC 'Situation of human rights in Yemen, including violations and abuses since September 2014: Report of the United Nations High Commissioner for Human Rights containing the findings of the Group of Independent Eminent International and Regional Experts and a summary of technical assistance provided by the Office of the High Commissioner to the National Commission of Inquiry', A/HRC/39/43 (17 August 2018).
[794] During an interview with Mohamed A. Al-Foqumi, Minister Plenipotentiary, Deputy Permanent Representative of Yemen to the United Nations and other International Organisations, in May 2017 the view was expressed that 'it would be very difficult for the government to go in the third UPR cycle', Interview UN 03, however, it has since been confirmed that Yemen will be attending, Riches (email 03 June 2018) (n 768).
[795] ibid.

women and children, achieve peace by ending the war and stopping the coup as well as holding those responsible for violating human rights in Yemen to account, 'not allowing impunity or providing impunity according to any political settlement solution that does not redress the damage'.[796] Final comments were for recommendations to be 'reasonable and commensurate with the government's capacities at this stage'.[797]

6.2 United Nations resolutions and reports on Yemen

Although the Security Council has not been included in the entities that populate the international human rights governance regime complex proposed in this thesis, it is worthy of some consideration. Prior to 2011, the Security Council had made no substantive resolutions in relation to Yemen, yet since then it has made eight that include matters of concern regarding human rights violations.[798] The first was in the wake of the Arab spring and 2011 uprising in Yemen; at that time the Security Council expressed 'serious concern' in relation to a number of matters including the: worsening security situation; deteriorating economic and humanitarian situation due to the lack of progress on a political settlement; potential for the further escalation of violence; increasing number of internally displaced persons and refugees in Yemen; alarming levels of malnutrition caused by drought and soaring fuel and food prices; increasing interruption of basic supplies and social services; increasingly difficult access to safe water and health care; increased threat from Al-Qaida in the Arabian Peninsula (AQAP) and the risk of new terror attacks in parts of Yemen.[799]

The resolution proceeded to 'strongly condemn' human rights violations by Yemeni authorities, which included 'the excessive use of force against peaceful protestors' as well as acts of violence, use of force, and human rights abuses perpetrated by other actors. It

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[796] ibid.

[797] ibid.

[798] Report of the United Nations High Commissioner for Human Rights on the human rights situation in Yemen, Human Rights Council 19th session, A/HRC/19/51, 13 February 2012, para 8 cites Security Council Resolution 2014 (2011), as the Security Council's first resolution on Yemen, S/RES/2014 (2011), 21 October 2011, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-51_en.pdf and http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2014(2011) respectively, both accessed 18 May 2018. There were, however, two previous resolutions, one in 1947 and the other in 1967, recommending Yemen for UN membership, and recommending Democratic Yemen (the People's Republic of Southern Yemen) for UN membership, Resolution 29 (1947), S/RES/29, 12 August 1947 and Resolution 29 (1947), S/RES/243, 12 December 1967.

[799] Security Council Resolution 2014 (2011), S/RES/2014 (2011), 21 October 2011, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2014(2011) accessed 18 May 2018.

stressed 'that all those responsible for violence, human rights violations and abuses should be held accountable'.[800] The resolution made other demands of the Yemeni authorities and armed groups with regard to the exercise of fundamental human rights and freedoms by the Yemeni people, including the right to peaceful assembly and freedom of expression and that 'all armed groups remove all weapons from areas of peaceful demonstration, refrain from violence and provocation, refrain from the recruitment of children, and urges all parties not to target vital infrastructure'.[801] It is therefore evident that the human rights situation in Yemen was of serious concern well ahead of Yemen's second cycle review in January 2014.[802] The Security Council has also reached out to civil society for its perspective on the situation; in May 2017, Radhya al-Mutawakel, Head of Mwatana, a Yemeni CSO, was invited to present evidence to the Security Council.[803]

In addition, Yemen has been the subject of seven Human Rights Council resolutions, five Human Rights Council reports, a number of Security Council presidential statements, and a UN Secretary-General Report, followed by an addendum to that report.[804] The content of the latter two raises questions of the political influence asserted by, and/or on behalf of, Saudi Arabia and the acquiescence to that influence by UN organisations. Within the Secretary-General's Report on children and armed conflict, dated 20 April 2016, is a section on Yemen that details the involvement of children in the conflict including the recruitment of seven hundred and sixty-two verified cases of boys as child soldiers, with the Houthis reportedly responsible for 72%, followed by the pro-Government popular committees at 15%, and AQAP, 9%.[805] It goes on to report that during 2015, the UN 'verified a six fold increase in the number of children killed and maimed compared with 2014, totalling 1,953 child casualties (785 children killed and 1,168 injured)', and that 60% of the casualties, of

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[800] Security Council Resolution 2014 (2011), S/RES/2014 (2011), 21 October 2011, para 2, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2014(2011) accessed 18 May 2018.

[801] UNSC S/RES/2014 (2011) 21 October 2011, para 8.

[802] A further eight Security Council recommendations have since been made to Yemen, including in February 2014, only one month following Yemen's second cycle UPR, the imposition of sanctions to freeze the assets and impose travel bans against designated individuals and entities, UNSC S/RES/2140 (2014) 26 February 2014.

[803] Chapter 2 'Yemen in the Security Council', Mwatana 'Annual Report 2017' (n 757).

[804] UN documents for Yemen, http://www.securitycouncilreport.org/un-documents/yemen/ last accessed 17 August 2018.

[805] 'Children and armed conflict: Secretary-General's report', A/70/836–S/2016/360, 20 April 2016, para 165.

which more than 70% were boys, were attributed to Saudi led coalition forces (510 deaths and 667 injuries).[806]

The report states that 'owing to the very large number of violations attributed to the two parties, the Houthis/Ansar Allah and the Saudi Arabia-led coalition', both parties are listed in its annex 'for killing and maiming and attacks on schools and hospitals'. [807] However, a note indicates that 'on 6 June, the Secretary-General removed the Saudi Arabia-led coalition from the listing in Annex 1 of the report, where it had been included for the first time'.[808] The removal was confirmed in an addendum to the report, dated 24 June 2016.[809] This removal suggests some background political manoeuvring. To some extent, this is an aside given the specific focus of this thesis is the UPR, but the change made to the Secretary-General's report exposes deep politicisation at the very highest ranks of the UN, the fact of the change made has, at least, remained in the public domain.

The change to the annex of the original report and removal of the reference to Saudi Arabia illustrates the difficulty of securing human rights protection and progress on the ground in Yemen, particularly as it is the site of a war being co-ordinated, resourced and funded by those external to it.[810] Furthermore, the internationally recognised government is not in control of the entire country.[811] This poses a challenge in terms of ensuring the Yemeni population has the potential to benefit from recommendations accepted at the UPR; those accepted and subsequently implemented by the government will only apply to those geographical areas over which the government has control.[812] Although the UN special envoy to Yemen, Martin Griffiths, is in dialogue with all parties to the conflict in Yemen,

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[806] ibid para 167.
[807] ibid para 228.
[808] UN documents on Yemen (n 804).
[809] ibid.
[810] Mwatana and Columbia Law School Clinic UPR Submission (n 757); Patrick Wintour, et al, 'Johnson says Saudi Arabia is a 'puppeteer' in Middle East proxy wars' 08 December 2016, https://www.theguardian.com/politics/2016/dec/07/boris-johnson-accuses-saudi-arabia-of-twisting-and-abusing-islam last accessed 20 May 2018; Wilcken (n 780); Jonathan Saul, Parisa Hafezi, Michael Georgy, 'Exclusive - Iran steps up support for Houthis in Yemen's war: sources' Reuters, 21 March 2017, https://uk.reuters.com/article/uk-yemen-iran-houthis/exclusive-iran-steps-up-support-for-houthis-in-yemens-war-sources-idUKKBN16S22P last accessed 27 August 2018.
[811] European Council on Foreign Relations, 'Mapping the Yemen Conflict' (n 90).
[812] This point was raised by one interviewee in relation to Libya and Afghanistan, as well as Yemen, interview, CSO 05.

reviewing states at the UPR are required to direct their recommendations to the recognised government of the SuR and to frame their recommendations in such language accordingly.[813]

Taking all this into account, one would be forgiven for thinking that Yemen appearing for its third cycle review in January 2019 will be an exercise in futility. Notwithstanding UN led human rights missions, investigations and reports, and civil society led investigations and reports,[814] if key actors in conflicts, particularly those conducted as 'proxy wars',[815] deny accountability and responsibility for violations, and are shielded in that process both via the removal of references in reports and by being permitted to remain on the Human Rights Council membership (see section 2.1, chapter 2 on this matter), there is little hope for improvement on the ground and the function of the UPR. If such a climate persists, the international human rights regime complex as a whole risks descending into ritual and ritualism due to a lack of will at the highest level to hold all states and actors accountable.

6.3 Structural and process indicators: Yemen

One measure of the extent of Yemen's engagement with aspects of the international human rights regime complex is to chart the number and nature of international human rights treaties it has ratified. This measure links with structural indicators, as defined in chapter 5, and Yemen's status in this respect can be seen at figure 5, appendix 5.[816] Those human

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[813] When Ireland made a recommendation to Syria during Syria's second cycle UPR, it is said to have made its recommendation to the 'Syrian Regime', interview CS0 07. This prompted the Syrian delegation to raise a point of order, stating that 'speakers were required, pursuant to Human Rights Council resolution 5/1, to use diplomatic language when addressing the Working Group on the Universal Periodic Review'. The response of the President of the Human Rights Council was to encourage 'all speakers to use standard United Nations terminology in the interactive dialogue', 'Report of the Working Group of the Universal Periodic Review: Syrian Arab Republic', Human Rights Council 34th Session, 27 February – 24 March 2017, A/HRC/35/4, 27 December 2016, paras 22-24.

[814] See the various reports of the High Commissioner for Human Rights referred to in this chapter and the recently published 2017 report of domestic CSO, Mwatana, http://mwatana.org/annul-report-2017/

[815] Patrick Wintour, et al, 'Johnson says Saudi Arabia is a 'puppeteer' in Middle East proxy wars' 08 December 2016, https://www.theguardian.com/politics/2016/dec/07/boris-johnson-accuses-saudi-arabia-of-twisting-and-abusing-islam accessed 20 May 2018.

[816] This appendix refers to information exported from the ratification status pages of the OHCHR website, 'Status of Ratification: Interactive Dashboard', http://indicators.ohchr.org/ last accessed 14 May 2018.

rights treaties ratified by Yemen are numerous and include CAT,[817] ICCPR,[818] CEDAW,[819] CERD,[820] ICESCR,[821] CRC,[822] OP-CRC/AC,[823] OP-CRC/SC,[824] CRPD.[825] The situation in Yemen that pre-dates the current conflict reflects aspects of the weakness of the treaty system, a matter that goes beyond the focus of this study but is debated elsewhere.[826]

The OHCHR compilation report during the first and second cycles provided a useful means of measuring progress according to structural and process indicators by recording a state's treaty ratification and compliance (or not) with reporting obligations.[827] The compilation for Yemen produced in anticipation of its second cycle UPR indicated that since its first UPR, Yemen had ratified the CRPD, but that the initial report had been overdue since 2011 and that four reports had been submitted to the relevant treaty bodies and were awaiting consideration, with three due in the future, meaning that only the CRPD report was

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[817] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1).

[818] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

[819] Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with article 27(1).

[820] International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with Article 19.

[821] International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27.

[822] Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.

[823] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002.

[824] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Adopted and opened for signature, ratification and accession by General Assembly Resolution 54/263, A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002.

[825] Convention on the Rights of Persons with Disabilities and its Optional Protocol, adopted on 13 December 2006, entered into force on 3 May 2008, General Assembly Resolution, 61/106, A/RES/61/106, 24 January 2007.

[826] Forthcoming '2020 Treaty Body Review' pursuant to UNGA 'Strengthening and enhancing the effective functioning of the human rights treaty body system' A/RES/68/268 (21 April 2014), see also, for example, Michael O'Flaherty, 'Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement' (2010) 10(2) Human Rights Law Review 319–335; Subedi (n 14); Weiss *What's Wrong with the UN* (n 25).

[827] The reporting convention has now changes so that third cycle OHCHR compilations do not contain the same summary of ratification, referring only to treaty committee recommendations and evidence of progress made.

overdue.[828] This was a marked improvement against the situation at the time of Yemen's first cycle UPR in 2009. At that point the follow up response to CERD had been overdue for two years since 2007; the follow up response to the Human Rights Committee overdue since 2006; and the second, third and fourth reports to CAT had been overdue since 1996, 2000 and 2004 respectively, although a report is referred to as having been submitted and considered in 2002.[829]

Of the recommendations Yemen received during its first cycle review, two required action to cooperate with treaty bodies and submit reports by the due date (Republic of Korea and Germany) and Yemen supported both recommendations.[830] It is possible these recommendations had a bearing on the action Yemen undertook to improve compliance with reporting obligations, further evidence of the UPR successfully fulfilling a governance function, albeit they are only two of the one hundred and fifty three recommendations Yemen received in that cycle.

However, as these indicators relate to structural and process matters they cannot of themselves be heralded as reflecting success in terms of the promotion and protection of human rights on the ground and give little reassurance of rights protection. This is particularly the case if structural indicators at a global level are not coupled with structural provisions at the national level, namely legislation. Similarly, if process indicators at the global level are not linked to, for example, enforcement and judicial infrastructure, they are not effective in terms of implementing norms and principles in the treaties ratified.

6.4 The challenge of follow up for states in crisis

The longevity of commitments made by states in crisis during the UPR is limited, and the likelihood that recommendations received by states in crisis will be implemented is slim, as one interviewee said, for Yemen as a state in crisis 'the UPR is an awareness raising mechanism. It's not the solution. It's a stepping-stone'.[831]

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[828] UNHRC 'OHCHR Compilation: Yemen', A/HRC/WG.6/18/YEM/2 (n 460).
[829] UNHRC '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 Yemen' A/HRC/WG.6/5/YEM/2 (09 March 2009).
[830] UNHRC 'Report of the Working Group on the Universal Periodic Review: Yemen' A/HRC/26/8, 07 April 2014.
[831] Interview CSO 07.

As set out below in table 2, of the 191 recommendations made to Yemen during the second cycle, 166 enjoyed its support, equating to an acceptance rate of 87%. Although this indicates a commitment to making progress to protect rights, there is little evidence of Yemen having made progress against first cycle recommendations and as noted above, even less likelihood now of progress against second cycle recommendations.

Yemen's second cycle national report refers to strengthening the national human rights infrastructure following the first cycle review.[832] Progress is reported as including the Government and the OHCHR jointly drafting a National Human Rights Institution Bill, however, there is no evidence of this having gone beyond consultation, reportedly with civil society and as part of Yemen's national dialogue.[833] In 2009 during its first cycle review, Yemen received and supported five recommendations relating to an NHRI.[834] Two were action category 5: establish an independent NHRI (France), and finalise procedures aiming at the establishment of an independent NHRI (Jordan). Of the other three recommendations, one was action category 4 (proceed with the intention to create an NHRI – Algeria), one action category 3 (consider establishing an NHRI – South Africa) and the third, action category 2 (continue to endeavour to create an NHRI – Thailand). Based upon the weak nature of the lower action category recommendations, confirming compliance with instructions to 'proceed with the intention to create', 'consider establishing' and 'continue to endeavour to create', is straightforward. The fact remains, however, that an NHRI was not established. This not only indicates very slow progress but also a reluctance to see the project through and reflects poorly on the state in terms of the nature of its engagement with the UPR.

Yemen's second cycle national report refers to a National Committee to Combat Human Trafficking as having been established, but the Committee's output amounts only to drafting and consulting upon a bill on human trafficking.[835] A General Department for Human Rights was reportedly established as part of a restructure of the ministry for human rights.[836] Other progress reported includes: the establishing of human rights offices in a number of

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[832] UNHRC 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Yemen', A/HRC/WG.6/5/YEM/1, 08 November 2013, paras 25-35.
[833] ibid paras 26-7.
[834] UNHRC 'Working Group Report: Yemen' A/HRC/12/13 (n 662).
[835] UNHRC 'National report: Yemen' A/HRC/WG.6/18/YEM/1 (n 603).
[836] ibid para 30.

governorates and human rights coordinators having been appointed to work in them; the expansion of the Technical Committee to include a larger number of governmental institutions that monitor human rights and mainstream them into their plans and programmes; an increase in the membership of the Advisory Body of the Ministry of Human Rights, representing CSOs that deal with human rights as well as academics, activists, journalists and trade unionists, with 60 members as of the date of the national report; and action to enhance the links between the government and civil society.[837] Much of what is reported here refers to initial steps rather than action that will actually secure protection of rights, and no doubt any progress will be seriously compromised in the face of the war in Yemen.[838]

In some respects, Yemen implicitly acknowledged its extremely limited capacity to be proactive in matters relating to rights protection. In its second cycle national report it accepted the country was 'going through a humanitarian crisis, which is linked to food and fuel-price hikes, the rising incidence of poverty, falling standards in social services, supply shortages, and internal conflicts'.[839] Even so, the overriding tone of that report was positive. It cited efforts, amongst others, to form a national human rights institution and attempts to address matters raised as part of the youth uprising during the Arab spring via the National Dialogue. However, stakeholders repeatedly raised concerns both formally through submissions made to the UPR Working Group, and informally at a parallel event in Geneva during the UPR's 18th session, that there had been failure on the part of the country to implement those recommendations that had been supported at the time of the first UPR cycle.[840]

As noted, between Yemen's first and second UPRs was the Arab spring followed by the current war and instability of the country. This, combined with the poverty faced by so

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[837] ibid paras 31, 32, 33, and 34 – 35.

[838] Human Rights Watch 'World Report: Yemen 2017' (n 757); Mwatana 'Annual Report 2017' (n 757).

[839] UNHRC 'National report: Yemen' A/HRC/WG.6/18/YEM/1 (n 603) para 9.

[840] In terms of formal concerns, see submissions by the Middle East Foundation for Social Development and Youth Development Foundation, and Youth Without Borders for Development, UNHRC 'Stakeholder summary: Yemen' A/HRC/WG.6/18/YEM/3 (n 17). 3. With regard to those concerns raised on a more informal basis, the Yemeni non-governmental organisation Alkarama hosted a side event attended by journalists, human rights activist and others at which grave concern was expressed in relation to Yemen's failure to take action to implement previous recommendations supported and the situation relating to the rights of women and children and human rights defenders, author's own notes, 28 January 2015.

much of its population makes it impossible to predict success in terms of the UPR's objectives being satisfied. However, the Yemeni Permanent Mission to the UN expressed the view that the government had tried to implement many of the second cycle recommendations by moving to a federal state underpinned by principles of democracy and reflected in the new draft constitution, which he explained was not implemented because of the now more urgent situation of how to feed people and how to protect civilians.[841]

To conclude this section, a high rate of acceptance of recommendations appears to reflect commitment on the part of the SuR to rights protection, but the cyclical nature of the UPR soon exposes whether that commitment leads to action to effect change on the ground. Lower action category recommendations encourage compliance but weaken the utility of the UPR because they do little to effect tangible change on the ground. It is action category 5 recommendations that will, if implemented, secure the longer-term governance function of the UPR.

6.5 Recommendations: statistics and type – states in crisis compared to stable states[842]

This section presents statistics in relation to the number of recommendations made to Yemen compared to the other sample comparator states and cites the number of recommendations requiring specific action. This exercise is undertaken to determine if the experience of states in crisis in terms of the number and nature of recommendations received at the UPR is any different to stable states, and to compare the acceptance rate between sample states.

As per the data in tables 2 – 6 below, during the first cycle, 153 recommendations were made to Yemen by 56 states, of which Yemen supported 131 (85.6%). Of the 153 made, 33 (21.5%) were category 5, which is 13% below the overall average for the same cycle. During its second cycle review, Yemen received a higher number of recommendations, 191, from 78 states, 21 states more than during the first cycle, of which it supported 166 (87%). This represented an increase of almost 25% in the number of recommendations made to Yemen in the second cycle compared to the first, which is lower than the overall percentage

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[841] Interview UN 03.
[842] All data in this section is extracted from the recommendations database and statistics of UPR Info: Database of Recommendations (n 125) and UPR Info: Statistics of Recommendations (n 126).

increase in recommendations made during the second cycle compared to the first, approximately 70%. Of those 191 recommendations made, 60 (31.5%) were action-category 5, more in keeping with the overall average of specific action across the two cycles.

Table 2: Yemen – recommendations: statistics and type

Yemen	No.		Specific action				Supported				No. States
			No.	%	% Variance		No.	%	% Variance		
1st cycle (May 2009)	153		33	21.6	N/A		131	85.6	N/A		56
2nd cycle (Jan 2014)	191		60	31.4	9.8		166	87	1.40%		77

Table 3: UK – recommendations: statistics and type

UK	No.		Specific action				Supported				No. States
			No.	%	% Variance		No.	%	% Variance		
1st cycle (Apr 2008)	35		11	31.4	N/A		22	62.9	N/A		16
2nd cycle (May 2012)	137		48	35.0	3.6		91	66.4	1.40%		55

Table 4: New Zealand – recommendations: statistics and type

New Zealand	No.		Specific action				Supported				No. States
			No.	%	% Variance		No.	%	% Variance		
1st cycle (May 2009)	73		19	26.0	N/A		38	52.1	N/A		29
2nd cycle (Jan 2014)	155		39	25.2	-0.9		121	78.1	1.40%		70

In terms of the experience of other states, the figures for the UK's first cycle review are, as noted in chapter 5, out of sync with SuRs in subsequent UPR sessions. This is attributable to

the UK being part of the first UPR session.[843] Other states reviewed during the first session similarly received a disproportionately lower number of recommendations. Bahrain, for example, received a total of 12 recommendations, a third compared to the UK, Argentina received a higher number of 41, and India received 30. It is therefore difficult to reach any substantive conclusions for that review or indeed that UPR session.

Looking at the UK's second cycle review compared to Yemen's, we can see Yemen received 54 more recommendations, from 22 more countries. This might indicate more widespread concern with the human rights situation in Yemen compared to that of the UK. Yemen has a higher acceptance rate than the UK for both cycles, Yemen being 85.6% and 87% for the first and second cycles respectively, the UK being 62.9% and 66.4%, respectively.

Comparing Yemen against New Zealand for both cycles reveals the same pattern. Yemen received more recommendations than New Zealand, 80 more in the first cycle and 36 more in the second cycle. In the first cycle, Yemen's acceptance rate was significantly higher than New Zealand's: Yemen supported 85.6% of the recommendations it received, against 52.1% for New Zealand. The variance between the two states was reduced for the second cycle, with Yemen's acceptance rate remaining higher: Yemen 87%, New Zealand 78.1%.

Table 5: Iraq – recommendations: statistics and type

Iraq	No.		Specific action				Supported				No. States
			No.	%	% Variance		No.	%	% Variance		
1st cycle (Feb 2010)	179		64	35.8	N/A		136	76.0	N/A		52
2nd cycle (Nov 2014)	242		87	36.0	0.2		175	72.3	1.40%		84

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843 Interview UN 01, during which the interviewee notes 'The first cycle, apart from the universality, the challenge was to form this into a meaningful exercise and if you look at the first two, three or four sessions, some of the recommendations were ridiculous, there were very few of them. It was clearly a system that was looking for its aim and soul and purpose and so on'.

Somalia	No. Recns	Specific action				Supported				No. States
		no.	%	% Variance		no.	%	% Variance		
1st cycle (May 2011)	155	58	37.4	N/A		155	100.0	N/A		47
2nd cycle (Jan 2016)	256	117	45.7	8.3		180	70.3	1.40%		80

Both Iraq and Somalia received a similar number of recommendations to Yemen during their first cycle reviews (Yemen: 153, Iraq: 179, Somalia: 155), however during the second cycle, both Iraq and Somalia received significantly more recommendations than Yemen (Yemen: 191, Iraq: 242 (51 more than Yemen), Somalia: 256 (65 more than Yemen). The number of states making recommendations to states in crisis compared to stable states in this sample is higher across both cycles; there is a higher divergence in the first cycle, but the pattern does continue into the second cycle: Yemen 56/77, Somalia 47/80, and Iraq 52/84 - compared to UK 16/55 and New Zealand 29/70.

In terms of the percentage of recommendations requiring specific action across the sample states from one cycle to the next, the increase is the most significant for Yemen and Somalia; this brings Yemen more in line with the overall average, but takes Somalia almost 10% higher than the overall average.[844] Yemen received an increase in recommendations requiring specific action of nearly 10% in the second cycle compared to the first (31.4% in the 2nd cycle, lower than the overall average of 36.9%), and Somalia an increase of 8.3% (45.7% in the 2nd cycle). The UK experienced only a slight increase (3.6%), New Zealand a marginal decrease (0.8%) and Iraq a marginal increase (0.2%).

It would appear from a sample analysis that states in crisis receive a higher number of recommendations, from a higher number of recommending states, but that those recommendations do not always reflect a higher rate of specific action being recommended. For the first cycle, Yemen received recommendations from more states than any other in

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[844] Yemen: 1st cycle - 21.6% / 2nd cycle - 31.4%; UK: 1st cycle - 31.4% / 2nd cycle - 35%; New Zealand: 1st cycle - 26% / 2nd cycle - 25.2%; Iraq: 1st cycle - 35.8% / 2nd cycle - 36%; Somalia 1st cycle - 37.4% / 2nd cycle - 45.7%.

this sample.   This suggests Yemen attracted the attention of a higher proportion of the international community compared to other states. This may be due to a number of factors. Reciprocity can play a part, as can regionalism, as discussed in chapter 5 and presented in more detail below. Further, the events of the Arab spring attracted global media coverage and may have contributed to a broader awareness raising of rights issues in Yemen. Geopolitical factors detailed above will also have an influence. Ultimately, the fact that more states are engaging with the human rights situation in Yemen in this way evidences closer international monitoring of the domestic rights situation and can be utilised by national and international NGOs as leverage in the follow up and consultation and advocacy process, as detailed in section 7.4, chapter 7.

Two further questions flow from this assessment of the monitoring process according to the nature and number of recommendations made to Yemen. These are, firstly, which states are making recommendations to Yemen? Secondly, what is the source of those recommendations? In terms of the former, of the 56 states that made recommendations to Yemen during the first cycle, states belonging to the Organisation of Islamic Countries (OIC) made the most recommendations (53 recommendations / 34.64%).[845] The EU was the second highest recommending grouping of states (43 / 28.1%), and the Arab League the third highest (34 / 22.2%).[846] That the OIC was the highest recommending group to Yemen might reflect politicisation in the form of regionalism, religious and cultural connections and reciprocity, or be an expression of regional concern. Of the 56 recommending states in the first cycle, 26 made action category five recommendations, six of which were made by counties in the OIC, of which four were also members of the Arab league. Five of these six recommendations were supported. The recommendation was from Iran and requested Yemen 'Develop a national plan of action aimed at fostering a culture of human rights and at raising public awareness of human rights among the society', and was supported. Whilst it refers to specific action, that action is broadly framed and therefore is not contentious. Therefore, whilst Yemen received more recommendations from OIC countries than any other grouping of states, the fact they were lower action category means they are more straightforward in terms of compliance. This further supports the view that allies treat each

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[845] UPR Info: Statistics of Recommendations (n 126).
[846] ibid.

other favourably in the UPR forum, contributing to the 'success' of a state's review. This can also be said of the second cycle as the analysis of data at the end of this section below shows.

Other states recommending specific action included: Austria, one on economic, social and cultural rights, women's rights and international instruments, and a second on rights of the child – both supported; the US, three in total, all supported, one on freedom of opinion and expression and freedom of the press, the second on detention, and the third on labour; and Argentina, one on enforced disappearances and international instruments, and one on detention, international instruments and torture.[847] There does not appear to be a particular pattern emerging here.

In the second cycle, 77 states made 191 recommendations to Yemen, with the EU and the OIC making an almost identical number, 58 and 59 respectively, amounting to 30.89% and 30.37%, followed by the OIF (Organization Internationale Francophonie), a total of 43, amounting to 22.51%.[848] A total of 60 specific action recommendations were made by 35 states, see appendix 6 'Action category 5 recommendations to Yemen 2nd cycle'. The majority, 35 recommendations, were made by EU states. Whilst this is an increase in the number of category 5 recommendations compared to the first cycle, it still represents under a third of the total recommendations made. Four members of the OIC, Bahrain, Jordan, Morocco and the Maldives made specific action recommendations to Yemen, a similar figure to that in the first cycle. Those recommendations referred to human trafficking, general rights protection, human rights education and training, and justice.[849]

6.6 Content of recommendations made to Yemen

Given that Yemen has ratified the majority of the UN international human rights treaties, most of the thematic content of the recommendations Yemen received refer to legal obligations and rights protection that Yemen has previously committed to. The content of the recommendations thus reveals the international community's view of the areas in which Yemen is falling short of its legal obligations and commitments. This demonstrates the

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[847] UPR Info: Database of Recommendations (n 125) filtered according to Yemen, first cycle, action category 5.
[848] UPR Info: Statistics of Recommendations (n 126) filtered according to Yemen, second cycle.
[849] See appendix 6 for the specific recommendations made.

multi-directional nature of the international human rights regime complex and the UPR's particular function in this respect.

In the first cycle, the issues that were the subject of most recommendations were women's rights (45/29.41%) and rights of the child (19/12.42%). Yemen broadly supported recommendations requiring non-discrimination against women and laws to prohibit violence and forced marriage, supporting 43 of the 45, and noted only one of the 19 recommendations received regarding rights of the child during the first cycle (to raise the legal age of marriage to 15 – Australia).[850]

In the second cycle it was again women's rights (49/25.65%) and rights of the child (51/26.7%) that received the greatest focus. Of the 51 rights of the child recommendations, 9 were noted (17.64%), whereas only one of the 49 recommendations on women's rights was noted (become party to the operational protocol to CEDAW - Australia). Most of the rights of the child recommendations that were noted referred to eliminating the death penalty for those under the age of 18 (France, Germany, Italy, Lithuania, Mexico, Norway, Switzerland, Uruguay), and eliminating punishment by stoning for those under 18 (Uruguay). There was one noted recommendation regarding the ratification of OP-CRC/CP (Portugal).

Yemen's refusal to support these recommendations is evidence of a lack of intention or will to change its position regarding the application of the death penalty to those under the age of 18. However, those recommendations that referred to eliminating child, early and forced marriage were all supported (save for raising the age of marriage to 15), as were those referring to domestic violence and traditional practices including female genital mutilation.[851] We might question whether such support will translate to greater protection for women and children in this respect. Effecting change on the ground where historic cultural and religious practice is concerned is a significant challenge and can only be

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[850] UPR Info: Database of Recommendations (n 125).
[851] There is some crossover in the UPR-Info database with some recommendations characterised as rights of the child and women's rights (for example, marriage and traditional customs / practices) which meant that some recommendations in the statistics are counted twice (indicative of the indivisibility and intersectionality of rights), ibid.

supported by significant efforts on the part of policy and practice by public authorities and enforcement of laws that prohibit the action referred to.[852]

Charting the response of Yemen to recommendations relating to torture and cruel, inhuman and degrading treatment also reveals the substance of what the government is willing to entertain movement on and that which it is not, as well as the importance attributed by reviewing states to this issue for Yemen. Yemen is a party to CAT yet received only 17 recommendations over the course of the first and second cycles in relation to torture and cruel, inhuman and degrading treatment.[853] Seven were received during the first cycle, of which four were noted and three supported. Those that were noted included reference to the abolition of: corporal punishments such as flogging and, in a few cases, amputation of limbs, in violation of article 7 of ICCPR (Nigeria); torture and other cruel, inhuman and degrading treatment in all forms, in particular stoning, flogging and the amputation of limbs, and the execution of minors, as recommended by the Human Rights Committee and the relevant special mandate holders (Israel) (note the direct reference here by Israel to another governance entity within the international human rights regime complex – further evidence of the complementarity facilitated by the UPR and the multi-directional function of the regime complex); and ratifying the OP-CAT (Argentina and the Czech Republic).[854] In its comments and observations, Nigeria 'noted the inadequate training of persons monitoring abuses and limited resources, and called upon the international community to assist Yemen in these areas' whilst Israel 'expressed concern about forced early marriages, draconic methods of execution and punishment, and discrimination and violence systematically directed against women and children'.[855]

Of the ten recommendations in the second cycle referring to torture and cruel, inhuman and degrading treatment, seven referred to female genital mutilation. Only three referred

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[852] For various discussions relating to cultural relativism and associated challenges of universal rights realisation see, for example, Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, (Princeton University Press 2002); Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, N.Y.; London: Cornell University Press 2002); Michael Goodhart, 'Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization' (2003) 25(4) Human Rights Quarterly 935-964; and Stephen A. James, 'Reconciling International Human Rights and Cultural Relativism: The Case of Female Circumcision' (1994) 8(1) Bioethics 1.
[853] UPR Info database of recommendations (n 125)
[854] ibid.
[855] UNHRC 'Working Group Report: Yemen' A/HRC/12/13 (n 662).

directly to CAT, one being to implement all CAT recommendations (supported) and two that referred to ratification of OP-CAT, Denmark and Tunisia, (noted). Stoning is referred to in two recommendations, in the context of the death penalty and stoning to death one from Canada that was supported,[856] the other by Uruguay which was noted, but this may be due to other matters referred to in the same recommendation.[857] The position of Yemen in relation to the three issue types referred to above, rights of the child, women's rights and torture, is self-evident via the 'noted' responses it gives to particular recommendations. The absence in the second cycle of any recommendations directly regarding corporal punishment such as stoning, flogging and the amputation of limbs is surprising in the context of torture and cruel, inhuman and degrading treatment.[858]

In the first cycle, just under a third of those recommendations that enjoyed the support of Yemen related to the rights of women, for example, calling for action to promote and secure gender equality, to observe commitments under CEDAW, to ratify the optional protocols to CEDAW, and to strengthen existing constitutional and legal frameworks.[859] In its statement to Yemen during the first cycle of the UPR, Norway noted that 'discrimination against women reportedly remained rampant and enquired about steps envisaged to implement the new law fixing a minimum marital age.'[860] It also echoed concerns that had been raised by the CEDAW committee, concluding it remained 'concerned about reports of harassment and intimidation against people expressing their views through peaceful demonstration.'[861]

The recommendations and the analysis conducted above evidences the UPR's complementary governance function as an entity within a multi-directional international human rights regime complex. This is illustrated in particular when reviewing states cross-reference treaty obligations and repeat concerns and recommendations previously raised by

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[856] 'Put an end by law to death by stoning and reduce the number of crimes that are punishable by the death penalty, excluding the death penalty for crimes related to drugs'.

[857] 'Review legislation on the death penalty in order to eliminate the use of the death penalty, including stoning, as well as ratify the Second Optional Protocol to ICCPR and comply with the provisions of article 6, paragraph 5, of the Covenant on crimes committed by persons under the age of 18'.

[858] UPR Info: Database of recommendations (n 125).

[859] Author's own figures compiled with reference to the first cycle UNHRC 'Working Group Report: Yemen' A/HRC/12/13 (n 662).

[860] ibid para 78.

[861] ibid.

another human rights mechanism in the regime complex. This has occurred in both of Yemen's UPR Working Groups to date.

As discussed in section 5.6, chapter 5, in the event that a state 'notes' a recommendation rather than supports it, the state is required to provide an update of its position at the Council's regular session immediately following that state's review pursuant to standing item 6 of the Council's agenda. This is further evidence of the co-ordinated human rights governance approach pursued by the Human Rights Council and its institutions and of the multi-directional nature of the international human rights regime complex. However, the failure of a state to give a full and substantial response to a noted recommendation, which is then not addressed, suggests that the governance function of the UPR can be easily undermined and proceeds with some fragility. This was evident in Yemen's failure to fully respond at a Human Rights Council's regular session to a recommendation made by the US regarding spousal rape, with that failure proceeding unchecked by the Council, see section 5.3 chapter 5.

6.7 The source of recommendations made to Yemen

The multi-directional global governance of the international human rights regime complex is further evident from an analysis of the UPR documentation for Yemen with reference to the potential source of recommendations made during the interactive dialogue by reviewing states.

Table 7 at appendix 7 tracks reference to a specific right / issue as referred to by treaty bodies in the OHCHR compilation report and whether that matter is subsequently the subject of a reviewing state's recommendation to Yemen. Table 8 at appendix 8 takes a similar approach with reference to the High Commissioner's report on the OHCHR mission to Yemen in December 2011, as does table 9 at appendix 9 regarding a sample of stakeholder submissions. Tracking recommendations in this manner reveals the extent to which other entities and actors within the regime complex contribute either directly or indirectly to the UPR peer review process. Due to the length of these tables they have been included as appendices rather than embedded into the main body of the text.

It is evident from the information presented in tables 7, 8 and 9 that the work of other entities within the regime complex is endorsed and reinforced via the UPR monitoring process. Tables 7 and 8 demonstrate that the OHCHR compilation report provides a vehicle to reiterate concerns and recommendations previously made (the report of the High Commissioner for Human Rights, for example, is referred to on nine separate occasions in the OHCHR Compilation report) and is a fertile source of recommendations to Yemen during the second cycle. This appears most successful when the OHCHR report names recommendations previously made to Yemen via other monitoring mechanisms. Where reference is made to reports of matters of concern and/or allegations these are not necessarily picked up during the UPR recommending process. The OHCHR compilation report cited, for example, widespread allegations of extrajudicial killings and excessive use of force by security forces and affiliated groups against civilians and civilian targets, torture or other ill-treatment by the Republican Guard and the Central Security Forces and individuals allegedly tortured in detention centres in Sana'a.[862] Linked to this, the OHCHR reported it had received information that more than 320 cases of violations affecting journalists, including illegal arrest and detention, had been reported since January 2011. However none of these specific matters featured in second cycle recommendations to Yemen. This may be due to the nature of the subject matter and the fact it refers to specific cases of allegations, or it may be because such material is not phrased in the language of a recommendation and is therefore less easily extracted by reviewing states in preparing their recommendations.

Table 9 tracks a sample of stakeholder submissions to determine the extent to which civil society recommendations and matters of concern are referred to by reviewing states during peer review. From the data presented it appears that reviewing states actively access stakeholder submissions as a source of information and influence for the recommendations they then construct and deliver. Whilst the majority of recommendations made by civil society included in this sample form the basis of recommendations to Yemen, of which the majority are supported, there are certain recommendations that do not. This includes recommendations to protect the Muhammasheen, a minority group in Yemen, from discrimination,[863] a recommendation to repeal amnesty laws and a recommendation to

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[862] UNHRC 'OHCHR Compilation: Yemen', A/HRC/WG.6/18/YEM/2 (n 460).
[863] UNHRC 'Stakeholder summary: Yemen' A/HRC/WG.6/18/YEM/3 (n 17) para 19.

criminalise honour crimes. Colombia made the only recommendation citing protection of minorities, which was supported.[864] There was one specific reference to honour crimes during the interactive dialogue by Lithuania that 'noted efforts to eliminate discrimination against women but remained concerned about honour killings and forced marriages.'[865] However, there was no direct reference to honour killings in the recommendations made (Spain recommended that marital rape and domestic violence be criminalised, which was supported), and there appears to have been no reference to amnesty laws or matters relating to impunity.[866]

To conclude, reviewing states access the OHCHR compilation and stakeholder submissions, the content of which then shapes the recommendations reviewing states make,[867] with some states reportedly copying and pasting recommendations.[868] By engaging with the documents and the processes of the UPR in this manner, reviewing states endorse the authority of the UPR process and of those other mechanisms and international organisations within the regime complex. Although not all of the recommendations made by other mechanisms and by stakeholders are adopted by reviewing states, the UPR fulfils an important function in terms of collating data and information from across the regime complex and creating a space within which it is presented to all interested parties.

Conclusion: the UPR and Yemen

This chapter has confirmed that the governance function of the UPR operates within a multi-directional international human rights regime complex; the procedural legitimacy of the UPR is reinforced by the substantive output of other reporting mechanisms being collated and accessed by reviewing states. In turn, many of the recommendations from other mechanisms then form the basis of UPR recommendations. In this manner, the UPR operates as a means to centralise the concerns made in other more fragmented fora. In doing so, it asserts the authority of those other fora and their legitimacy whilst

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[864] UNHRC 'Working Group Report: Yemen' A/HRC/26/8 (n 830) para 115.49.

[865] ibid para 58.

[866] Related to this, Lithuania recommended Yemen 'Take measures to protect women and girls from domestic violence and to ensure that acts of such violence are fully investigated and those responsible are held accountable' (supported), ibid para 115.72.

[867] Interview UN 03.

[868] 'We do get an awful lot of states that do admit to copying and pasting NGOs recommendations that they provide', interview CSO 05.

simultaneously enhancing its own. The UPR ultimately provides a succinct record of the human rights reviewing and monitoring activity in the period since the last UPR by other human rights governance regimes within the regime complex in a formal arena for reflection and comment.

It is acknowledged in this chapter that the UPR was not conceived as a mechanism to respond to emergency situations or to maintain international peace and security.[869] Although the UPR is limited in its capacity in the interactive dialogue and via the process of making and receiving recommendations to take account of the very complex cultural, historical and political factors that impact upon a state's human rights situation, rarely do crisis situations emerge without some forewarning. Many of the issues raised by treaty bodies, the UNCT to Yemen and civil society ahead of Yemen's second cycle review were long-term matters of concern. Many predate the uprising of 2011 and the current war, stemming from entrenched social and cultural practices such as child marriage, poor treatment of women, poor levels of literacy and access to health care and education to name a few.[870] A review of the first and second cycle UPR documentation for Yemen reveals warning of fragmentation, corruption, and widespread human rights violations; an indication Yemen could quickly become the site of more significant and fundamental human rights suffering and violations, as is now the case.[871]

Extreme poverty and poor human rights protection have been prevalent in Yemen for many decades, and whilst there appeared to be evidence of some improvement towards the end of the 1990s following the unification of Yemen, this was limited and short-lived.[872] The position of women within Yemeni culture, female illiteracy, reported in 2004 as being 90% of women in rural areas, and a high birth rate and expanding population present further

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[869] This falls within the remit of the Security Council, and other United Nations agencies referred to in the introduction to this chapter, United Nations Charter, Article 24, paragraph 1 'In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'. In addition, the Human Rights Council does have some mandate in this regard, UNGA A/RES/60/251 (n 143) para 5(f).

[870] UNHRC 'Stakeholder summary: Yemen' A/HRC/WG.6/18/YEM/3 (n 17).

[871] ibid, and UNHRC 'OHCHR Compilation: Yemen', A/HRC/WG.6/18/YEM/2 (n 460), for example.

[872] 'Report submitted by the independent expert on extreme poverty' E/CN.4/2004/43/Add.1 (n 717) 4 with reference to a visit in 1999 during which there was evidence of greater freedom of expression for women and a greater awareness of human rights objectives within the Government.

developmental challenges.[873] Such challenges seriously undermine the capacity of the state to meet its human rights commitments and obligations; for example, whilst women legally have the right to work, this right is rarely enforced and conservative social pressures invariably prevail.[874]

As this chapter illustrates, the UPR does not operate in a vacuum; references and warnings of concern abound in Security Council resolutions, OHCHR reports and, of course, in the UPR documentation including the recommendations made, the OHCHR compilation and the summary of stakeholder submissions. The Middle East Foundation for Social Development and Youth Development Foundation and Youth Without Borders for Development, for example, noted in their joint second cycle NGO submission 'that Houthis and affiliates of the doctrine of al-Zaidi raise several problems and concerns, including threats on the media, religious confrontation and sectarianism and risks of instability'.[875]

By referencing and collating the findings of various human rights monitoring institutions and UN agencies, the UPR presents a site at which information from an array of organisations and civil society is assembled and should be paid close attention to. Further, the UPR is part of the Human Rights Council and there is a flow of information and intelligence between the Human Rights Council and the Security Council, as well as civil society, as illustrated above. However, a question arises as to the nature of the duty of the UN and the international community and it meeting that duty in terms of action it takes when in receipt of such information.

If UN monitoring mechanisms with a governance function fail to take heed of the warning signs and act accordingly, the credibility and purpose of those mechanisms should rightly be questioned. There is an argument that the situation in Yemen both now and at the time of the second cycle provides grounds for calling the UN and those states that have invested so heavily in the human rights monitoring and reporting machinery to account for inaction. To

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[873] ibid.

[874] ibid.

[875] UNHRC 'Stakeholder summary: Yemen' A/HRC/WG.6/18/YEM/3 (n 17), para 62, submission by Middle East Foundation for Social Development and Youth Development Foundation (YDO) and Youth Without Borders for Development (YWBD).

refrain from doing so may relegate the work of entities within the international human rights regime complex to little more than pen pushing.

In the case of entrenched and exacerbated human rights failings, it would nonetheless be naïve and idealistic to advocate that the UPR will prompt implementation of human rights protection when so many others have failed. Yet the normative space that the Working Group in Geneva creates, being the physical space of the interactive dialogue and the textual space of the UPR documentation, combined with the attention the human rights situation in Yemen is receiving at the highest level,[876] means that diplomatic pressure from and upon the international community will be significant. It is possible that this pressure will be informed by the decision of a number of Western states to suspend their arms exports to Saudi Arabia as a result of evidence of their use in Yemen in violation of international humanitarian law,[877] and the fact that the UK's Court of Appeal has agreed to hear Campaign Against Arms Trade's appeal against the High Court declining to interfere the UK government's decision to continue to sell arms to the Saudis.[878]

The analysis of quantitative data conducted in this chapter demonstrates that states in crisis receive more recommendations from a higher number of countries. This may indicate a greater degree of concern from reviewing states, an acknowledgement of the need to encourage human rights protection in states where people on the ground are most in need. States in crisis also accept a higher number of recommendations compared to stable states and this trend looks set to continue despite a decrease in the proportion of supported recommendations by some states during the third cycle. In terms of the identity of recommending states, for Yemen it was the OIC group of states that made the most recommendations in the first cycle, although only one required specific action, suggesting an

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[876] The High Commissioner for Human Rights, presented evidence of violations and abuses of international human rights law and violations of international humanitarian law, 'in particular those relating to the impact of attacks on the population in Yemen, the recruitment of children for their use in hostilities, and violations of freedom of expression that allegedly took place between 1 July 2015 and 30 June 2016', UNHRC A/HRC/33/38 (n 756) para 10 and para 1. This report also refers to failings on the part of the national commission of inquiry that was set up to investigate allegations of human rights violations that have been reported since 2011. The national commission of inquiry was set up in accordance with UHNRC 'Technical assistance and capacity-building for Yemen in the field of human rights' A/RES/HRC/24/32 (09 October 2013) and UNHRC 'Technical assistance and capacity-building for Yemen in the field of human rights' A/RES/HRC/27/19 (03 October 2014).
[877] Wilcken (n 780).
[878] *R (on the application of Campaign Against Arms Trade) v Secretary of State for International Trade* [2018] EWCA Civ 1010.

element of regionalism and reciprocity. The OIC and the EU made the highest number of recommendations to Yemen in its second cycle review. A review of the nature of the recommendations made to Yemen during both cycles suggests that the OHCHR compilation and summary of stakeholder submissions are fertile sources of recommendations for reviewing states, but not all substantive matters raised in those reports translate into recommendations.

Looking to the third cycle, as discussed in section 5.3.2, chapter 5, the UPR in January 2019 can contribute to a broader acculturation for Yemen, taking guidance from other states as to how they approach human rights protection, particularly those in transition to peace.[879] A question asked during a number of the interviews for this study was whether the UPR might present an opportunity for Yemen to reassert its sovereignty and statehood. A number of interviewees agreed with this hypothesis; one commented 'depending on circumstances, even the worst-case scenario, even Yemen they may want to show some elements of implementation to show they are not a failed state,' another that 'a government that might be vying for legitimacy back home would see the UPR as an additional platform to reify its existence as the legitimate state. I could see that being a dynamic'.[880] A further thought expressed was that making recommendations as a reviewing state was also a means of validation, particularly by giving specific and well considered recommendations that reflected research on the part of the recommending state.[881]

One civil society representative indicated that good practice, advice and recommendations made whilst a country such as Yemen is in the midst of conflict may not be immediately referred to, but in the post-conflict peace building phase, such reports and recommendations can be returned to and form the basis upon which to plan and coordinate.[882] Furthermore, there will be attention given to the comments, recommendations and the role of Yemen's neighbouring countries during its third cycle review. The same interviewee commented that for civil society it may not be possible 'to

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879 Interview CSO 03.
880 Interview UN 01 and CSO 07 respectively.
881 Interview CSO 05.
882 Interview CSO 03.

have a consultation in the country but you can have it in neighbouring countries to have a regional perspective on it and to bring it to attention'.[883] Another view was that, for Yemen:

> (…) depending how the situation evolves, I think the UPR provides some opportunities... it provides the opportunity for a frank assessment of the situation on the ground at the time, drawing from expert sources. I think it provides an opportunity for states to really elaborate a blue print for reform and for, again depending on the situation, an end to the conflict and accounting for the human rights violations that have occurred in the context of the ongoing crisis.
>
> I think it also provides an opportunity to focus humanitarian and development assistance, both bilaterally and at the UN level. One way in which I think that more could be made of the UPR is through the integration of critical UPR recommendations in the programming and planning of UN country teams and UNDP and to some extent in bilateral relations.[884]

This interviewee went on to emphasise the UPR's role 'in mapping out the steps that may need to be taken to end the conflict, and to re-build post conflict, sometimes associated with development assistance', making the very valid point that given Yemen's third cycle review will be in January 2019 that 'those UPR recommendations then remain valid or are intended to be relevant for the period 2019 until at least 2023'; recommendations that might not be possible to follow up immediately can be returned to in the future.[885] This is all the more reason for UPR recommendations to Yemen to be precise, action oriented and well thought out:

> (…) some dealing with the current crisis and ensuring compliance with international law in the context of the current crisis, some dealing with what's needed to end the crisis and some dealing with what's needed to ensure the establishment of a rule based order and human rights based development and accountability post-crisis.[886]

One interviewee's opinion was that it would be reasonable to expect the situation in Yemen to be addressed under item 4 of the agenda of the Human Rights Council's regular session; in

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[883] Interview CSO 03.
[884] Interview CSO 06.
[885] ibid.
[886] ibid.

his view this had not occurred because of the identity of those states involved in the Saudi-led coalition.[887] In a similar vein, media reports refer to the view that the situation in Yemen is not being addressed at the UN Security Council in the way that it should because the UK is protecting its ally Saudi Arabia.[888]

The push to focus the UPR's third cycle on follow-up and implementation is all the more timely for Yemen; whilst progress against second cycle commitments will be all but absent, the High Commissioner for Human Rights has a vested interest to maintain the legitimacy of that office given the number and content of reports issued in the last few years on the human rights situation in Yemen discussed in section 6.2 above. The human rights failings detailed and the allegations of breaches of international humanitarian law cited in those reports evidence that the need for follow up with a longer term move towards implementation and a co-ordinated multi-agency approach is particularly acute.[889] The UPR provides a further international forum within which to bring together and voice these concerns.

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[887] Interview UN 01: 'I suppose that is one of the responses to your question, I guess in the case of Yemen it is far more complicated because there the situation is chaotic and the coalition is in a moving nature and there are the states form the Gulf, there are other states from the WEOG, and the situation is not being dealt with at the level of the Council except for at the UPR. There have been several joint statements, but it has not moved beyond this, which is an anomaly'.
[888] Andrew Mitchell, 'Britain is complicit in Saudi Arabia's war on Yemen' *The Guardian* (13 June 2018), asking 'the government rightly condemned Assad's attack on Aleppo. Why is it silent on Hodeidah?', possibly implying that the UK's role in Yemen echoes the role of Russia in Syria's attack on Aleppo, https://www.theguardian.com/commentisfree/2018/jun/13/britain-complicit-saudi-arabia-war-yemen-hodeidah both last accessed 15 June 2018.
[889] UNHRC A/HRC/33/38 (n 756).

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Chapter 7 – Civil society and states in crisis at the UPR

Introduction

Pursuant to Human Rights Council Resolution 5/1, it is a principle of the UPR that all stakeholders, including NGOs and NHRIs, participate in the review.[890] In addition, the objectives of the review require 'the sharing of best practice among states and other stakeholders', and under the process and modalities of the review states are 'encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders'.[891] With this in mind, the purpose of this chapter is twofold: to critically address the role of civil society (defined below) in relation to the UPR and how that role might be strengthened, and to evaluate the particular challenges faced by civil society seeking to operate in states in crisis, such as Yemen. These matters are important given the inclusion of civil society in Resolution 5/1. Furthermore, as a stakeholder and a non-state actor, the role of civil society is central to the concept of global governance, as discussed in section 3.3.1, chapter 3.

The role of civil society in terms of human rights advocacy, follow up and implementation is evolving, particularly in relation to the UPR. The presence and influence of civil society in its capacity as a non-state actor on state practice is at the heart of the evolving concept of global governance (chapter 3), and civil society is a key actor in the international human rights regime complex (chapter 4). The traditional binary positioning of states as the subject of international law, with individuals and non-state actors as the objects does not reflect the emerging complex web of interaction between states and non-state actors,[892] an interaction that is given particular emphasis by theories of global governance.

One important contribution of the UPR in respect of the role and function of civil society has been to promote and help to create the conditions for dialogue between a state and civil

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[890] UNHRC A/HRC/RES/5/1 (n 9) para 3(e), and that this is 'in accordance with General Assembly resolution 60/251 of 15 March 2006 and Economic and Social Council resolution 1996/31 of 25 July 1996, as well as any decisions that the Council may take in this regard'.

[891] ibid, para 4(d) and para 15 (a) respectively.

[892] Ruth Alice Houghton, 'Hybrid Processes for Hybrid Outcomes: NGO Participation at the United Nations Human Rights Council', in Lemay-Hébert and Freedman (n 8) 75, citing Robert McCorquodale, 'The individual and the international legal system' in Malcolm Evans, *International Law* (Oxford: Oxford University Press 2014) 280-308, 281.

society that may not have otherwise existed.[893] With reference to documentary evidence and interviews with representatives of NGOs, this chapter progresses over four sections that incorporate a critical perspective to acknowledge the achievements as well as the challenges and limitations of the role and function of civil society in the context of the UPR. A specific focus on Yemen as a state in crisis is integrated into a more general approach throughout.

The first section provides a critical assessment of the concept, origins and definition of civil society. Section two applies the concept of communities of practice to the UPR and civil society, exploring how collaboration between different civil society actors in the preparation of joint stakeholder submissions and via parallel events to the UPR and Human Rights Council sessions can be conceived as building communities of practice. The third section interrogates civil society's capacity to consult and conduct advocacy with state actors during the UPR process. This relates to contact with the SuR as part of the state's preparation of the national report, and with reviewing states as to the recommendations they will make. Section four addresses the crucial issue for states in crisis of civil society's role with regard to follow up and implementation of recommendations, and the inherent challenges with this aspect of the UPR process. It also briefly considers how the evolving role and importance of civil society echoes aspects of the concept of experimentalist governance.

This chapter concludes by making and evaluating policy and process recommendations in terms of a more formal definition of the governance role of CSOs and resourcing support for this.

7.1 Civil society: concept, origins and definition

Civil society is populated by diverse actors and its standing is perceived to be increasingly important and authoritative; the investigation and reporting of human rights violations by civil society and the reliance placed upon such information by reviewing states in the context of the UPR, as well as the dependence upon such reporting by committees of experts treaty bodies is evidence of this.[894] The OHCHR defines civil society actors as: 'individuals who voluntarily engage in forms of public participation and action around shared interests,

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[893] Interview CSO 03, CSO 06 and CSO 07.
[894] Matua (n 372).

purposes or values that are compatible with the goals of the United Nations.'[895] For Makau

Matua, civil society comprises 'nonstate, nongovernmental formations that are formally

independent from the state', with NGOs having become 'key players in international

governance.[896] David Armstrong and Julia Gibson trace the concept of civil society from John

Locke's reference to 'an association based on the rule of law and formed by men in a state of

nature to protect their property' thereby assuming 'a force standing in opposition to

oppressive state power' as being akin to its role today.[897] Armstrong and Gibson then cite a

more recent definition offered by David Held:

> Civil society constitutes those areas of social life - the domestic world,
> the economic sphere, cultural activities and political interaction –
> which are organized [sic] by private or voluntary arrangements
> between individuals and groups outside the *direct* control of the state
> (emphasis in the original).[898]

Of particular note for this study is the developing importance being attributed to civil society

'in both the legitimacy and the effectiveness of global/regional governance',[899] particularly in

the face of rights issues that are not territorially limited to the borders of one state or

another.[900] Armstrong and Gibson refer here to matters such as the environment, trade and

finance, however, conflict, migration and the refugee crisis are good examples of symptoms

of rights violations that have a transnational reach and through which non-state actors are

increasingly connecting with one another to share knowledge, intelligence and the fruits of

their investigatory labours conducted in often extremely difficult and dangerous conditions,

as discussed in section two below in relation to communities of practice.

As well as ranging from NGOs to NHRIs, civil society actors include community and faith

based groups, coalitions and networks, unions and social movements.[901] Such actors have

been described as 'the eyes of the people' seeking to 'police the actions of the state at the

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[895] OHCHR 'Handbook for civil society' (n 373) vii.
[896] Matua (n 372) 85.
[897] Armstrong and Gibson (n 290) 4, citing D. Armstrong, L. Lloyd, and J Redmond, *International Organisation in World Politics: The Making of the Twentieth Century* (3rd edn, Basingstoke: Palgrave Macmillan 2004).
[898] ibid 4, citing David Held, *Political Theory and the Modern State* (Cambridge: Polity Press 1993), 6.
[899] ibid 5.
[900] ibid 5.
[901] Andreas Godsater and Fredrik Soderbaum, 'Civil Society in Regional Governance in Eastern and Southern Africa', in David Armstrong et al, *Civil Society and International Governance: the role of non-state actors in global and regional regulatory frameworks*, (Routledge 2011) 149.

national level' and prevent states from 'going rogue' (although, as Mutua notes, hate groups also fall within the definition of an NGO).[902] The notion of civil society emanates from Western intellectual thought and reflects a particular construction of society based upon the social contract, as discussed by Rousseau in the late eighteenth century.[903] Rousseau explored concepts of dualism and situated civil society in opposition to the 'natural' state of human behaviour whereby there was no fabric of society; behaviours and actions were dictated by passion and immediate survival rather than by reason and thoughts of the future.[904] Pursuant to the social contract, social and cultural mores and norms have developed which in turn underpin the construction of the international human rights paradigm. Civil society serves to entrench this paradigm by disseminating its norms on a local, national and global level.

Although civil society actors are gaining power and traction, CSOs are largely dominated by Western agencies that are funded by the global north.[905] With this there arguably comes the risk of a civilising mission that echoes imperialism and potentially validates criticisms levied against the operation of the international human rights framework as a neo-imperialistic vehicle.[906] Philip Alston and Colin Gillespie are critical of the reporting methods employed by NGOs, suggesting that a norm has evolved for the structure and character of reports produced mainly spearheaded by Human Rights Watch simply because its production of reports has been so prolific.[907] They perceive that reports are not designed to encourage 'sharing', or to form part of a broader enterprise and that other limitations abound, such as competition for funding amongst NGOs, the perceived need to have a finished product distinct from others, branding, and influence and authoritativeness.[908] The conclusion is that funders of this work need to be convinced of the merits of sharing to encourage a move away from the current segregated model of reporting and dissemination.[909]

Other scholarship cites the influence of the national origins of an international NGO as being determinative to a significant extent of what is planned or undertaken by the organisation

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[902] Matua (n 372) 85.
[903] Frank M Turner, *Western Intellectual Reason from Rousseau to Nietzsche*, (Yale University Press 2015).
[904] ibid 10-12.
[905] Matua (n 372) viii and 80.
[906] ibid viii and 80.
[907] Alston and Gillespie (n 697) 1107.
[908] ibid 1109.
[909] ibid.

and also the factors that influence its operation in the field in host countries.[910] Many NGOs are at pains to point out that they do not accept funds from governments and therefore operate independently of state-backing and associated influence. Human Rights Watch, for example, states that it 'does not seek or accept financial support from any government or government-funded agency', but there is no explicit reference to the private funders and donors in either its annual report or audited accounts.[911]

The Gulf Centre for Human Rights states that it does not accept funds from any governments in the countries in which it works and refers to being funded by 'Open Society Foundations, Sigrid Rausing Trust and International Media Support, among other donors'.[912] Whilst the work of the Open Society Foundations, established by George Soros, previously a hedge fund manager,[913] may be notable in terms of range and reach, the particular focus may well be driven by the personal and political concerns and connections of its founder and leader, with George Soros having been the subject of criticism as well as praise.[914] Most notable in terms of its independence may be Amnesty International, which is 'almost alone in relying essentially on membership contributions rather than foundations, large individual donors, or governments'.[915]

To return to Rousseau, for Rousseau the process of socialisation corrupts human kind and society is said to become more corrupt because 'as it develops it embodies more inequality and hence more oppression', and so the need for non-partisan work to be carried out and

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[910] Sarah S Stroup, *Borders Among Activists: International NGOs in the United States, Britain and France*, (Ithaca London: Cornell University Press 2012).

[911] Human Rights Watch, Inc, Financial Statements year ended 30 June 2016, note 1, page 10 https://www.hrw.org/sites/default/files/supporting_resources/financial-statements-2016.pdf Human Rights Watch Annual Report 2016, https://www.hrw.org/sites/default/files/news_attachments/english_annual_report-2016.pdf both accessed 5 June 2017.

[912] 'About us', Gulf Centre for Human Rights, http://www.gc4hr.org/page/about_us last accessed 20 August 2018.

[913] Being established in 1979 when Soros had apparently 'decided he had enough money', Open Society Foundations background https://www.opensocietyfoundations.org/about/history last accessed 5 June 2017.

[914] Editorial, 'In Praise of George Soros, *The Guardian* (28 October 2010) https://www.theguardian.com/commentisfree/2010/oct/28/in-praise-of-george-soros; Lizzie Dearden, 'George Soros criticised by pro-Israel groups as conspiracy theorists seize on Open Society Foundations leak', *The Independent* (16 August 2016) https://www.independent.co.uk/news/people/george-soros-pro-israel-groups-conspiracy-theorists-open-society-foundations-leak-hack-documents-a7193166.html Daniel Wiser, 'Critics: George Soros Using Political Connections to Benefit His Foreign Policy Goals' *The Washington Free Beacon* (13 May 2014) https://freebeacon.com/politics/critics-george-soros-using-political-connections-to-benefit-his-foreign-policy-goals/ last accessed 5 June 2017.

[915] Alston and Gillespie (n 697) 1109.

contribute to the demand for transparent government only continues to increase.[916]
Rousseau adopted a constructivist perspective in his observation that '…the social order is a
sacred right which serves as a foundation for all other rights. Nevertheless, this right does
not come from nature, it is therefore founded on convention'.[917] Furthermore, that which
has been constructed does not universally hold morality and virtue as its pressing pursuit.
The concerns of Rousseau reflect the contemporary problems of a world order dominated by
a neoliberal sensibility: 'Ancient politicians spoke incessantly of mores and virtues; ours
speak only of commerce and money'.[918]

Although this may be a somewhat over-simplified interpretation of the contemporary web of
politics that the international human rights framework and, vis-à-vis, civil society is caught
up in, Jean Bricmont illustrates this complexity by constructing a critique of what he refers to
as 'humanitarian imperialism'.[919] Bricmont draws parallels between the 'civilising' mission of
the European colonial era to be rid of the 'barbarous' acts discovered in far off lands to
'violations of human rights, the absence of democracy or the fate of women in Muslim
countries' as contemporary versions of barbarisms.[920] The position he takes is not to belittle
the rights abuses and political issues he refers to, but to illustrate that the 'denunciation of
those customs' has been used to 'legitimize [*sic*] our interventions, wars and interference.'[921]

Gerd Oberleitner is simultaneously supportive and sceptical of the rise and role of NGOs.
Whilst they have become 'indispensible to the successful development and implementation
of human rights', he poses a pertinent question when he asks whether such entities are the
antithesis of inter-governmental organisation, or 'merely another complement in a
proliferating global 'bureaucratic' web'.[922] Ruth Houghton is less pessimistic and has
conceptualised the participation of civil society in the promotion and protection of human
rights in hybrid terms, suggesting that the Human Rights Council might be understood as a

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[916] Turner (n 903) 10-13.

[917] ibid 16 citing Jean Jacques Rousseau 'On the Social Contract Book I' in in Donald A Cress (trans. ed.) *The Basic Political Writings* (Indianapolis Hackett Publishing Company 1987) 141.

[918] ibid 9, citing Rousseau 'Discourse on the sciences and art' in Cress ibid 4.

[919] Jean Bricmont, *Humanitarian Imperialism: using human rights to sell war* (New York University Press 2006) preface.

[920] ibid.

[921] ibid.

[922] Oberleitner *Global Human Rights Institutions* (n 23) 2.

'third space' within which NGOs can influence states.[923] Houghton explains that 'hybridity 'reshapes the terms of the binary' between subject and object to highlight not only the role of participation, but also the role of informal participation, in discussing the actors involved in international decision-making'.[924] Understood in this way, there is also a certain hybrid approach to the formulation of UPR recommendations in terms of their source as presented in section 6.7, chapter 6.

What is apparent is the requirement for civil society to function independently of the state, to operate from a position that is external to the state's machinery. This is important bearing in mind that, as considered in chapter 3, a key aspect of an entity securing a governance function is the extent to which it achieves externality from the state actor.[925] However, the extent to which the UPR promotes externality comes under question given the limited role of civil society in the final stages of the recommending process, section 7.5 below provides analysis of stakeholder capacity in this respect. As well as civil society, reviewing states are external to the SuR but, as sections 4.4 and 5.3 in chapters 4 and 5 respectively illustrate, due to the dynamic of politicisation and regionalism externality cannot necessarily be equated with objectivity.

Civil society occupies a stronger position of externality. The absence of civil society's direct voice during the interactive dialogue was met with dismay but comes with (unintended) potential benefits. Initial discussions about the concept of the UPR and what it would involve included a central role for civil society.[926] When Resolution 5/1 was presented, it was to the 'shock and horror and disappointment' of civil society that it would not be an active participant in the Working Group.[927] Unlike the Council's regular sessions, which permit a verbal as well as a written contribution from CSOs to the debate,[928] at the UPR's

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[923] Houghton (n 892) 81-3. Homi K. Bhabha has previously used the concept of the 'Third Space, Bhabha (n 547).

[924] ibid Houghton 81, citing Amar Acheraiou, *Questioning Hybridity, Postcolonialism and Globalization* (London: Palgrave Macmillan) 93.

[925] Möllers (n 277) 320.

[926] Interview CSO 02 and UN 01 respectively.

[927] Interview CSO 02. See also, Lilliebjerg (n 127) 311, which states at footnote 1: 'During the negotiations of the Human Rights Council Amnesty International campaigned for a review mechanism with human rights expertise at its centre, thorough analysis of each situation, a dedicated follow up mechanism and a greater role for civil society'.

[928] As Ruth Houghton observes, these sessions support a hybridization process which fosters participation by those actors 'that are otherwise omitted in a state-centric narrative', Houghton (n 892) 76.

Working Group the stakeholder's voice is muted.[929] As cited in chapter 3, Thomas Weiss and Rordan Wilkinson have raised the concern that governance in the global arena fails to represent stakeholder interests due to 'club models of power' that make decisions in their own interests,[930] and the exclusion of civil society's voice in the space created by the interactive dialogue may exacerbate this concern.

The function of civil society in states in crisis and in autocratic states is particularly challenging. During its 27th session, in September 2014, the Human Rights Council adopted resolution 27/31 on civil society space requesting that the High Commissioner for Human Rights 'prepare a compilation of practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned.'[931] This request was informed by an expression of deep concern of instances of civil society being hindered and endangered at both a national and international level.[932] The outcome was a series of practical recommendations put to the Human Rights Council in April 2016, centred around five essential 'ingredients' deemed by the then High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, to be necessary to optimise 'civil society's transformative potential'.[933] The five requirements were: a robust legal framework compliant with international standards that safeguards public freedoms and effective access to justice; a political environment conducive to civil society work; access to information; avenues for participation by civil society in decision-making processes; and long-term support and resources for civil society.[934] Much of this report reads along the lines of a list of examples of 'good practice' that was submitted to the High Commissioner by civil society representatives.[935]

Of themselves, these ingredients are laudable. How realistic they are for states in crisis is questionable. As with many of the reports produced by the international human rights

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[929] UNHRC A/HRC/RES/5/1 (n 9), which provides that 'relevant stakeholders may attend the Review in the Working Group', para 18(c).
[930] Weiss 'Governance, good governance and global governance' (n 279) 207-215.
[931] UNHRC 'Civil society space' A/HRC/RES/27/31 (23 September 2014) paragraph 15.
[932] ibid preamble.
[933] UNHRC 'Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned: Report of the United Nations High Commissioner for Human Rights' A/HRC/32/20 (11 April 2016) para 4.
[934] ibid para 4.
[935] OHCHR 'Contributions from Stakeholders' https://www.ohchr.org/EN/AboutUs/Pages/ReportHConCivilSociety.aspx last accessed 20 August 2018.

machinery at the behest of the UN, the content is context specific and narrowly focuses on success. At paragraph 43, for example, brief reference is made to the part played by civil society in strengthening efforts to eradicate Ebola in west Africa, but with no acknowledgment of the difficulties faced in dealing with the spread of the disease, its treatment and its prevention both on the ground in terms of resources, and the response of the international community.[936] The report's section on education refers to numerous examples of good practice in seeking to combat racism and other forms of discrimination, but does not acknowledge concerns elsewhere that media reportage and political rhetoric may serve to undermine and unravel the good work and progress made by civil society initiatives.[937] What is increasingly clear is the concern within the Human Rights Council of the limitations placed upon the freedoms of civil society actors by certain sates, as further evidenced by the invitation of the Human Rights Council to the UN Secretary-General to report upon such matters, as discussed in section 7.3 below.[938]

7.2 The Working Group and Consultative status

A civil society actor does not require ECOSOC consultative status in order to make a written submission to the OHCHR ahead of a state's UPR, although this status is required to arrange and host a parallel event, as detailed in the section 7.3.2 below. Guidelines for submissions are provided in Human Rights Council Decision 6/102 and required that single submissions should be no more than five pages, and joint submissions can be up to ten pages.[939] Supplementary guidance is given in the OHCHR Civil Society Handbook.[940] The capacity of civil society to engage with the UPR is, however, diluted compared to its role in the treaty system of human rights monitoring and protection. Ahead of a state's treaty body review,

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[936] See, for example, Aimee Summers, 'Challenges in Responding to the Ebola Epidemic — Four Rural Counties, Liberia, August–November 2014', 63(50) *Weekly* (19 December 2014) 1202-1204**,** https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6350a5.htm last accessed 16 April 2017; J. Agua-Agum 'After Ebola in West Africa - Unpredictable Risks, Preventable Epidemics' (2016) 375(6) The New England Journal of Medicine, August 2016, 587-96.

[937] See, for example, David Machin and Andrea Mayr, 'News Discourse II: Anti-Racism and neo-liberalism in the British Regional Press', in Andrea Mayr *Language and Power: An Introduction to Institutional Discourse*; John E. Richardson, *(Mis)representing Islam: The Racism and Rhetoric of British Broadsheet*, (John Benjamins Publishing Company 2004).

[938] UNHRC 'Cooperation with the United Nations, its representatives and mechanisms in the field of human rights', A/HRC/RES/12/2 (12 October 2009).

[939] UNHRC A/HRC/DEC/6/102 (n 201).

[940] OHCHR 'Handbook for civil society' (n 373) 149.

an NGO can apply to be accredited with observer status in order to attend the review and, in addition, can arrange an informal briefing with members of the committee of experts prior to the formal review.[941] Such intimate contact with state missions prior to a state's UPR is only possible via informal pre-sessions organised by UPR Info, the nature and role of pre-sessions being addressed in section 7.4.2 below. Furthermore, NGOs and broader civil society can submit a report directly to a treaty committee for consideration, which is then provided in full to the state concerned.[942]

An NGO with consultative status can, however, apply to be accredited with observer status and attend the UPR Working Group of an SuR.[943] Despite the Human Rights Council falling within the remit of the General Assembly, the application to gain consultative status in relation to the UPR (and the Human Rights Council) is to be made via ECOSOC.[944] ECOSOC's power to grant consultative status is pursuant to article 71 of the UN Charter and detailed in ECOSOC resolution 1996/31.[945] NGOs may have their consultative status withdrawn if by a vote of members of the ECOSOC NGO Committee it is decided the NGO concerned has conducted itself in breach of the principles within resolution 1996/31.[946] This power needs to be exercised objectively and with caution and there is a risk that this process could fall prey to politicisation. In 2015, the decision to withdraw consultative status from two African

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[941] See, for example, CED 'The relationship of the Committee on Enforced Disappearances with civil society actors' CED/C/3 (30 December 2013) and OHCHR 'ICERD and CRED: A guide for Civil Society Actors' The International Movement Against all forms of Discrimination and Racism (Geneva 2011) http://www2.ohchr.org/english/bodies/cerd/docs/ICERDManual.pdf last accessed 01 July 2018.

[942] Here the concept of 'broader civil society' refers to 'Civil society actors involved and interacting with treaty bodies may be: human rights defenders; human rights organizations (NGOs, associations, victim groups); coalitions and networks (women's rights, children's rights, environmental rights); community-based groups (indigenous peoples, minorities); unions (trade unions as well as professional associations such as journalist associations, bar associations, magistrate associations, student unions); social movements (peace movements, student movements, pro-democracy movements); relatives of victims; and academic institutions', OHCHR The United Nations Human Rights Treaty System: Fact Sheet No.30, Rev 1, (New York and Geneva 2012), https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf last accessed 30 June 2018.

[943] 'Working with ECOSOC: an NGO's guide to consultative status', United Nations (New York 2011) 18 http://csonet.org/content/documents/BrochureLite.pdf last accessed 01 July 2018.

[944] 'Even though this body is not subsidiary of ECOSOC, only NGOs in consultative status with the United Nations Economic and Social Council can be accredited to participate in the Human Rights Council's sessions as observers' ibid 18.

[945] ECOSOC 'Consultative relationship between the United Nations and non-governmental organizations', Economic and Social Council Resolution 1996/31, 25 July 1996, the requirements for gaining consultative status include an organisation being 'concerned with matters falling within the competence of the Economic and Social Council and its subsidiary bodies', para 1, and whose aims and objectives are 'in conformity with the spirit, purposes and principles of the Charter of the United Nations', and amongst other factors, that it is 'of recognized standing within the particular field of its competence or of a representative character', para 9).

[946] ibid para 15.

NGOs, the African Technology Development Link and the African Technical Association, at the request of Pakistan in its capacity as a member of the ECOSOC NGO Committee at that time, has been criticised as a way 'to mute unwanted criticism' and evidence that 'Member States in the NGO Committee retaliate for the statements and participation of NGOs at the Human Rights Council'.[947]

Returning to the role of civil society with consultative status during the Working Group, representatives can be physically present in Salle XX of the Palais des Nations where the Working Group takes place, but there is no scope to make a verbal submission. As one interviewee commented, the silencing of civil society at this juncture may be part of the UPR's attraction to states: '…we [NGOs/civil society] of course can see why it is they [states] love the UPR so much; they are in control, sovereignty reigns, civil society can't take the floor in the UPR working group'.[948] Paradoxically though, it may be that civil society's silence at the interactive dialogue prompts state actors to say the more difficult things they might usually leave to NGOs. When this interviewee was asked if states over-rely on civil society for the making of recommendations, the response was an emphatic yes, particularly in those forums where civil society has a voice:

> (…) within the UN human rights system and the Human Rights Council in particular I think states are very reliant on civil society saying the difficult things. Even countries we would consider like-minded might not say something that is going to impact on their relationship with a particular country if they know an NGO that is further down the speakers' list will say that thing.[949]

In the interviewee's opinion, the 'heavy lifting' of making the more difficult recommendations is generally left to the domain of smaller states, whilst others such as the US, Canada, Australia or Argentina keep their recommendations safe and vague to preserve relations. However, the marginalisation of civil society from the UPR recommending process means that:

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[947] International Service for Human Rights 'Withdrawal of UN consultative status for two NGOs could have 'chilling effect' on civil society' (04 June 2015) https://www.ishr.ch/news/withdrawal-un-consultative-status-two-ngos-could-have-chilling-effect-civil-society last accessed 01 July 2018.
[948] Interview CSO 02.
[949] Interview CSO 02.

(…) by putting it on its head we are seeing that there is a silver lining
nonetheless, because it means that those states are now committed to the
Human Rights Council and the UPR being not an abject failure. They realise
that they have to go in and raise some of those difficult issues, otherwise
they won't be raised.[950]

The extent to which state practice is moving towards the making of difficult
recommendations is an area for further study. As chapter 6 indicates, there have been key
changes in the response of states to the recommendations they receive which would suggest
states are starting to take their implementation and follow up obligations more seriously. In
tandem with this, state practice may well be evolving to improve the quality of
recommendations made as states more properly comprehend their role in the
recommending process and its impact upon the UPR's credibility and legitimacy, and
therefore its success.

7.3 Communities of practice

This section explains and applies the concept of communities of practice to the UPR and civil
society as a means to conceptualise the coalitions between civil society actors that are
emerging as a result of the UPR, and to further consider how to consolidate the role of civil
society for states in crisis at the UPR to strengthen its governance function. In doing so, this
section explores collaborations between civil society actors in the preparation of UPR
stakeholder submissions and also via participation in parallel events.

A community of practice refers to those with a shared interest or practice or pursuit of
knowledge.[951] The creation and existence of a community of practice generates legitimacy
in a social sense.[952] Three characteristics are crucial to the existence of a community of
practice: the domain, whereby 'identity is defined by a shared domain of interest'; secondly,
the community, within which members engage 'in joint activities and discussions, help each

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[950] Interview CSO 02.

[951] Jean Lave and Etienne Wenger, *Situated Learning* (Cambridge: Cambridge University Press 1991); Etienne
and Beverley Wenger-Trayner, 'Communities of Practice: A brief Introduction' http://wenger-trayner.com/wp-
content/uploads/2015/04/07-Brief-introduction-to-communities-of-practice.pdf accessed 18 June 2018;
Cotterrell (n 277) 262 – 268.

[952] CA Thomas, *The Concept of Legitimacy and International Law,* LSE Legal Studies Working Paper, 12/2013,
(London, London School of Economics, 2013) 22.

other, and share information. They build relationships that enable them to learn from each other; they care about their standing with each other'; and, thirdly, the practice, whereby practitioners 'develop a shared repertoire of resources: experiences, stories, tools, ways of addressing recurring problems—in short a shared practice.'[953]

Through communities of practice there is the potential to legitimise and support the mainstreaming of civil society advocacy and activism within the UPR and to strengthen the role of civil society across the international human rights regime complex. There are three primary methods by which such communities are developed: one is the coming together of civil society actors, domestic and global, to form a coalition that prepares and submits a joint submission; the second is the hosting of a parallel event at the UN in Geneva alongside the relevant Working Group of an SuR; the third is via in-country workshops. These methods are critically explored in the subsections below.

By coming together to create communities of practice, civil society creates a space akin to that which Bhabha conceptualises as the 'Third Space', as touched upon in chapter 4, section 4.4.2.[954] This is a space in which 'the historical identity of culture as a unifying force' is challenged by seeing cultural knowledge and cultural performance as a process of translation and negotiation.[955] Forging links and combining interests between different organisations and groups through the UPR means that civil society can operate to create new, dynamic, and ideologically open spaces within which difference is shared in pursuit of a common goal. By building coalitions, it has been suggested that the recommendations reviewing states make are more relevant and better facilitate follow up by civil society with the relevant government.[956]

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[953] Wenger-Trayner (n 951) 2.
[954] Bhabha (n 547) 155–157.
[955] ibid.
[956] 'The huge value of working as a coalition of CSAs in the submission of the report and in lobbying governments in the UPR process resulted into more relevant recommendations. This also facilitated follow-up and our active engagement with the government on their implementation', The Medical Action Group, leading a CSO coalition in the Philippines and meetings with 16 diplomatic missions to raise awareness of matters relating to torture, as cited in OHCHR 'How to Follow Up on United Nations Human Rights Recommendations: A Guide for Civil Society' (October 2013) 19, https://www.ohchr.org/Documents/AboutUs/CivilSociety/HowtoFollowUNHRRecommendations.pdf last accessed 20 August 2018.

As one interviewee commented: 'Some of the strongest successes we've seen is the way the UPR has been a rallying point for domestic civil society to build coalitions, come together and influence their government'. In the interviewee's experience, this success was often dependent upon the pre-existing conditions within the SuR:

> The space in which the UPR has been most useful is areas where there is enough democratic space that civil society can come together and influence the outcomes, and perhaps less influential in cases of conflict or very closed states.[957]

Tunisia provides an example communities of practice within civil society emerging as part of a political transition to democracy and in acknowledgement of human rights abuses that have been perpetrated by the state.[958] Another example is Egypt where civil society actors came together to collectively follow up with the government its progress on UPR recommendations; various NGOs monitored implementation of UPR recommendations as part of a '100 days' campaign, providing updates on a daily basis over a period of 100 days according to the thematic area of their organisation's focus.[959]

Despite the ongoing war, ahead of Yemen's third cycle review there is emerging evidence of communities of practice including domestic and international NGOs in the form of stakeholder submissions.[960] Another indication of civil society coalescing to support rights

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[957] Interview CSO 05.

[958] 'Tunisia would be a good example of that [civil society being strengthened]. You had a big group of NGOs that organised themselves together to prepare and to contribute to Tunisia national report. I think that was quite capacity building for those NGOs and it brought to NGOs a lot of knowledge about how NGOs work and gave them a more international context to the work they had been doing up to that point, which had been mainly focused on national reform. And I think for them it was an opportunity for them to use their arguments and their research and the work they had done, kind of broadcast it at a larger audience', interview CSO 05. There was a similar reference made to Tunisia by a separate interviewee, interview CSO 03.

[959] As relayed during interview CSO 05, see also: Egyptian Initiative for Human Rights 'Our Rights in 100 Days: "The Form" Launch a Campaign to Monitor the President [*sic*] Human Rights Priorities' https://eipr.org/en/press/2012/07/our-rights-100-days-%E2%80%9C-form%E2%80%9D-launch-campaign-monitor-president-human-rights-priorities last accessed 17 August 2018.

[960] Joint Submission 'UPR Submission Yemen 2018', Joint Submission by CIVICUS: World Alliance for Citizen Participation, Gulf Centre for Human Rights (GCHR) and Front Line Defenders (25 July 2018) https://www.frontlinedefenders.org/en/statement-report/upr-submission-yemen-2018 last accessed 20 August 2018, which states that it specifically analyses: 'Yemen's fulfilment of the rights to the freedoms of association, peaceful assembly and expression, and unwarranted restrictions on HRDs, since its previous UPR examination in January 2014. To this end, we assess Yemen's implementation of recommendations received during the 2nd UPR cycle relating to these issues and provide a number of specific, action-orientated follow-up recommendations'. The deadline for stakeholder submissions was 12 July 2018; at the time of writing, not all submissions are publicly available.

protection in Yemen is a criminal complaint reported in April 2018 to have been submitted by a coalition of NGOs against an arms manufacturer regarding Italian arms exports and the use of such arms in an attack in October 2016.[961] Even so, the fabric of civil society in Yemen is unsurprisingly extremely fragile; at a Human Rights Council regular session side event in June 2017, Kristine Beckerle of Human Rights Watch explained that whilst she had been to Yemen many times to document the human rights situation the current conditions meant this was now proving to be very difficult. She explained that space for civil society in Yemen had shrunk dramatically, that whilst it had never been easy to be a defender, activist, or lawyer in Yemen it was 'now incredibly (…) difficult'.[962]

These difficulties are not limited to civil society operating in states in crisis, but also for those within states that are known human rights violators. Whilst for some states, peer review may provide a political motivation for action, for others, the pressure of having one's human rights situation visible on the world stage can exacerbate the desire to repress and silence the expression of criticism or descent and prompt reprisal via the detention of human rights defenders, and/or imposition of travel bans. This was evident during Bahrain's most recent review, which took place as part of the first UPR session of the third cycle in May 2017. During Bahrain's Working Group interactive dialogue, a number of reviewing states expressed concern that travel bans had been imposed on certain human rights defenders to prevent them from travelling to Geneva, and those civil society actors interviewed during the author's visit to the UN at that time expressed similar concerns.[963]

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[961] Complaint submitted to the Italian Public Prosecutor's Office, Rome, 'Coalition of NGOs files criminal complaint against RWM Italia S.p.A a subsidiary of German Arms Manufacturer Rheinmetall AG and Italian Export Arms Authority: Are arms manufacturer and Italian Authorities complicit in deadly Saudi-coalition airstrike in Yemen?', Press Release, European Centre for Constitutional Rights, Mwatana (Yemen) and Rete Disarmo, Berlin/Rome/Sana'a (18 April 2018) http://mwatana.org/en/criminal-complaint-against-rwm-italia-s-p-a-and-italian-arms-export-authority/ last accessed 28 August 2018.
[962] Kristine Beckerle's panel contribution was via a remote appearance on the panel via video, from the author's own notes in attendance at the panel event, following an invitation to the author by the Gulf Centre for Human Rights, 'The ongoing attacks on public freedoms in Yemen during wartime', Human Rights Council Side Event, Palais des Nations, United Nations, Geneva, 21 June 2017.
[963] 'Estonia expressed disappointment about incidents of reprisal against human rights defenders, in particular the travel ban imposed on Sayed Hadi al-Musawi, who was supposed to speak at the pre-sessional meeting for the review of Bahrain', para 76, Germany was 'troubled by reports about human rights defenders being banned from travelling to attend pre-sessional meetings for the current universal periodic review session', to which the state delegation's response was 'everyone should be free to leave any country, "including his own", and that right should not be subject to any restrictions except those which are provided by law and are necessary to protect national security, public order, public health or morals or the rights and freedoms of

Travel bans have also been reportedly imposed to prevent travel to Human Rights Council regular sessions.[964] Similar action in China in 2013 has been said to have led to the death of human rights activist Cao Shunli; Shunli was detained by Chinese authorities at Beijing airport whilst she was seeking to travel to Geneva to attend a advocacy training ahead of China's second cycle UPR and later died in detention reportedly being denied medical access.[965] Indeed, there are reports that it was personnel at the OHCHR that provided the names of human rights defenders planning to attend human rights advocacy training ahead of the Human Rights Council session in September 2013 to the Chinese government.[966] If these allegations are well founded this is of particular concern where the legitimacy and authority of the UPR is concerned and its successful function as a governance entity. Yemen has also been cited as having raided the premises of human rights defenders and subjected them to acts of intimidation thought to have related to Yemen's first cycle UPR.[967] More generally, the Council has raised with the UN Secretary-General concerns regarding instances of intimidation and reprisal.[968]

For the UPR to support tangible output for states in crisis such as Yemen it is paramount that civil society is able to coalesce as a community of practice. These are issues that are heightened in places of conflict; the already fragile and limited presence and activity of

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others.' UNHRC 'Report of the Working Group on the Universal Periodic Review: Bahrain' A/HRC/36/3 (10 July 2017) paras 79, 83 and 86 respectively. Concerns were expressed by civil society in person during interviews, as well as in various publications, interview CSO 06.

[964] European Centre for Democracy and Human Rights 'Bahrain Authorities Prevent Civil Society Members and Human Rights Defenders from Participating in UN HRC 32' (13 June 2016) https://www.ecdhr.org/bahrain-authorities-prevent-civil-society-members-and-human-rights-defenders-from-participating-in-un-hrc-32/ last accessed 24 May 2018.

[965] Jonathan Kaiman, 'Chinese activist Cao Shunli dies after being denied medical help, says website' *The Guardian* (14 March 2014) reporting her death following her initial detention in September 2013, https://www.theguardian.com/world/2014/mar/14/china-activist-cao-shunli-dies-human-rights; International Service for Human Rights 'China interrupts moment of silence for Cao Shunli at the UN Human Rights Council', (20 March 2014) http://www.ishr.ch/news/china-interrupts-moment-silence-cao-shunli-un-human-rights-council and UPR Info 'China prevents moment of silence in memory of human rights defender' (26 March 2014) https://www.upr-info.org/en/news/china-prevents-moment-silence-memory-human-rights-defender all accessed 24 May 2018.

[966] Bea Edwards, 'A Third Whistleblower Unsuccessfully Seeks Protection from Retaliation at UN/OHCHR', Government, 01 February 2017, Accountability Project, https://www.whistleblower.org/blog/014301-third-whistleblower-unsuccessfully-seeks-protection-retaliation-unohchr accessed 24 May 2018.

[967] UNHRC 'Report of the Secretary-General on cooperation with the United Nations, its representatives and mechanisms in the field of human rights', A/HRC/14/19 (07 May 2010) paras 48-51, citing an urgent appeal sent by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders to Yemen on 02 December 2009.

[968] UNHRC A/HRC/RES/12/2 (n 938).

domestic civil society in Yemen is exacerbated by the conflict and its consequences. Normal civil society mechanisms are not able to function, they are not free to operate. This is evidenced by the lack of personal safety of those that speak out in support of human rights and reports of human rights defenders and journalists having been unlawfully detained by both sides of the conflict, as discussed below. One individual interviewed for this study is a Yemeni woman who fled Yemen following the Arab Spring because of the threat to her safety due to her involvement in the youth uprising to seek asylum in the West.

Freedom of expression is curtailed by the reported detention of journalists and the risks they face,[969] and by the fatalities of the conflict including Yemeni journalists killed by airstrikes.[970] Access to information and freedom of expression is also prevented by censorship and limits on internet access.[971] Furthermore, freedom of movement is limited, having a detrimental impact upon the investigation of violations and freedom of expression and association; a recent press release issued by the Gulf Centre for Human Rights (GCHR) in June 2018 refers to two Yemeni human rights defenders being detained by Saudi and UAE-led coalition forces whilst en route to engage in human rights activities overseas.[972] These individuals have also reportedly been detained on previously by Houthi security services.[973] At the time, a number of international NGOs are cited in support of the statement issued by GCHR demanding immediate release, evidence of a developing global civil society community of

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[969] Gulf Center for Human Rights, 'Yemeni Human Rights Blogger Hisham Al-Omeisy has been missing for 150 days' Press Release (11 January 2018), reporting that Al-Omeisy had been detained in Sana'a by security officers of the Houthi-controlled National Security Bureau on 17 August 2017, via email with the author.
[970] Reference to the detention of journalists by Houthi forces and to the killing of Takieddin al-Hudhaifi, a freelance cameraman, and Wael al-Absi who worked for the official Yemen TV channel allegedly by Houthi shell fire on 26 May 2017. Such action is not limited to the Houthis, with reports that those loyal to President Hadi have conducted 'arbitrary arrests, enforced disappearances, raids against media offices, the closure and confiscations of newspapers, unfair trials, and the blocking of websites', 'Caught between Saudi Coalition and Houthi Rebels, Yemenis journalists face challenges on all sides' *Global Voices* (28 June 2017), https://globalvoices.org/2017/06/28/caught-between-saudi-coalition-and-houthi-rebels-yemeni-journalists-face-challenges-on-all-sides/# last accessed 01 July 2018.
[971] ibid.
[972] Those temporarily detained were reported as being the President of Mwatana Organization for Human Rights in Yemen, Radhya Al-Mutawakel (a panellist at a Human Rights Council side event in June 2017 in Geneva to which the author of this study was invited to attend and spoke with), and Executive Director Abdulrasheed Al-Faqih. They are reported as having been detained for a day by Saudi and United Arab Emirates-led coalition forces at Sayoun Airport in the Hadhramout region of Yemen and having been 'taken to an unknown location, before being released late at night', Gulf Centre for Human Rights 'Yemen: Human Rights Groups Condemn Arbitrary Detention of Yemeni Human Rights Defenders and Urge Authorities to Permit Advocates to Freely Travel and Conduct Human Rights Work' Press Release (June 2018) https://www.gc4hr.org/news/view/1889 last accessed 05 July 2018.
[973] ibid.

practice for Yemen and the governance role of that community outside of formal UN forums.[974]

7.3.1 Stakeholder submissions

This section addresses the formal aspect of CSO engagement with the UPR, making a written stakeholder submission to the OHCHR. Other civil society interactions with the UPR are *ad hoc* being variously dependent upon state practice and the resources an NGO has access to. They include: consultation with the SuR in respect of the state's preparation of the national report; attendance and advocacy at pre-sessions organised by the international NGO UPR-Info;[975] hosting or being party to parallel events at the UN in Geneva during a UPR session;[976] and follow up with the SuR, each of which is considered further below.

The deadline for stakeholder submissions is some six months ahead of a state's review; for example, the deadline for stakeholders ahead of Yemen's third cycle Working Group in January 2019, was no later than 12 July 2018.[977] Given the dynamic, fast-moving situation in Yemen, and ongoing serious human rights violations, stakeholder reports will inevitably be out of date and would benefit from updating by the time of the Working Group. Even so, the prevailing view of civil society actors is that each opportunity to bring the situation in Yemen to the attention of the international community should be taken,[978] and the UPR is relevant in this respect.

Mwatana, a domestic Yemeni NGO referred to above, made a joint submission with Columbia Law School Human Rights Clinic in respect of Saudi Arabia's third cycle UPR (scheduled for November 2018), reporting on the NGO's human rights investigations of

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[974] Those cited at the foot of the press release are: Amnesty International; Article 36; Cairo Institute for Human Rights Studies; Center for Civilians in Conflict (CIVIC); Control Arms Coalition; European Center for Constitutional and Human Rights (ECCHR); Global Centre for the Responsibility to Protect; Global Justice Clinic (NYU School of Law); Gulf Centre for Human Rights (GCHR); Human Rights Clinic (Columbia Law School); Human Rights Watch; International Federation for Human Rights (FIDH) within the framework of the Observatory for the Protection of Human Rights Defenders; International Service for Human Rights (ISHR); PAX; Reprieve; Rights Watch (UK); World Organization Against Torture (OMCT) within the framework of the Observatory for the Protection of Human Rights Defenders, ibid.

[975] UPR Info 'Pre-sessions' https://www.upr-info.org/en/upr-process/pre-sessions last accessed 15 June 2018.

[976] A number of side events have been attended by the author at the United Nations in Geneva as part of the research for this thesis, this includes a side event at the time of Yemen's second cycle review, a side event hosted by Amnesty International in relation to its international advocacy during the first session of the third cycle in May 2017, and a side event linked to Human Rights Council regular session 32 during June 2017 that focused on the human rights situation in Yemen.

[977] OHCHR '3rd UPR cycle: contributions and participation of "other stakeholders"' (n 228).

[978] Interview CSO 03, CSO 04 and HRD 01 respectively.

violations committed by the Saudi-led coalition.[979] This submission is an example of a community of practice emerging between academia and a human rights NGO. It also reveals a further opportunity afforded as a result of the UPR for domestic civil society located in states in crisis: to engage with the UPR of those states that are reported and understood to be committing human rights violations extra-territorially and in breach of principles of international humanitarian law.

It is a reflection of the strength of the UPR that a domestic Yemeni NGO such as Mwatana is able to contribute to an event on the world stage about Saudi Arabia, an internationally high-profile state that wields significant geopolitical power and is, controversially, as noted in chapter 4, section 4.2.1, a current member of the Human Rights Council. Whilst detailed discussion of the content of Mwatana's submission is beyond the specific focus of this study, the nature of the rights violations reported upon refer to international human rights law and principles of international humanitarian law, both of which, as detailed in chapter 2, fall within the scope of UPR. The joint submission cites violations by Saudi Arabia in Yemen in relation to: civilian casualties and the right to life; civilian infrastructure damage, forced displacement and the rights to health, education, and water; severe restrictions on humanitarian aid and access to medical treatment; restrictions on humanitarian aid and the supply of basic goods: impacts on the rights to life, health and food.[980] The allegations presented accord with media coverage of the conflict and the recent report by international experts.[981]

The success of a stakeholder submission is in part measured according to the recommendations it makes being adopted by a reviewing state. As investigated in chapter 6,

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[979] Mwatana and Columbia Law School Clinic UPR Submission (n 757).
[980] ibid.
[981] UNHRC 'Situation of human rights in Yemen' A/HRC/39/43 (n 793) and, for example, Mohammed Ghobari, Death toll from air strike on Yemen wedding party rises above 130: medics', *Reuters* (29 September 2015) https://www.reuters.com/article/us-yemen-security/death-toll-from-air-strike-on-yemen-wedding-party-rises-above-130-medics-idUSKCN0RT0XT20150929; Staff Agencies, 'Saudi-led coalition admits to bombing Yemen funeral: 'Incorrect information' meant hall in Sana'a was mistaken for military target, leading to 140 deaths, says US-backed mission', *The Guardian* (15 October 2016), https://www.theguardian.com/world/2016/oct/15/saudi-led-coalition-admits-to-bombing-yemen-funeral; and Jon Sharman, Ghaida Ghantous and Ahmed al-Haj, 'Yemen: 'At least 20 killed including bride' after airstrike by Saudi-led coalition hits wedding party', *The Independent* (23 April 2018) https://www.independent.co.uk/news/world/middle-east/yemen-airstrike-wedding-party-killed-injured-bani-qayis-saudi-coalition-latest-updates-a8317826.html, all last accessed 06 July 2018.

of the sample of stakeholder submissions and recommendations made, the majority formed the basis of recommendations made by reviewing states, see also table 9 at appendix 9. For states in crisis such as Yemen, the role of civil society is even more fundamental in terms of helping to shape the recommendations of reviewing states to ensure the recommendations made are the most useful and directed to assist those on the ground in the SuR.[982]

It is possible that some UPR recommendations to Saudi Arabia during its third cycle review will directly refer to the actions of the Saudi-led coalition in Yemen and their consequences which have led to 'the world's worst humanitarian crisis'.[983] That said, no specific comments or recommendations were made by reviewing states to the UK during its third cycle review in May 2017, although Peru made a general recommendation that the UK 'in the context of the defence of the right to life, carefully assess the transfer of arms to those countries where they are likely to be used for human rights abuses and violations'.[984] This was despite the UK's role in the Yemen conflict as an ongoing supplier of arms to Saudi Arabia and its provision of strategic military training and support having come under scrutiny both in the media and via legal action.[985] Surprisingly, reference in stakeholder submissions to the UK's role in this respect was made only in general terms and only in two submissions.[986] At the time of writing, the summary of stakeholder submissions relating to Saudi Arabia's forthcoming UPR is not available publicly and so cannot be assessed in terms of the extent and nature of any other stakeholder submissions citing Yemen.[987]

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[982] Interview CSO 05.

[983] Guterres (n 169).

[984] UNHRC Report of the Working Group (UK), A/HRC/36/9 (n 810) para 134.132.

[985] An appeal against the High Court's dismissal of the application for judicial review, led by Campaign Against Arms Trade (CAAT), of the UK's decision to continue licensing the supply of arms to Saudi Arabia was heard by the UK Court of Appeal in early 2018. The Court of Appeal handed down its ruling in May 2018 granting CAAT permission to appeal to the Court of Appeal against the High Court's decision, *R (on the application of Campaign Against Arms Trade)* (n 477). Examples of media reports raising concerns about the role of the UK (and the us) include: Richard Spencer, 'UK military 'working alongside' Saudi bomb targeters in Yemen war', *The Telegraph*, 15 January 2016, https://www.telegraph.co.uk/news/worldnews/middleeast/saudiarabia/12102089/UK-military-working-alongside-Saudi-bomb-targeters-in-Yemen-war.html and Wilcken (n 780).

[986] The Center For Global Nonkilling 'commended the State's support towards abolishing the death penalty worldwide and encouraged it to enhance the respect for the right to life in its constitution and to progressively and duly limit arms transfer', with the relevant footnote also citing Rights Watch (UK), UNHRC 'Summary of other stakeholders' submissions United Kingdom of Great Britain and Northern Ireland', A/HRC/WG.6/27/GBR/3 (27 February 2017) para 58.

[987] 'Universal Periodic Review: Saudi Arabia', Human Rights Council, OHCHR, https://www.ohchr.org/EN/HRBodies/UPR/Pages/SAindex.aspx last accessed 21 August 2018.

As variously discussed in chapters 2, 4 and 6, the OHCHR produces a précis of the submissions it receives in a summary document limited to ten pages.[988] Single or joint submissions may be made, and OHCHR guidelines must be adhered to.[989] Ahead of Yemen's second cycle review, eight joint submissions were made to the OHCHR, five of which were made by a combination of domestic and international or regional civil society organisations, and six single submissions, made by individual INGOs.[990]

The UPR has thus 'been a catalyst for dialogue within national civil society and between national civil society and international civil society… in some instances, the UPR has provided a platform for dialogue between the state and civil society whereas it may not otherwise exist'.[991] The UPR's capacity to encourage the forging of links between CSOs and the strengthening of their cause is further illustrated by one interviewee, an international advocate for a global NGO, explaining the motivation for making a stakeholder submission:

> (…) sometimes in the past we have engaged with the UPR even though if we looked at it very narrowly we could see the UPR would have a very limited impact in that country, but sometimes we nonetheless engage, we make a submission of information either in an act of solidarity with other partners who would like to have [the international NGO's] voice there, we are a big organisation, we have a strong brand, we have a lot of access to many places and sometimes we are conscious that we need to wade in in order to support the advocacy by other organisations (…) so that would be a consideration for us (…).
>
> If [the international NGO] is not saying something there is the danger it will be misunderstood and seen that the matter is not important, that is because the human rights movement is political and of course we can never be naive and we have to play our cards in the best possible way. But it doesn't mean that we don't also have strategy and those considerations weigh in the hardest and the heaviest. Our interest

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[988] UNHRC A/HRC/RES/5/1 (n 9), paras 15(c). Only the summary document is provided on the OHCHR's extranet, OHCHR 'Modalities and practices for the universal periodic review process', Statement of the President of the Human Rights Council 8/PRST/1 (09 April 2008) para 15.
[989] OHCHR 'UPR (Third Cycle): Information and guidelines for relevant stakeholders' (n 229).
[990] UNHRC 'Stakeholder summary: Yemen' A/HRC/WG.6/18/YEM/3 (n 17) 12.
[991] Interview CSO 06, with reference to Singapore as a good example, where the UPR 'opened a space for them [CSOs] to engage in dialogue with government around critical human rights issues that didn't otherwise exist' in relation to preparation of the national report, during conduct of the UPR and follow up'.

> always in a UPR engagement, a treaty body engagement, always is
> what will the impact be on the human rights situation in the ground.[992]

This statement reveals the power of endorsement and the legitimising impact provided by certain civil society human rights actors. It also betrays that a level of game playing and strategy is required to secure tangible improvement that in turn may have the (unintended) consequence of elevating one right or norm above another. Importantly in terms of this study, it indicates the burgeoning power and standing of certain civil society actors in the global governance of international human rights, as given consideration in section 7.1 above.

In terms of stakeholder submissions, and by association the OHCHR compilation, it may be appropriate to approach the content with a degree of criticality and caution in light of the discussion relating to fact-finding and human rights indicators in section 5.4, chapter 5.

7.3.2 Parallel (side) events

A further method by which communities of practice are developed and strengthened by the UPR (and the Human Rights Council) is via the hosting and participation of parallel events, commonly referred to as side events.   As explained in section 7.2, to arrange a parallel event linked to a UPR session or a regular session of the Human Rights Council an NGO must have consultative status.[993] These events are generally hosted by one or more CSOs with a focus on a particular genre of rights, a specific rights issue (such as human rights defenders), or the general human rights situation in a particular country or region. As part of the research for this thesis, the author attended various parallel events at the UPR's 14th session, January-February 2014, and 27th session, May 2017 and an event linked to the 36th regular session of the Human Rights Council in June 2017. Other parallel events in relation to Yemen have been hosted during 2016 and 2017.[994]

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[992] Interview CSO 02.

[993] 'Working with ECOSOC: an NGO's guide to consultative status' (n 943).

[994] For example, 'Nothing is Safe: Yemen', hosted by Geneva International Centre for Justice with the cooperation of EAFORD and Women Journalists Without Chains Organization during Human Rights Council 33rd regular session, 23 September 2016, which included Ms. Hooria Mashhour, a former Minister of Human Rights in Yemen and a human rights activist, as a panellist, http://www.gicj.org/conferences-meetings/human-rights-council-sessions/side-events/982-side-event-at-the-human-rights-council-yemen accessed 09 July 2018, and 'Accountability, ending impunity, and protection of human rights defenders in Yemen', Gulf Centre for Human Rights (GCHR), 36th session of the United Nations Human Rights Council in Geneva, Press Release, GCHR, 21 September 2017.

Commonly, there is a panel comprised of domestic and international civil society, human rights defenders and journalists and, for example, personnel from the OHCHR.[995] Given that UPR parallel events occur at the time of the state's review, impact on recommendations made is highly unlikely. Some interviewees questioned the utility of parallel events at the UPR, surmising that they may have some purpose in relation to being part of a larger strategy, 'a meeting point to head up something else at the Human Rights Council', or to form a civil society taskforce.[996] Whilst their utility can be 'wildly variable',[997] parallel events can be strategically timed and used as a forum to raise the profile of rights issues, with panellists carefully chosen to add credibility and legitimacy to the event and the topics under scrutiny, as well as providing an opportunity to invite state parties and other stakeholders.

A parallel event at the 36th regular session of the Human Rights Council on 19 September 2017 regarding Yemen and hosted by the Gulf Centre for Human Rights (GCHR), called for an end to impunity, for accountability, and for the establishment of an international committee.[998] Two Special Rapporteurs were members of the panel, making a specific request for Yemeni human rights defenders to provide them with information relating to human rights abuses to assist in documenting the situation in Yemen.[999] It is acknowledged by civil society actors that a parallel event or a submission is part of a much broader process, as one interviewee explained with reference to the situation in Yemen and the role of civil society:

> (…) we are a human rights organisation, we are not involved in politics. We
> can't call for an end to the war, but always we are calling for people to get
> engaged in dialogue, healthy dialogue, to end this because really without

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[995] Based upon the author's experience of attending side events in person.

[996] Interview CSO 05.

[997] Interview CSO 06, with reference to the success of a parallel event in which a film on the situation in Sri Lanka was shown and the Sri Lankan Ambassadors response at the event to the film as sending a powerful message to the Human Rights Council that a national investigation into human rights violations would have little value, 'and therefore there was a need for the international community to act'.

[998] Gulf Centre for Human Rights 'Accountability, ending impunity, and protection of human rights defenders in Yemen', 36th session of the United Nations Human Rights Council in Geneva, Press Release (21 September 2017).

[999] ibid, the panellists were Radhia Al-Mutawakel, Chairperson of Mwatana for Human Rights, Dr. Annalisa Ciampi, UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Michel Forst, UN Special Rapporteur on the situation of human rights defenders, and Safa Al-Ahmad, Award-winning Saudi journalist and filmmaker.

dialogue it seems to me this is going to be just to kill the ordinary citizens.[1000]

The pressure on the UN to call an independent international inquiry into the situation in Yemen had been building for a number of years. It may be that the repeated hosting of parallel events, the profile of panel members and the persistent and growing call for an international inquiry helped force the hand of the UN to announce the establishment of an International Committee of Experts in September 2017, referred to in section 6.2, chapter 6.

To conclude this section, ultimately, an NGO's engagement with the UPR of a particular SuR will be determined by a number of factors. Clearly, domestic civil society has a vested interest in making its voice heard via a submission. However, global NGOs have a number of factors to consider in determining where to allocate their resources and energies. As one interviewee, an international advocate with a global NGO, acknowledged, engagement with a particular state's review is subject to a number of factors:

> We never knee jerk into the UPR for the sake of it. We always look at the UPR, what does it have to offer, the same way we look at a treaty body review of a country (…), the prospect of a visit by a special rapporteur, whatever it is that is within the realm of possibility for what is coming up through the UPR schedule, the treaty body schedule, and employ our own resources against those opportunities that we think are most effective.[1001]

7.4 Consultation and advocacy

This section critically addresses the potential for civil society to engage in consultation with an SuR as part of that state's process of preparing the national report. In addition, it considers the advocacy civil society conducts in terms of recommendations to be made by reviewing states with the final section addressing advocacy regarding follow up and implementation. Throughout, the particular challenges faced by civil society based in conflict zones and states in crisis are considered.

As set out above in this chapter, the function of civil society in states in crisis such as Yemen and in autocratic states is often curtailed by detention, travel bans and other limits on the

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[1000] Interview CSO 04.
[1001] Interview CSO 02.

freedom of expression. Whilst civil society's voice is only indirectly present in the UPR's interactive dialogue there is some limited direct reference to civil society via comments and recommendations by reviewing states. Such recommendations include impressing upon an SuR the need to protect the right to freedom of expression that is core to the work of civil society, and to put an end to arbitrary detention of human rights defenders.[1002]

There are, however, relatively few such comments and recommendations and there appears to be a slight downward trend. In the first cycle, a total of 481 out of 21,355 recommendations were made relating to civil society, amounting to 2%.[1003] Of those 481, 113 (23%) referred to specific action (action category 5) and the majority were supported (352, amounting to 73%). In the second cycle, 650 recommendations out of 36,331 referring to civil society were made, amounting to 1.7%, of which 217 (33%) were action category 5 and 468 were supported (72%). This suggests a consistent rate of recommendations referring to civil society, but this is a small proportion overall, despite the majority of those being made being supported by the SuR. At the time of writing, for the third cycle there are no recommendations recorded regarding civil society for the 3,328 recommendations so far captured.[1004]

The low number of recommendations may indicate that many reviewing states do not see the operation of civil society as a priority human rights matter. It may also reflect the limits some states are imposing; concerns about the ability of civil society to function freely have been raised by Philip Alston in his capacity as the UN Special Rapporteur on Extreme Poverty and Human Rights:

> (…) rather than "shrinking civil space" the reality is that the space has already closed in a great many countries. In my capacity as United Nations (UN) Special Rapporteur on extreme poverty and human rights I have seen this first hand in my country visits to Mauritania and to

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[1002] For example, China received six recommendations at its second cycle review regarding civil society, five of which it supported. These included 'Intensify efforts to facilitate the participation of NGOs, academic institutions and the media in safeguarding human rights' (Nigeria), and 'Facilitate the development, in law and practice, of a safe and enabling environment in which both civil society and human rights defenders can operate free from fear, hindrance and insecurity' (Ireland). The one recommendation that was noted was 'Set up a national institution in line with the Paris Principles and ensure a climate that is favourable to the activities of human rights defenders, journalists and other civil society actors' (Tunisia), UPR Info: Database of Recommendations (n 125).
[1003] ibid.
[1004] UPR-Info: Database of recommendations (n 125)

China, while other countries are excellent students in this domain. Egypt recently passed a law limiting the activity of nongovernmental organisations (NGOs) to social and development work, and banning all NGOs from cooperating in any way with any international body without governmental approval.[1005]

Regardless of the training and support provided to civil society by INGOs, such as UPR Info or the OHCHR, as Alston's sentiments allude to, this support is futile in the face of restrictive domestic legislation and reprisals in places where the efforts of civil society may be most needed.

7.4.1 Consultation: the national report

As indicated above, the process and modalities of the UPR do not oblige an SuR to consult with civil society in preparing its national report; states are 'encouraged' to undertake 'a broad consultation process at the national level with all relevant stakeholders'.[1006] To 'encourage' reflects the spirit of the international human rights framework as it is currently constructed, premised upon cooperation and the promotion of good practice. Yet this may be at the expense of a state taking its human rights commitments and obligations seriously.

As chapter 6 explains, it has taken time for states to determine how to approach the recommending process and the same is true of state consultation with non-state actors in preparation of the national report. Interviews conducted with a selection of commonwealth states at the close of the UPR's first cycle revealed that a somewhat haphazard and uncoordinated approach undermined the quality of state reports and civil society's capacity to engage.[1007] Given the mechanism was a novelty for all parties at that point this is not surprising. Guidance for civil society was initially prepared based upon experience garnered during the UPR's first cycle (2008 – 2012).[1008] This and subsequent guidance focuses upon

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[1005] Philip Alston, 'Human Rights under Siege', (2017) 14 (25) SUR International Journal on Human Rights, 267-272.
[1006] UNHRC A/HRC/RES/5/1 (n 9), para 15 (a).
[1007] Sen (n 188) 12 and 21.
[1008] Connectas 'Road Map For Civil Society Engagement with the UPR (Draft Version)' http://www.upr-info.org/sites/default/files/general-document/pdf/roadmap_en_13.01.11.pdf produced by Connectus, an NGO based in Spain, www.conectas.org; Franciscans International 'UPR Follow-Up Strategy: Practical Advocacy Initiatives' http://www.upr-info.org/sites/default/files/general-document/pdf/upr_follow-up_strategy.pdf both last accessed 24 April 2014.

how to foster proactive engagement and good practice, suggesting how civil society could prioritise which UPR recommendations to focus on and encourage an SuR to follow up and implement, as well as holding the SuR to account.[1009] This guidance is well and good but depends upon the extent to which the SuR responds to the contact it receives from civil society. A useful and telling indicator would be a requirement that states include in the national report details of the number of CSOs that had been in contact with the SuR regarding follow up, whether the state had responded and in what terms. This would be an effective means of enhancing the content of the national report and its focus on implementation, as well as building communication between the state and civil society.

In order to strengthen the governance function of the UPR and to better promote the development of a dialogue between stakeholders within civil society, a further Human Rights Council resolution should be agreed to set consultation with civil society as a requirement to be undertaken by the government of the SuR. A requirement for the report to include details of such dialogue and consultation might assist in securing safer and uninterrupted passage of civil society representatives and human rights defenders to human rights advocacy and training and UPR Working Groups.

According to the UN Permanent Mission of Yemen in Geneva, Yemen will be engaging with the UPR and the government is keen to involve civil society in the preparation of the national report.[1010] The Permanent Mission reported that the government will 'continue consultations with civil society to achieve a balanced national report despite the war conditions in Yemen'.[1011] Although the intention may be for Yemen to consult with civil society ahead of its third cycle review, given the country is controlled by a Houthi government in some areas, and the Hadi government in others,[1012] it is unlikely that all civil

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[1009] OHCHR 'UPR (Third Cycle): Information and guidelines for relevant stakeholders' (n 229); OHCHR 'How to Follow Up on United Nations Human Rights Recommendations' (n 956); and UPR Info, The Civil Society Compendium: A comprehensive guide for civil society organisations engaging in the Universal Periodic Review' (UPR Info 2017), https://www.upr-info.org/sites/default/files/general-document/pdf/upr_info_cso_compendium_en.pdf last accessed 20 August 2018.
[1010] Riches 'email 03 June 2018' (n 768).
[1011] Riches 'email 03 June 2018' (n 768).
[1012] European Council on Foreign Relations, 'Mapping the Yemen Conflict' (n 90), a comparison of 2015 against 2017 indicates Houthi controlled areas as reduced in 2017 compared to 2015.

society representatives will have access to a consultation process,[1013] or that the consultation process will meet the 'broad' requirement with 'all relevant stakeholders'.[1014] As a result, principles of democratic governance may inevitably be compromised.

One interviewee was not optimistic about the contribution civil society can make for states in crisis where the UPR is concerned, stating:

> If you look at it from a state perspective, perhaps it's more appropriate to ask what can the other states use the UPR for. We [civil society] don't have a direct role in the working group, our influence has to be via states, and what is it that other states can use the UPR for, mindful that they can seek to encourage engagement with special procedures, encourage engagement with fact-finding missions are agreed and dispatched, as is the case at the moment with Yemen where the OHCHR is mandated to assist with a national process.

> So, looking at that broader situation, on the one hand the UN, but also the international community, what is it that that community can do to put pressure, to encourage, to help, to assist, whatever form the engagement can take to try and improve the human rights situation on the ground and improve adherence to its human rights obligations.[1015]

The second cycle national report of Yemen makes a number of references to civil society (20 in total), for example, in the context of steps taken to follow up on UPR recommendations in conjunction with civil society; the sharing of the draft report with cooperation from UN Development Programme and funding for workshops with civil society provided by the governments of Norway and Sweden; and the organising of a national dialogue and in relation to Yemen's first National Human Rights Conference held in December 2012.[1016]

This follows the pattern of other national reports; for example, Norway makes general reference to consultation with civil society in open meetings regarding its national report

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[1013] The United Nations Special Envoy for Yemen, Martin Griffiths, has been in consultation with the Houthi Government under-secretary Faisal Amin Abu-Rass, and representatives of the Hadi government, Associated Press, 'Saudi-led forces seize airport in Yemen city of Hodeidah' *The Telegraph* (16 June 2018) https://www.telegraph.co.uk/news/2018/06/16/saudi-led-forces-seize-airport-yemen-city-hodeidah/ last accessed 18 June 2018.
[1014] 'States are encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders', UNHRC A/HRC/RES/5/1 (n 9), para 15(a).
[1015] Interview CSO 02.
[1016] UNHRC 'National report: Yemen' A/HRC/WG.6/5/YEM/2 (n 832), paras 2, 4, 7 and 10 respectively.

and other matters, such as a report on the possible Norwegian ratification of the Optional Protocol to the Convention on the Rights of the Child on establishing an individual complaints mechanism.[1017] No specific CSOs, however, are cited as having been included in the consultation process. The third cycle national report for Argentina also gives a number of examples of consultation with civil society for example, the prevention of torture, discrimination, migrants, disabilities and freedom of expression.[1018] Again, no specific civil society organisations are named in the report. For civil society in other countries, the same opportunities are not afforded; Sohair Riad, for example, notes that in relation to Egypt the potential to get involved was significantly undermined by the Egyptian government.[1019]

There is divergence amongst civil society actors as to the future utility of the UPR both generally and in relation to states in crisis. Some disquiet and frustration was expressed by representatives of an international NGO whose work focuses on the Middle East and North Africa region,[1020] and representatives of other international NGOs expressed similar misgivings.[1021] On the other hand, there were two interviewees that discussed the UPR's potential for states in crisis to bring the deep and complex human rights challenges within Yemen to the international stage.[1022] Of these two interviewees, one was from an NGO that campaigns for freedom of expression in the Gulf region, the other from an organisation whose objective is to strengthen civil society and citizens across the world.[1023] A more general comment from a further interviewee was the potential for the UPR to invigorate the link between governments and civil society at the domestic level,[1024] crucial for states in crisis in terms of reconciliation and genuine communication and consultation to identify need and secure rights protection on the ground. For Yemen, this is further complicated by

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[1017] UNHRC 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Norway', A/HRC/WG.6/19/NOR/1, 03 February 2014, paras 4 and 11, see also paras 89, 112 and 113.

[1018] UNHRC 'National Report Argentina' A/HRC/WG.6/28/ARG/1 (n 543) paras 11, 103, 132, 148, 162, 184.

[1019] Sohair Riad, 'Local Media Coverage of the UPR: Egypt and Bahrain as Case Studies', Researcher, the Cairo Institute for Human Rights Studies, (publication date would appear to be circa 2013), http://www.arabstates.undp.org/content/dam/rbas/doc/DemGov/10b%20UPRmediaCoverage%20SR.docx last accessed 16 July 2016.

[1020] Interview CSO 01.

[1021] Interview CSO 05. Another interviewee expressed similar misgivings but asked for this to be removed from the transcript.

[1022] Interview CSO 03 and CSO 04.

[1023] Interview CSO 04 and CSO 03, respectively.

[1024] Interview CSO 03.

the influence, and interference, of Saudi Arabia with the government of Yemen and the freedoms afforded for civil society as well as rights protection more broadly.

7.4.2 Advocacy: reviewing states

Once the national report has been submitted there is a limited period of time before the Working Group during which the Geneva based INGO UPR Info hosts pre-sessions. These are designed to provide a forum within which civil society representatives and NHRIs have between five and seven minutes 'to share their assessment of the human rights situation in the country since the previous review' as well as progress on recommendations.[1025] Member State Permanent Missions to the UN are invited to attend pre-sessions and can ask civil society advocates questions to assist in formulation of recommendations to the relevant SuR.

Any representation civil society can make to reviewing states in the lead up to a state's review is crucial in terms of seeking to influence and shape recommendations and comments during an SuR's interactive dialogue. NGOs will draft recommendations and send them directly to reviewing states advocating for that state to make their recommendations at the particular state's review.[1026] It is apparent that the advocacy process involves some strategic engagement on the part of civil society, particularly global actors, to increase the likelihood of securing commitment from a reviewing state to make a recommendation identified by a civil society actor. During an informal conversation with an international NGO representative the author was informed that NGOs would often seek to lobby those smaller states that may be more open to influence.[1027] For some NGOs, the pre-sessions are considered to be one of the most effective forms of advocacy, alongside the stakeholder submission on the basis that permanent missions are highly unlikely to read all of the submissions made in respect of each state's review.[1028]

[1025] See the guide published at the end of the second cycle with the third cycle in mind: *UPR Info Pre-sessions: empowering human rights voices from the ground*, (UPR Info, Geneva 2016) https://www.upr-info.org/sites/default/files/general-document/pdf/pre-sessions_web.pdf and information stored here: https://www.upr-info.org/en/upr-process/pre-sessions both accessed 15 June 2018.
[1026] Interviews CSO 01, CSO 02, CSO 05, CSO 06 and informal conversations between the author and INGOs, January 2014.
[1027] As explained during an informal conversation with an INGO representative at the UPR's 14th session January 2014.
[1028] Interview CSO 01.

The associated costs and resources for attending pre-sessions in Geneva may limit an NGO's capacity to participate, particularly domestic civil society and even more so civil society in a state in crisis, although some funding is available.[1029] For these reasons, a community of practice is all the more important; if a joint submission has been made by a domestic NGO and a high(er) profile international entity, the latter may be better placed to attend and advocate at the pre-session.

Furthermore, there is no guarantee that civil society advocacy in the pre-session forum, or any other forum, will be translated by UN State Missions into recommendations. Nonetheless, the role of civil society to lobby and advocate to State Missions, and to provide reports and investigations by which those missions can become better informed of a state's human rights situation is pivotal. A more recent development has been the co-ordination of workshops within the territory of the country with a forthcoming UPR. This has been with the support of OHCHR and the UPR Fund for Participation aiming to create further links between civil society and strengthen its standing and the profile of issues within a particular state.[1030]

This approach continues to evolve as illustrated by the in-country workshop in May 2018 with CSOs ahead of Cambodia's third cycle review, scheduled during the same session as Yemen's third cycle review.[1031] These forums have the potential to play a strengthening role in shaping and securing the governance function of the UPR. Evidently, it is not feasible to organise such a session in Yemen at this time, but this is something that a post-conflict Yemeni civil society can work towards.

[1029] In particular, 'Voluntary Fund for Financial and Technical Assistance for the Implementation of the Universal Periodic Review', set up in response to UNHRC 'Establishment of funds for the universal periodic review' A/HRC/RES/6/17 (n 619).

[1030] Workshop on the UPR process for English Speaking African States, on 23 April to 24 April 2018, in Entebbe, Uganda, https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRTrustFunds.aspx last accessed 12 July 2018. A similar event in Cambodia in May 2018 is noted below.

[1031] 'Cambodian CSOs gear up for the third cycle', 24 May 2018, it is reported by UPR Info that on 09 and 10 May 2018, 80 participants joined the Civil society submission follow-up workshop, co-organised by Cambodian Center for Human Rights (CCHR), Office in Cambodia of the United Nations High Commissioner for Human Rights (OHCHR) and UPR Info in Phnom Penh, Cambodia https://www.upr-info.org/en/news/cambodian-csos-gear-up-for-the-3rd-cycle. The full report is available here: https://www.upr-info.org/sites/default/files/cambodia_activity_report_step_1.1.pdf both accessed 15 June 2018.

7.5 Recommendations, follow up and implementation: evolving practice

Human Rights Council resolution 5/1 provides that civil society has a role to play in follow up to the UPR.[1032] This role is evolving and individual NGOs are forging a follow up methodology, detailed below. In association with UPR Info, OHCHR is promoting a more coordinated and comprehensive approach to review preparation that integrates reporting on follow up both ahead of state's review and at the mid-term point.[1033] The renewed focus on implementation at the start of the UPR's third cycle, as outlined in chapter 5, has been said to have 'created a new momentum for constructive and cooperative engagement on the implementation of recommendations of international human rights mechanisms, including those emanating from the UPR'.[1034]

The role of civil society is arguably at its most effective in terms of follow up when a methodical approach is adopted, although not all CSOs will have the necessary resources. One interviewee for this study outlined the systematic and coordinated approach to follow up and implementation being adopted under her instruction at the INGO she works for.[1035] The interviewee outlined the approach for the different stages of the UPR process, explaining it was still embryonic. At the outset, prior to a particular state's Working Group, the INGO sends 'concrete' and specific recommendations to all member states to request it take these recommendations into account when formulating its UPR recommendations. Following a the review, the INGO identifies which recommendations remain under consideration by the state and, of those, which refer to specific action and will add value by being 'potentially transformative at the national level'.[1036] A letter is then sent to the state indicating why those recommendations are important and urging it to accept them. A letter is also sent to the recommending state, requesting it use its contacts with the embassy of the SuR to urge acceptance.

[1032] UNHRC A/HRC/RES/5/1 (n 9), para 33.

[1033] 'UPR Mid-term reporting - Optimising Sustainable Implementation: Good Practice for UPR Stakeholders, UPR Info 2018, https://www.upr-info.org/sites/default/files/general-document/pdf/upr_midterm_report_web_v1_high.pdf last accessed 21 August 2018.

[1034] UPR: Overview of the Voluntary Fund for Implementation', Office of the High Commissioner for Human Rights, undated document that covers the period 2002-2017, 5, https://www.ohchr.org/Documents/HRBodies/UPR/UPR_VF_for_Implementation.pdf accessed 09 July 2018.

[1035] Interview CSO 02.

[1036] ibid.

Following the formal adoption by the Human Rights Council of the Working Group report, the INGO reviews the final list of recommendations supported by the SuR and writes to the state suggesting it devise an implementation plan, referring not only to UPR recommendations, because 'in isolation… they're never going to be strong enough', but also to those recommendations made by treaty bodies and other mechanisms such as special rapporteurs.[1037] The interviewee reported that whilst this is a time-consuming process it goes beyond a more basic and less fruitful tick box approach, and that receiving letters back from states pays dividends and endorses the approach being taken. This approach is further evidence of the role of the UPR's governance capacity and its function as a site for cross-referencing and emphasis, thereby placing importance upon and legitimising, the work and governance function of other entities within the regime complex.

In 2017, UPR Info reported that the coming together of over one hundred activists resulted in joint stakeholder submissions supported by sixty-four civil society organisations to Thailand's second cycle UPR. Following Thailand's review 'in an unprecedented step, the coalition was invited to present [to the Thai government] their views on the recommendations Thailand received after their second UPR', and that the CSO coalition had 'noted a clear shift in the way the Government approached them'.[1038]

The evolving role of non-state actors in the implementation of UPR recommendations corresponds with the proposition of experimentalist governance, 'that such inclusiveness could improve implementation of standards or regulations, as implementation often is a local action'.[1039] Chapter 3 touched upon the concept of experimentalist governance which is premised upon the 'systematic and substantive inclusion of all relevant stakeholders, ranging from the most local to the international levels of action'.[1040] Experimentalist governance affords non-state actors a central rather than more peripheral role,[1041] meaning it is not a model directly suited to the UPR, but is cited here to emphasise the increasingly important role civil society as a non-state actor is playing regarding some states in the success of the UPR in terms of follow up and implementation.·

[1037] ibid.
[1038] UPR Info, Civil Society Compendium (n 1009) 14.
[1039] Sen (n 188) 12 and 21.
[1040] Nance and Cottrell (n 380) 285.
[1041] ibid 285-6, citing Sabel and Zeitlin (2010) (n 384).

Conclusion

Whilst non-state actors, individuals, and collectives have long influenced the changing or making of a country's laws, often this has been the result of activism whereby change is long coming and hard-fought for, sometimes with fatal consequences.[1042] The UPR offers a space in which change is lobbied for peacefully, and diplomatically, aligned with issues brought to the fore by civil society and given weight and global state-based endorsement via the recommending process. It has been said that 'the main challenge that the Human Rights Council and the NGO community faces is to move beyond participation of civil society in the work of the Council, to a true partnership between Member States and civil society'.[1043] Despite the concerns and criticisms levied at the UPR by various civil society actors interviewed for this study, the work of the organisations they represent by making stakeholder submissions, organising and/or contributing to parallel events, attending pre-sessions, etc. demonstrates some level of commitment to the UPR and is an endorsement of its legitimacy.[1044]

This chapter has illustrated examples of how partnerships are being formed and communication channels are being opened. There remains much to be achieved in this respect, particularly in relation to states in crisis where the existence of civil society is extremely fragile and in those states in which civil society and human rights defenders are subject to repression via travel bans and detainment.

Nonetheless, as evidenced in this chapter, domestic and international civil society continues to report upon the state of human rights in Yemen and make recommendations via stakeholder submissions, and in doing so forges links with other civil society actors to create communities of practice. The analysis in chapter 6 reveals that those recommendations and themes of concern that are documented in the OHCHR summary of stakeholder submissions

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[1042] Marianne Hester, Liz Kelly and Jill Radford (eds) *Women, violence and male power: feminist activism, research and practice* (Open University Press 1996).

[1043] OHCHR 'Handbook for civil society' (n 373) 91, quoting Ambassador Luis Alfonso de Alba of Mexico, First President of the Human Rights Council (2006-2007).

[1044] One civil society interviewee responded to the author's request to speak with some caution. She was mindful that the UPR is still a relatively young mechanism and was keen to be reassured that the task of this thesis was not to undermine the mechanism entirely, being of the mind that so much had been vested in the mechanism that it was too early for an overtly critical assessment.

are subsequently reflected in the recommendations received by the SuR. If a state declares to the world that it supports a recommendation, a civil society actor has a basis upon which to make a subsequent approach to the relevant state's authorities and request a progress report.

The UPR thus offers civil society a 'way in'. As one interviewee, a senior member of the OHCHR, explained when questioned about the role of civil society and the UPR for a state in crisis such as Yemen:

> It is a situation that is very chaotic and a situation of conflict… in very dire and difficult circumstances the UPR brings forward this element of being able to speak with the authorities; when you are from civil society and if you get there and you say you want to talk about torture, they will slam the door in your face and you will not be received by anyone. But if you say you want to see the people in the administration and want to talk about the situation relating to the implementation of the UPR, then in all likelihood you may be provided with the opportunity to speak with people.

> It may happen and it may be the case that they want to look good, particularly one year before the UPR, it may be that they want to look good, they want to show they have done something. So just this element of face saving and this element of being able to report on some changes will have an impact on civil society being able to do something about it. So on this account, yes, it will remain an excellent tool and it will be very helpful.[1045]

As such, the governance function of the UPR has the potential to facilitate and generate a new nexus between voice, entitlement and civil society and this is crucial in respect of the function of the UPR in relation to states in crisis. It can support the positioning of civil society as a key non-state actor both in terms of norm building and implementation as well as its position in relation to the state and to rights holders. At its most effective, the UPR can provide civil society with the means to access state authorities and be heard by government, contributing to global governance in a tangible manner.

To a lesser degree, there is a community of practice amongst those constituted to form part of the internal machinery of the UN, for example, diplomatic state missions to the UN, the

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[1045] Interview UN 01.

membership of the Human Rights Council, the Working Group troika of the UPR, and those parties external to the UN, such as civil society and the states themselves. Thus the networks both transcend the formal boundaries of the sovereign state and reinforce those boundaries. The operation of, and engagement with, such networks fosters cultural authority and legitimacy.

Finally, although civil society struggles to operate in Yemen, there is evidence that the UPR will give much needed voice to domestic and global civil society as part of the forthcoming UPR. As one interviewee, a Yemeni human rights defender now living in Western Europe as a political refugee commented, 'Yemenis feel there's no space for them; nobody can really defend them and speak for them'.[1046]

[1046] The interviewee went on to say 'As a Yemeni myself, I'm shocked when I hear from you because I'm surprised because at least someone from the international community cares to ask why this mechanism is not functioning in Yemen, can we really understand how this conflict is not progressing Yemen within the framework of the international bodies', interview HRD 01.

Chapter 8: Overall Conclusion

Introduction

Neil Walker observes that 'conceptual analysis and empirical inquiry alone can never solve normative problems. Yet they can help us to understand these problems more clearly, and to provide a better route map through the moral and political maze'.[1047] This sentiment reflects the motivation fuelling the questions posed in this thesis and the investigations conducted in the pursuit of answers to those questions.

Two objectives have driven this study: one, to conduct an empirical assessment of the function of the UPR through the conceptual lens of global governance and, two, to take a case study approach to explore the nature of the UPR's governance function for Yemen as a state in crisis. These objectives have mobilised an exploration of the impact on the legitimacy and authority of the UPR when states in crisis repeatedly have little tangible follow up and implementation progress to report since the previous UPR cycle.

In pursuit of the first objective, this thesis has adopted the research methods of conditional international law theory by taking the conceptual lens of global governance theory and applying it to the various components of the UPR as part of a critical investigation of its legitimacy and authority both generally and in the context of its current and potential function in relation to states in crisis. This has been a theoretical and practical application, the latter informed by empirical research via interviews and documentary analysis. This study has used aspects of global governance theory to conceptualise the global human rights framework as an 'international human rights regime complex'. It has evaluated the UPR's governance function as an entity that supports multi-directional interaction between the institutions that comprise that regime complex.

By assessing the conditions under which the UPR was created and investigating its conceptual and its real-world application, this study aligns with principles of conditional international law theory discussed in section 1.6 of the introductory chapter. However, given the nature of the UPR, the prescience of state actors and the role of civil society as a

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[1047] Walker (n 271) 1.

non-state actor, this thesis has gone beyond the scope international law, entering the territory of international relations, for example, in relation to matters of state practice and compliance and the nature of international organisations.

This study makes a number of findings and these are summarised below. Some are more general in terms of how the UPR functions as a global governance mechanism, others are more specific to states in crisis, particularly Yemen.

8.1 The UPR within an 'international human rights regime complex'

The conceptualisation of an 'international human rights regime complex' illustrates the pivotal role of the UPR as a mechanism operating in a multi-directional fashion, uniquely linking with each entity located within the regime complex. As noted in chapter 3, state actors may choose which of those entities within a regime complex to engage with according to perceived need.[1048] This freedom prompts positive and negative consequences in terms of rights protection. Adversely, a state's choice editing may lead to engagement with entities where it has positive action to report, or to use its UPR participation to absolve obligations to report to, for example, treaty committees. Constructively, such freedom might encourage engagement when there might otherwise be very little. In turn, it is possible that the quality of that engagement is enhanced as a result.

Of the states included in this study, there is strong evidence of engagement with a range of human rights monitoring entities, although the quality of that engagement varies and the ability to determine the success of one entity above another is difficult. As one interviewee observed:

> The UPR is never the only factor contributing to positive human rights change, but it can certainly be a significant contributing factor, particularly when it's integrated into bilateral relations and development plans, and so on.[1049]

The fact of universal engagement by UN member states with the UPR over the first decade of its life suggests it has emerged as a preferred mechanism within the international human

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[1048] Keohane and Victor (n 5) 15.
[1049] Interview CSO 06.

rights regime complex. This is despite the UPR's peer review aspect, which could be interpreted as amounting to a threat to the principle of non-interference by one state in the internal affairs of another.[1050] If an SuR considers a recommendation seeks to interfere in domestic affairs, it has the option of refusing to support it on that basis.[1051] Ultimately the UPR functions to reassert state sovereignty by placing the state at the centre of the review and affording the state the power and authority to decide what recommendations it will / will not support. The primacy of the state is also implicit by the move to encourage domestic parliaments to proactively engage with UPR follow up and implementation.[1052]

The UPR is a space within which politicisation, acculturation and the institutionalisation of human rights all impact upon state behaviour, as discussed in section 5.3 of chapter 5. The UPR is constituted to mitigate threats to the credibility of its operation that may result from these factors; the procedural parity that is staunchly adhered to seeks to promote and reinforce an international order that is supposed to be 'committed to the principle of the formal equality of sovereign States'.[1053]

8.2 The UPR's Claim to Legitimacy and Authority

8.2.1 Input (source) legitimacy, procedural legitimacy and authority

The UPR has a strong claim to input (source) legitimacy and procedural legitimacy and as such has a basis upon which to command authority and secure engagement by UN member states and stakeholders. Chapter 4 finds that the source legitimacy of the UPR is both normatively and legally sound. It does so by tracing the mandate of the General Assembly to devise institutions via the UN Charter and assessing the normative and legal foundations of the UPR under its founding instruments, namely Human Rights Council and General Assembly resolutions.

In determining the UPR's procedural legitimacy, chapter 4 addresses the modalities and documentation the review is based upon and the actors involved. It addresses the primary

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[1050] See sections 2.2 and 4.1.3 above.

[1051] '…the delegation expressed its regret that a number of States refused to abide by the principles of universal periodic review as stipulated in the Human Rights Council resolution 5/1. In this context, Syria was compelled to reject the recommendations of those states, as they represented flagrant interference in the internal affairs of an independent sovereign state', UNHRC 'Report of the Human Rights Council on its thirty-fourth session' A/HRC/34/2 (14 June 2018) para 459.

[1052] UNHRC 'Contribution of parliaments' (n 741) para 5.

[1053] Macklem (n 47) 49.

challenges to the UPR's procedural legitimacy. These variously include: politicisation of the recommendation process; routine procedural compliance displacing substantive compliance, risking descent into ritualism rather than robust assessment; and the prevalence of the bureaucratisation, institutionalisation and legalisation of human rights to the detriment of rights protection.

Each of these matters reveals the nuanced and complex interplay between the dynamics of law, politics and the social behaviour of state actors in the global arena, where geopolitical matters also have a bearing. As chapter 4 concludes, these risks are inherent with the UPR given it is an innately state-centric and political mechanism. Those factors, however, also come with some unforeseen and at times surprising benefits. There is evidence of states conceiving rights-based programmes sourced from non-political UPR recommendations, as indicated in chapter 5. Reciprocity drives states to review and engage with the human rights situation in neighbouring countries and related stakeholder submissions, taking heed and making recommendations accordingly. The institutionalisation of rights protection contributes towards strengthening public infrastructure and accountability. Arguably one of the strongest facets of the UPR's governance capacity is the emerging role played by civil society with a new and unique space for dialogue between states and NGOs being created, complementing and developing further the more expanded form of authority that characterises the UPR, as discussed in section 4.2 of chapter 4.

Although not all recommendations are supported, and not all recommendations lead to action, the process facilitates global norm dispersal and dissemination. Reviewing states implicitly endorse the principles and norms their recommendations refer to. Making a recommendation is a powerful public statement in an international and political setting and the longer-term acculturation practice this supports is significant. Importantly, the substance of a recommendation provides a reference point for the reviewing state and civil society to subsequently hold the SuR to account.

By illustrating the input (source) legitimacy and the procedural legitimacy of the UPR, this thesis demonstrates the UPR's governance function is not solely dependent upon its output legitimacy, commonly perceived as the follow up and implementation of recommendations, although this aspect does, of course, play a crucial part.

8.2.2 Output (substantive) legitimacy

Measuring and verifying the UPR's output (substantive) legitimacy is a challenging endeavour. Chapter 5 interrogated two challenges: firstly, how to measure output / action and, secondly, if there is action, how to determine the UPR as an influencer / cause. At a basic level, output includes recommendations made, the nature of those recommendations and the commitments given by SuRs in response.

The investigation of global governance theory in chapter 3 indicates an institution that issues or supports recommendations as part of its governance function is not within the realm of rule making and enforcement. There is thus an argument that compliance is not mandatory. However, the advent of the UPR's third cycle has renewed focus on follow up and implementation. Supporting recommendations suggests an SuR's commitment to rights protection, but the cyclical nature of the UPR soon exposes an absence of action; as the lifespan of the UPR progresses, substantive legitimacy will be determined by what states do with recommendations, not simply what they say they will do. To strengthen the UPR's longer-term global governance function, states need to construct recommendations requiring specific action.

During the first and second cycles, follow up was slow to take pace and few states and NGOs voluntarily reported at the mid-term on implementation, however, the OHCHR overview of the third cycle includes dates for submitting an implementation plan.[1054] In addition, CSOs are developing follow up methods that pursue avenues of diplomacy via the UPR by encouraging reviewing states to follow up directly with the relevant SuR. In addition, a change in state practice in some quarters to support fewer recommendations suggests UPR commitments are being treated more seriously.

Attributing a state's human rights achievements specifically to the UPR remains difficult. In UPR terms, state progress is communicated via UPR documents comprising the national report, the OHCHR compilation and the OHCHR summary of stakeholder submissions. Arguably, a biased national report is tempered by the OHCHR compilation and the OHCHR summary of stakeholder submissions. Each of these documents variously refers to and relies upon structural, process and outcomes indicators, generally supported by qualitative field-

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[1054] UPR Third Cycle 2017-2021 (2022) (n 38).

based research. However, limitations remain irreconcilable in terms of decisions as to what is reported upon, where investigations take place and what information takes precedence.

Chapter 6 illustrates improvement in process indicators for Yemen between the first and second cycles related to treaty reports, but this does not guarantee improvement in terms of outcome indicators. Where there appears to be progress, questions of knowledge creation via data collection, collection techniques, and the identification of relevance is pertinent as discussed in section 5.4, chapter 5. Data collection in states in crisis such as Yemen is sporadic, may be prone to duplication and may not produce sufficiently reliable conclusions.[1055] For those working in the field, qualitative data such as narrative interviews should complement fact-finding missions and inform conclusions reached.[1056]

8.3 UPR and states in crisis

This thesis makes certain findings for the specific global governance function of the UPR regarding states in crisis. Chapter 6 suggests states in crisis receive more recommendations than stable states, and that a higher number of states make recommendations to states in crisis. This indicates the UPR has an important function in terms of global diplomatic and political engagement with pressing human rights issues and challenges in countries where many of the most basic rights are severely lacking.[1057]

Analysis within chapter 6 confirms the OHCHR compilation and the OHCHR summary of stakeholder submissions are fertile sources of recommendations for reviewing states, although specific action does not always translate into the construction of UPR recommendations. This illustrates one aspect of the multi-directional character and function of the international human rights regime complex. It means matters of central concern for states in crisis are referred to across mechanisms. The UPR offers a unique textual and physical space in this respect; it allows recommendations made by an otherwise range of

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[1055] 'Report submitted by the independent expert on extreme poverty' E/CN.4/2004/43/Add.1 (n 717) 2, citing issues relating to duplication of records, to the cost of issuing identity documents resulting in the poorest people not receiving any, which in turn limits the capability of those people from accessing public services and being recorded as such.
[1056] Root (n 716) 356.
[1057] See section 6.5, chapter 6.

fragmented monitoring regimes to be collated in one place. The authority of other mechanisms is also asserted, in addition enhancing human rights norm dissemination.

A pertinent issue remains; the challenge states in crisis face when it comes to follow up and implementation. Chapter 6 acknowledges the UPR was not conceived as a first response mechanism in crisis situations. Yet state instability and significant human rights violations are generally preceded by some indication of a (human rights) crisis on the horizon; the deficit of rights protection in Yemen has obviously escalated significantly during the current war but chapter 6 analysis of first and second cycle documentation reveals warning of fragmentation, corruption, and widespread human rights violations indicating Yemen could quickly become the site of more significant and fundamental human rights suffering, as is now the case.[1058]

In this context, chapter 6 offers a word of warning of the need not just for actors within the UPR but, more generally, for UN monitoring mechanisms with a human rights governance function to consider how to more effectively take heed of information that should place relevant parties on notice of future risks to rights protection due to civil unrest and conflict. To criticise or rebuke the legitimacy of the UPR for the failure of a state in crisis to implement recommendations in this context would seem rather short-sighted.

8.4 UPR and civil society

Civil society's role is fundamental to the UPR's current and future success in monitoring and supporting implementation, and to counter the potential detrimental effects of ritual and ritualism.[1059] It therefore has a central governance role to play in developing and maintaining the UPR's legitimacy and authority. A key challenge is to strengthen civil society's relationship with member states.[1060] This is being encouraged through UPR pre-

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[1058] UNHRC 'Summary 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' A/HRC/WG.6/5/YEM/3 (19 February 2009); UNHRC 'Summary of stakeholder submissions: Yemen' A/HRC/WG.6/18/YEM/3 (n 17); UNHRC 'Compilation: Yemen' A/HRC/WG.6/5/YEM/2 (n 829); UNHRC 'Compilation: Yemen' A/HRC/WG.6/18/YEM/2.

[1059] Charlesworth and Larking '…the ability of the UPR to transcend ritualism and to function as an empowering regulatory mechanism depends heavily on effective NGO and civil society engagement in the process' (n 330) 16.

[1060] OHCHR 'Handbook for civil society' (n 373) 91, quoting Ambassador Luis Alfonso de Alba of Mexico, First President of the Human Rights Council (2006-2007).

sessions described in chapter 7, led by UPR Info and via workshops and consultations in certain states. These approaches are however *ad hoc* and civil society's capacity to contribute is far from consistent partly due to preventive action by SuRs including travel bans and reprisals.[1061]

At its most effective, the UPR is a forum for states in crisis and stakeholders to seek support from the international community and for CSOs to strengthen their presence and influence building communities of practice. The textual space created by stakeholder submissions and the physical space occupied by parallel events facilitates the creation, and enhances the function, of communities of practice making a positive contribution to the UPR's governance role for states in crisis.

The nature of the follow up methodology described by one interviewee has great potential for states in crisis in transition from conflict to peace. Any commitments of assistance made, for example, during Yemen's third cycle review in January 2019 will provide leverage for civil society to follow up. A recommendation is valid for at least five years, the length of the UPR cycle; in the interim period civil society can use those recommendations to garner support and resources from the international community and UPR funds.

Although the UPR does not afford civil society the same standing as treaty bodies do, it more formally endorses civil society's voice and tangible opportunities for open communication between states and CSOs encouraging transparency and contributing to important aspects of the UPR's global governance function have been emerging, lending weight and authority to CSOs as part of the follow up and implement process.

8.5 Recommendations

This section makes some final recommendations emanating from this study as a means to strengthen the governance function of the UPR in respect of all states, but particularly for those in crisis.

States currently have the option to submit a mid-term report, as section 2.3.3 of chapter 2 details, engagement with this is poor. A requirement to submit mid-term report would be sensible given the length of each UPR cycle is now five years. This would have the added

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[1061] See section 7.3, chapter 7, with regard to human rights defenders.

benefit of making UPR a live issue for states, rather than something to rush towards once a state's review is on the horizon. A Human Rights Council Resolution could: require states to devise and submit at the mid-term an implementation plan reporting on progress to date and ongoing implementation measures; require states to establish a specific mechanism tasked with UPR follow up; and encourage support for states with OHCHR country offices from other relevant institutions in the international human rights regime complex in a coordinated fashion, for example, with UNCTs playing an active and defined role.

Linked to this some states, such as Kenya, demonstrate good practice providing a comprehensive implementation plan.[1062] A pro forma matrix, based upon that used by Kenya, could be annexed to the Council resolution as guidance for presenting progress in a clear and comprehensive manner, citing the government department with responsibility for action and relevant partners / stakeholders, see the matrix for implementation, table 4 at appendix 3.

States have been instructed to directly refer to progress in their national report.[1063] In addition, states should be required to present their consultation methodology with the objective of enhancing communication and cooperation between non-state CSOs and state actors. Information should include timescale, geographical reach, actors involved, and action arising. This would provide a useful and telling indicator, enhancing transparency and revealing states where engagement is lacking. To improve the multi-directional nature of the international human rights regime complex, the SuR should respond directly in its national report to treaty body and other recommendations cited in the OHCHR compilation where those recommendations have not been accommodated in UPR recommendations of the previous cycle.

It is important that the Human Rights Council provides clear guidance as to what 'cases of persistent non-cooperation' might include.[1064] For example, this could amount to repeated instances of an SuR preventing civil society from attending training and advocacy or failing to integrate consultation with civil society into UPR preparations. The iterative and cyclical

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[1062] Kenya 'Office of the Attorney General and Department of Justice: Universal Periodic Review Second Cycle Implementation Plan 2015 – 2019' https://www.upr-info.org/sites/default/files/general-document/pdf/kenya_2nd_cycle_final_matrix_2016.pdf last accessed 27 August 2018.
[1063] OHCHR 'Guidance Note' (n 218) 1-2.
[1064] UNHRC A/RES/5/1 (n 9) para 38.

nature of the UPR exposes those states whose actions repeatedly fail to reflect their words. Through such exposure the risks of ritual and ritualism are greatly reduced, however, the Council has a more robust role to play in this respect not only regarding persistent non-cooperation but also via its regular sessions. Under agenda item 6, a standing item on the agenda, the Working Group reports of states reviewed during the previous UPR session are formally adopted. At this juncture, states confirm their position in respect of previously noted recommendations. The Council should signal when a state's response falls short of the expected human rights standards under treaty law and other relevant human rights instruments and principles of customary law, rather than allowing the response by states to pass by unnoticed.[1065]

The UPR's cooperative approach could more effectively include sharing good practice between states. Currently, good practice is highlighted in various publications,[1066] but there is no guarantee that states in need of support would access them. Better awareness raising amongst state delegations, potentially during a parallel event for the delegation, would assist in this respect.

Emerging state practice suggests a reviewing state has a vested interest in the SuR's response as the example of Mexico calling the UK to account in chapter 5, section 5.3.4, shows. This should be encouraged, particularly where states in crisis are concerned; it provides a means of enhancing follow up but could encourage support and capacity building for the state in crisis.

One interviewee observed that compared to the treaty bodies, the UPR is 'easier for the media to digest, it's that one day of the year that your country's being reviewed'.[1067] Research indicates however that mainstream media coverage of the UPR is low.[1068] If the UPR can attract more widespread domestic and global media coverage it will expose those states that lack sincerity and that use the UPR as a 'one-stop' for human rights monitoring at the expense of engagement with other entities. It will also assist in bringing to the fore the

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[1065] See section 5.5.3, chapter 5.
[1066] UPR Info 'Butterfly Effect' (n 463).
[1067] Interview CSO 05.
[1068] Sarah Joseph, 'Global Media Coverage of the Universal Periodic Review Process' in Charlesworth and Larking (n 3).

deep and complex geopolitical factors that have a severe impact on human rights protection in states in crisis such as Yemen.

The deadline for stakeholder submissions some six months before the Working Group means that reports may well be in need of updating, particular in unstable situations that characterise many states in crisis. Consideration should be given as to how an update could be accepted in the weeks before the scheduled review, whilst still allowing time for translation.

8.6 Final conclusions

The primary focus of this study has been a critical appraisal of the governance function of the UPR in relation to states in crisis; a crucial related question therefore is, what might a cessation of the UPR mean for those states?

This would present a blow for Yemen. It is the site of a complex geopolitical conflict described as having created the world's worst humanitarian crisis, a crisis that has been grossly under-reported in western media.[1069] As chapter 7 concludes, without the UPR Yemen would be denied dedicated time with global elites and the international community, under the watch of global media, where the sole focus is the human rights situation at a time when matters are otherwise under-reported, reports amended and access to Council regular sessions seemingly blocked. A fundamental strength of the UPR is the space and voice it affords to the people of Yemen via global and domestic civil society, that is otherwise being all but silenced and overlooked and the opportunity for the government of Yemen to reach out to the international community. In addition, it creates a space that makes publicly available other states' views of Yemen's crisis.

The UPR has a potentially unifying effect as a confluence where multiple sources of information and actors are collated. The universal scope of its subject matter means human rights monitoring and reporting is not siloed and those issues that are most pertinent to the SuR come to the fore. Conversely, some issues are only touched upon; there is insufficient time or expertise for in-depth discussion and interrogation that characterises treaty body

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[1069] Guterres (n 169).

reviews.[1070] What this does mean is that the UPR complements other mechanisms as per its design, whilst also affirming those mechanisms designed to assess in depth and detail, namely treaty committees and special procedures, via the OHCHR compilation document.

Without the UPR the UN would lose a singular mechanism that all states have engaged with and have voluntarily subjected their internal affairs to transparent international scrutiny in an unprecedented manner. On the premise that UPR recommendations are largely sourced from other UN human rights mechanisms, as chapter 6 suggests, to deny the UPR legitimacy and authority because states in crisis repeatedly fail to implement recommendations risks the entire UN human rights framework. The threat to the UPR's legitimacy comes less from states in crisis and more from those strong and stable states that have the means, resources and public infrastructure to improve rights on the ground but seek not to. It comes also from those states that use the UPR to absolve the state of its reporting obligations to other mechanisms and to congratulate allies for their achievements in full knowledge of ongoing rights violations and repression.

On a final closing note, the situation in Yemen as with other states in crisis, has been the subject of discussion in other UN organisations. As chapter 6 explains, there have been eight Security Council Resolutions addressing Yemen since 2011, seven Human Rights Council Resolutions, five Human Rights Council reports and more recently the group in independent experts appointed in 2017 to investigate allegations of human rights violations in Yemen since September 2014 has published its findings.[1071] This report contains allegations of potential war crimes committed by the Saudi-led coalition and highlights the role of the UK and the US in advising and supporting the coalition, making a plea to the international community to refrain from providing arms that could be used in the conflict in Yemen.[1072]

With such a complex array of international organisations, state actors and non-state actors, it is not surprising that the reach of the UPR is limited for states in crisis. The UPR's strength may only come to bare for a state such as Yemen during post conflict peace building when

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[1070] The author of this study witnessed a far greater level of detail in terms of scrutiny and questioning during Germany's treaty review in relation to the Convention on the Rights of the Child, Geneva, January 2014.
[1071] UNHRC 'Situation of human rights in Yemen' A/HRC/39/43 (n 1104).
[1072] ibid para 18 and 112(b).

rights protection and promotion on the ground will be fundamental to building a resilient state for the future.

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APPENDICES

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Appendix 1: Figure 1 - Compliance with UPR reporting – 3rd cycle sample - 27th session (Apr-May 2017)

State under Review	State reported submitted for 3rd cycle (Y/N)*	Date of report	stakeholder submissions summary 3rd cycle (Y/N)	State report for 1st cycle**	State report for 2nd cycle**
Algeria	Yes	20.02.17	Yes	Yes (18.04.08 - post-WGS) Review 14.04.17	Yes (14.04.12) Review 29.05.12
Bahrain	Yes	13.02.17	Yes	Yes (11.03.08) Review 07.04.08	Yes (30.03.12) Review 21.05.12
Brazil	Yes	27.02.17	Yes	Yes (07.03.08) Review 11.04.08	Yes (07.03.12) Review 25.05.12
Ecuador	Yes	07.04.17 (available in Spanish only)	Yes	Yes (07.04.08 - day of WGS) Review 07.04.08	Yes (08.03.12) Review 21.05.12
Finland	Yes	16.02.17	Yes	Yes (18.03.08) Review 09.04.08	Yes (07.03.12) Review 23.05.12
India	Yes	23.02.17	Yes	Yes (06.03.08) Review 10.04.08	Yes (08.03.12) Review 24.05.12
Indonesia	Yes	20.02.17	Yes	Yes (11.03.08) Review 09.04.08	Yes (07.03.12) Review 23.05.12

Morocco	Yes	20.02.17	Yes	Yes (11.03.08) review 08.04.08	Yes (08.03.12) Review 31.05.12)
Netherlands	Yes	27.02.17	Yes	Yes (07.03.08) Review 15.05.08	Yes (08.03.12) Review 31.05.12
Philippines	Yes	01.05.17 (available English only)	Yes	Yes (07.03.08) Review 11.04.08	Yes (19.03.12) Review 29.05.12
Poland	Yes	27.02.17	Yes	Yes (07.03.08) Review 14.04.08	Yes (08.03.12) Review 30.05.12
South Africa	Yes	11.04.17 (post-deadline but translations available)	Yes	Yes (15.04.08 - day of WGS) Review 15.04.08	Yes (07.03.08) Review 31.05.12
Tunisia	Yes	20.02.17	Yes	Yes (11.03.08) review 08.04.08	Yes (30.03.12) Review 22.05.12
UK	Yes	24.02.17	Yes	Yes (06.03.08) Review 10.04.08	Yes (08.03.12) Review 24.05.12

* information taken from http://www.ohchr.org/EN/HRBodies/UPR/Pages/CyclesUPR.aspx

** information taken from https://www.upr-info.org/en/review

Yemen	Third cycle pending January 2019 (no documents on OHCHR website as of 27 August 2018)	Yes (20.02.09) Review 11.05.09	Yes (08.11.13) Review 29.01.14

National Human Rights Institutions (NHRIs)

Human Rights Council – regular and special sessions / special procedures

International human rights treaties and treaty committees

Civil society (international, regional and domestic)

Universal Periodic Review

United Nations Country Teams

The State: Judiciary, Legislature, Executive and emanations of the state

Regional HR Conventions and related courts

Other treaties (e.g. ILO Convention No. 169 (Rights of Indigenous Peoples)
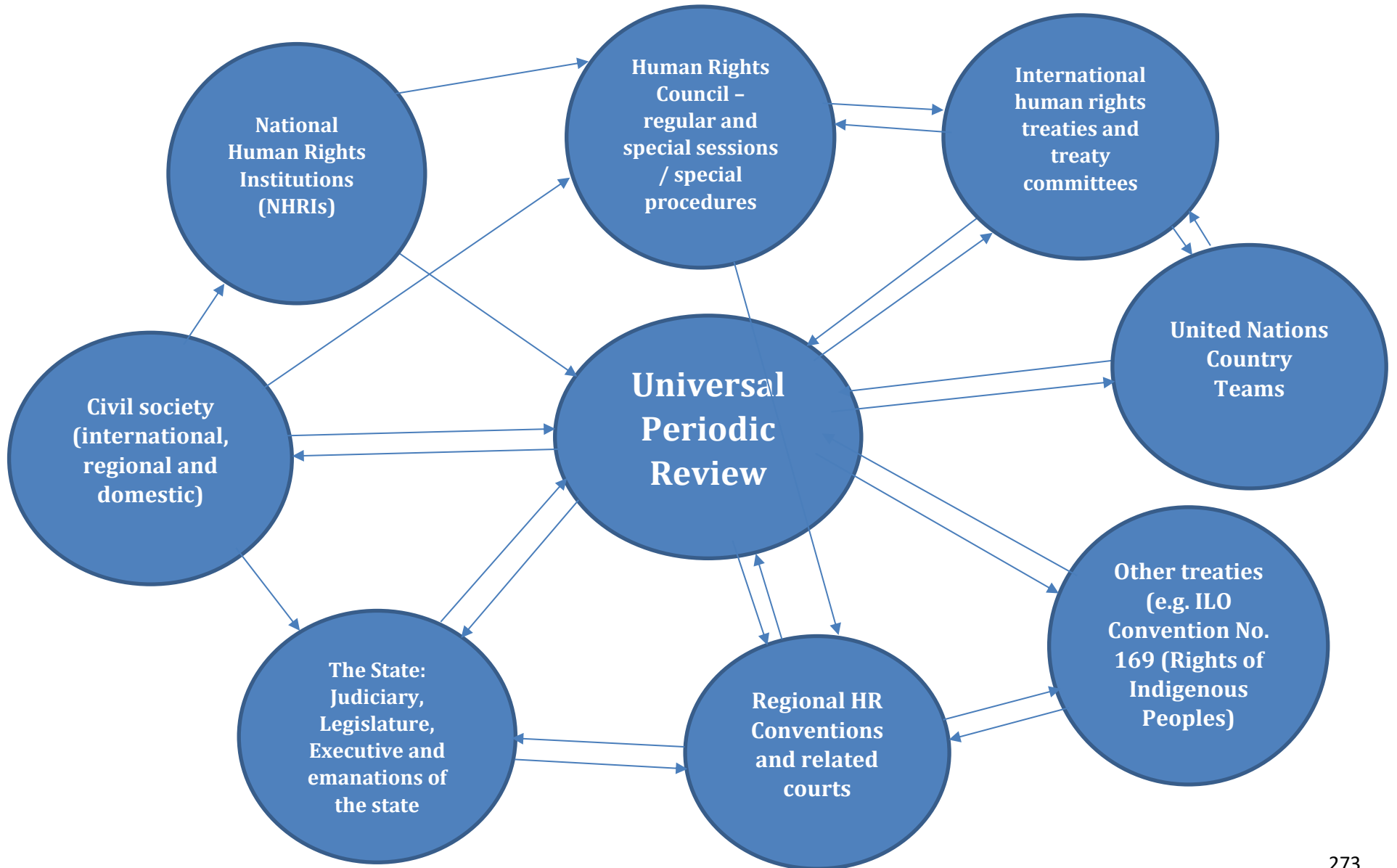
Appendix 3: Figure 3 - Levels of state engagement with the UPR

Implementation
by next review

Consultation with
stakeholders

Submits interim report

Consults with and responds to
CSOs during follow up

Supports recommendations

Responds to comments and advance questions
during interactive dialogue

Attends working group session

Submits national report

Appendix 4: Figure 4 - Matrix for Implementation[1073]

Rec. Number	Recommendation	Specific Action by Government	Indicators/Data to Track Progress of Implementation	Government Body Responsible	Potential Partners	Time Frame

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[1073] This is based upon Kenya's matrix, 'Office of the Attorney General and Department of Justice: Universal Periodic Review Second Cycle Implementation Plan 2015 – 2019', Kenya, https://www.upr-info.org/sites/default/files/general-document/pdf/kenya_2nd_cycle_final_matrix_2016.pdf last accessed 27 August 2018.

Country	Treaty Description	Treaty Name	Signature Date / Accession (a)
Yemen	Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment	CAT	05 Nov 1991 (a)
Yemen	Optional Protocol of the Convention against Torture	CAT-OP	
Yemen	International Covenant on Civil and Political Rights	CCPR	09 Feb 1987 (a)
Yemen	Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty	CCPR-OP2-DP	
Yemen	Convention for the Protection of All Persons from Enforced Disappearance	CED	
Yemen	Convention on the Elimination of All Forms of Discrimination against Women	CEDAW	30 May 1984 (a)
Yemen	International Convention on the Elimination of All Forms of Racial Discrimination	CERD	18 Oct 1972 (a)
Yemen	International Covenant on Economic, Social and Cultural Rights	CESCR	09 Feb 1987 (a)
Yemen	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	CMW	
Yemen	Convention on the Rights of the Child	CRC	13-Feb-90 / 01-May-91
Yemen	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	CRC-OP-AC	02 Mar 2007 (a)
Yemen	Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	CRC-OP-SC	15 Dec 2004 (a)
Yemen	Convention on the Rights of Persons with Disabilities	CRPD	30-Mar-07 / 26-Mar-09

[1074] This appendix refers to information exported from the ratification status pages of the OHCHR website, 'Status of Ratification: Interactive Dashboard' http://indicators.ohchr.org/ last accessed 14 May 2018.

Appendix 6: Action category 5 recommendations to Yemen 2nd cycle[1075]

SuR	Rgrp	Org	Recommendation	RS	Rgrp	Org	Response	Action	Issue	Session
Yemen	Asia	OIC, AL	Ratify the Rome Statute of the ICC	Botswana	Africa	AU, Commonwealth	Supported	5	International instruments, Justice	18
Yemen	Asia	OIC, AL	Ratify the Rome Statute that Yemen signed in 2000 and align legislation with all the obligations related to this text	France	WEOG	EU, OIF	Supported	5	International instruments, Justice	18
Yemen	Asia	OIC, AL	Ratify the Rome Statute and take necessary measures to ensure its implementation in the national legislation	Switzerland	WEOG	OIF	Supported	5	International instruments, Justice	18
Yemen	Asia	OIC, AL	Ratify/accede to the Rome Statute of the International Criminal Court and to implement it fully at national level and to accede to the Agreement on Privileges and Immunities of the Court	Slovakia	EEG	EU	Supported	5	International instruments, Justice	18
Yemen	Asia	OIC, AL	Ratify the Rome Statute of the International Criminal Court and fully align its legislation with all obligations under the Rome Statute, including incorporating the Rome Statute definition of crimes and general principles,	Latvia	EEG	EU	Supported	5	International instruments, Justice	18

[1075] Exported from UPR Info: Database of Recommendations (n 125).

			as well as adopting provisions enabling cooperation with the Court							
Yemen	Asia	OIC, AL	Lift the reservations to article 29 (1) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	Belgium	WEOG	EU, OIF	Supported	5	International instruments, Women's rights	18
Yemen	Asia	OIC, AL	Become party to the Convention on the Elimination of All Forms of Discrimination against Women	Australia	WEOG	PIF, Commonwealth	Supported	5	International instruments, Women's rights	18
Yemen	Asia	OIC, AL	Adopt national legislation prohibiting all domestic violence and discrimination in law and in fact against women and girls	Republic of Congo	Africa	AU, OIF	Supported	5	Rights of the Child, Women's rights	18
Yemen	Asia	OIC, AL	Establish in law a minimum age for marital consent to put an end to early marriages of young girls	Spain	WEOG	EU, OEI	Supported	5	Rights of the Child, Women's rights	18
Yemen	Asia	OIC, AL	Revise the law on marriage so that women and men are treated with equality in the state of marriage	Chad	Africa	AU, OIC, OIF	Supported	5	Women's rights	18
Yemen	Asia	OIC, AL	Adopt the new law proposing a minimum marital age as a matter of urgency and prohibit forced marriages in all cases	Norway	WEOG		Supported	5	Rights of the Child, Women's rights	18

Yemen	Asia	OIC, AL	Amend the Personal Status Law to bring it into conformity with international standards, that protection of women from domestic violence and investigations of violence within families be ensured, and forced marriage be prohibited in all cases	Czechia	EEG	EU	Supported	5	Women's rights	18
Yemen	Asia	OIC, AL	Amend the Press and Publication Act by repealing provisions that curtail journalists' rights and prescribe excessive penalties	Lithuania	EEG	EU	Supported	5	Freedom of the press	18
Yemen	Asia	OIC, AL	Finalize the procedures of submitting the Bill on Human Trafficking to Parliament for discussion and the adoption at the earliest possible time	Bahrain	Asia	OIC, AL	Supported	5	Trafficking	18
Yemen	Asia	OIC, AL	Establish in the new Constitution guarantees in the field of human rights and implement a national strategy for human rights, supported by the creation of a national human rights institution in conformity with the Paris Principles	France	WEOG	EU, OIF	Supported	5	National Human Rights Institution	18
Yemen	Asia	OIC, AL	Establish an independent national human rights institution in line with the Paris Principles and by strengthening results-based human rights	Germany	WEOG	EU	Supported	5	National Human Rights Institution	18

			monitoring throughout the country							
Yemen	Asia	OIC, AL	Establish promptly a national human rights institution in conformity with the Paris Principles	Nicaragua	GRULAC	OAS, OEI, ACS	Supported	5	National Human Rights Institution	18
Yemen	Asia	OIC, AL	Adopt legislation, strategies, national action plans and initiatives and establish committees on human rights	Jordan	Asia	OIC, AL	Supported	5	General	18
Yemen	Asia	OIC, AL	Establish and implement a comprehensive action plan to further improve and promote women's rights	Republic of Korea	Asia		Supported	5	Women's rights	18
Yemen	Asia	OIC, AL	Disseminate human rights culture through training and awareness programs to the benefit of the law enforcement officials and to all segments of Yemeni society	Morocco	Africa	OIC, AL, OIF	Supported	5	Human rights education and training	18
Yemen	Asia	OIC, AL	Strengthen its cooperation with the special procedures of the Human Rights Council by responding positively to the pending visit requests and eventually consider extending a standing invitation to all the special procedure mandate holders	Latvia	EEG	EU	Supported	5	Special procedures	18

Yemen	Asia	OIC, AL	Revise its death penalty legislation so that it complies with ICCPR and particularly to ensure that the death penalty does not apply to minors	Slovenia	EEG	EU	Supported	5	Death penalty, International instruments, Rights of the Child	18
Yemen	Asia	OIC, AL	Put an end by law to death by stoning and reduce the number of crimes that are punishable by the death penalty, excluding the death penalty for crimes related to drugs	Spain	WEOG	EU, OEI	Supported	5	Death penalty	18
Yemen	Asia	OIC, AL	Reduce the number of crimes punishable by the death penalty in conformity with the International Covenant on Civil and Political Rights, to which Yemen is party	Belgium	WEOG	EU, OIF	Supported	5	Death penalty, International instruments	18
Yemen	Asia	OIC, AL	Suspend executions of persons whose age is subject to doubt, having in mind the establishment of a special commission to determine the age of accused suspected of being a minor at the time of commitment of the crime	Spain	WEOG	EU, OEI	Supported	5	Death penalty, Rights of the Child	18
Yemen	Asia	OIC, AL	Fully implement the adopted action plan on the recruitment of children to the armed forces and take into consideration the relevant recommendations made by the Secretary-General in his annual report on children and armed conflict	Slovenia	EEG	EU	Supported	5	International humanitarian law, Rights of the Child	18

Yemen	Asia	OIC, AL	Continue activities to protect and promote the rights of children by taking steps - such as implementing the Action Plan on Child Soldiers - to eliminate the unlawful recruitment and use of child soldiers	United States	WEOG	OAS	Supported	5	International humanitarian law, Rights of the Child	18
Yemen	Asia	OIC, AL	Take effective action to end gender-based discrimination, to ensure full protection of women's right, including by ending harmful practices such as female genital mutilation (FGM), and to criminalize domestic violence, including sexual abuse and martial rape	Germany	WEOG	EU	Supported	5	Rights of the Child, Torture and other CID treatment, Women's rights	18
Yemen	Asia	OIC, AL	Publish clear instructions on the use of force during protests in compliance with international human rights standards and ensure that the training of law enforcement personnel incorporates best human rights practices	Czechia	EEG	EU	Supported	5	Freedom of association and peaceful assembly, Human rights education and training, International instruments	18
Yemen	Asia	OIC, AL	Establish an effective national monitoring system to ensure that throughout the process detainees are protected by the minimum safeguards for those deprived of their liberty, as provided for by international law	Mexico	GRULAC	OAS, OEI, ACS	Supported	5	Detention	18

Yemen	Asia	OIC, AL	Establish a commission to investigate the alleged human rights violations in 2011 and ensure that all perpetrators are brought to justice	United Kingdom	WEOG	EU, Commonwealth	Supported	5	Justice	18
Yemen	Asia	OIC, AL	Conduct an independent, transparent and objective investigation to improve the human rights situation through the Commission of Inquiry	Maldives	Asia	OIC, Commonwealth	Supported	5	Justice	18
Yemen	Asia	OIC, AL	Put into operation this important mechanism, the Commission of Inquiry, including by expediting the appointment of its members to look into the 2011 events and bring those who committed human rights violation to account	Thailand	Asia	ASEAN	Supported	5	Justice	18
Yemen	Asia	OIC, AL	Install a proper reconciliation and transitional justice framework in conformity with international standards and good practice and in line with the recommendations of the National Dialogue Conference and the report of the UN High Commissioner on Human Rights, including effective legislation on transitional justice and the appointment of members in the independent commission to investigate	Netherlands	WEOG	EU	Supported	5	Human rights violations by state agents, Justice	18

			allegations of human rights violations committed by Government security forces during the events of 2011							
Yemen	Asia	OIC, AL	Put an end to any form of discrimination against women, both in practice and in legislation, particularly those remaining in the Code of Personal Status	Belgium	WEOG	EU, OIF	Supported	5	Women's rights	18
Yemen	Asia	OIC, AL	Implement the recommendation of its National Dialogue Conference to set the minimum marriage age at 18 years in line with its obligation under the Convention on the Rights of the Child to take measures with a view to abolishing practices detrimental to the health of children	Netherlands	WEOG	EU	Supported	5	International instruments, Right to health, Rights of the Child	18
Yemen	Asia	OIC, AL	Take effective measures to end the practice of early, forced and child marriage, including by setting a minimum marriage age of 18 years for both genders	Germany	WEOG	EU	Supported	5	Rights of the Child, Women's rights	18
Yemen	Asia	OIC, AL	Adopt and implement legislation setting the minimum age of marriage at 18 years, as recommended by the National Dialogue Conference, and raise awareness of the negative effects of child marriage	Ireland	WEOG	EU	Supported	5	Human rights education and training, Rights of the Child	18

Yemen	Asia	OIC, AL	Incorporate the proposed recommendation of the National Dialogue Conference, to set the minimum age for marriage at 18 years for men and women equally in the Yemeni legislation	Libya	Africa	AU, OIC, AL	Supported	5	Rights of the Child	18
Yemen	Asia	OIC, AL	Take all necessary measures to protect journalists, particularly by prosecuting perpetrators of violence or intimidations against them	France	WEOG	EU, OIF	Supported	5	Freedom of the press	18
Yemen	Asia	OIC, AL	Promptly investigate any continued allegations of child, early and forced marriage, especially in the case of young girls, and undertake measures to prevent girls from being forced to withdraw from school	Canada	WEOG	OAS, OIF, Commonwealth	Supported	5	Right to education, Rights of the Child, Women's rights	18
Yemen	Asia	OIC, AL	Implement all the recommendations of the UN Committee against Torture	France	WEOG	EU, OIF	Supported	5	Torture and other CID treatment, Treaty bodies	18
Yemen	Asia	OIC, AL	Implement the guidance and the recommendations of the National Conference on Human Rights, which took place from 9 to 10 December 2012	Republic of Congo	Africa	AU, OIF	Supported	5	Other	18
Yemen	Asia	OIC, AL	Ratify OP-CAT	Denmark	WEOG	EU	Noted	5	Detention, International instruments, Torture and other CID treatment	18

Yemen	Asia	OIC, AL	Ratify, as a priority, the UN Convention against Transnational Organized Crime and the Protocols thereto, as well as the Rome Statute of the ICC, and consequently to fully align its national legislation with all obligations under the Rome Statute	Slovenia	EEG	EU	Noted	5	International instruments, Justice, Trafficking	18
Yemen	Asia	OIC, AL	Sign and ratify the Optional Protocol to ICESCR and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure	Portugal	WEOG	EU, OEI	Noted	5	ESC rights - general, International instruments, Rights of the Child	18
Yemen	Asia	OIC, AL	Ratify the International Convention for the Protection of All Persons from Enforced Disappearance, the Rome Statute and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Tunisia	Africa	AU, OIC, AL, OIF	Noted	5	Detention, Enforced disappearances, International instruments, Justice, Torture and other CID treatment	18
Yemen	Asia	OIC, AL	Become party to the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women	Australia	WEOG	PIF, Commonwealth	Noted	5	International instruments, Women's rights	18
Yemen	Asia	OIC, AL	Ensure full compliance with international standards on the death penalty, but ultimately establish a moratorium with a	Australia	WEOG	PIF, Commonwealth	Noted	5	Death penalty, International instruments	18

			view to ratifying the Second Optional Protocol to ICCPR							
Yemen	Asia	OIC, AL	Issue a standing invitation to all mandate holders of the Human Rights Council	Tunisia	Africa	AU, OIC, AL, OIF	Noted	5	Special procedures	18
Yemen	Asia	OIC, AL	Impose a moratorium on the death penalty with a view to abolishing the capital punishment. Further with regards to numerous cases of juvenile offenders facing the death penalty	Czechia	EEG	EU	Noted	5	Death penalty	18
Yemen	Asia	OIC, AL	Announce a moratorium on the death penalty with a view to its eventual abolition. Pending this, Germany recommends taking appropriate steps to reduce its application, to respect international minimum standards and, in particular, to ensure that the death penalty is not imposed on persons under the age of 18 at the time of infringing penal law. Due process of law should be guaranteed in all judicial proceedings	Germany	WEOG	EU	Noted	5	Death penalty, Rights of the Child	18
Yemen	Asia	OIC, AL	Establish a moratorium on the use of the death penalty with a view to its abolition and, in the meantime, immediately stop imposing the death penalty on anyone under the age of 18	Lithuania	EEG	EU	Noted	5	Death penalty, Rights of the Child	18

Yemen	Asia	OIC, AL	Establish immediately a moratorium on the death penalty as a first step towards the complete abolition of the capital punishment	Switzerland	WEOG	OIF	Noted	5	Death penalty	18
Yemen	Asia	OIC, AL	Establish an official moratorium on the use of the death penalty	Montenegro	EEG		Noted	5	Death penalty	18
Yemen	Asia	OIC, AL	Impose a moratorium on the execution of death sentences	Sweden	WEOG	EU	Noted	5	Death penalty	18
Yemen	Asia	OIC, AL	Implement a moratorium on the use of the capital punishment with a view to its abolition	Portugal	WEOG	EU, OEI	Noted	5	Death penalty	18
Yemen	Asia	OIC, AL	Abolish the death penalty for all persons considered as minors under international law	Switzerland	WEOG	OIF	Noted	5	Death penalty, Rights of the Child	18
Yemen	Asia	OIC, AL	Introduce an immediate moratorium on executions with the intention of abolishing the death penalty and improve methods to accurately determine the ages of all defendants, such as by improving birth registration rates	United Kingdom	WEOG	EU, Commonwealth	Noted	5	Death penalty, Statelessness and the right to nationality	18
Yemen	Asia	OIC, AL	Adhere to the global trend against the capital punishment by establishing, as a first step, a moratorium on its use	Poland	EEG	EU	Noted	5	Death penalty	18

Appendix 7: Table 7 - OHCHR compilation report: references to treaty bodies, treaty body recommendations and recommendations of other institutions, and related second cycle recommendations received[1076]

Compilation report reference	UPR second cycle recommendation made
Committee against Torture (CAT) invited Yemen to ratify ICRMW and CPED	Yes, Philippines (ICRMW) (noted).
UNCT recommended ratifying CPED	Yes, Argentina (supported), Tunisia (noted)[1077]
CERD encouraged to consider ratifying ICRMW	Yes, Philippines (noted)
UNCT recommended ratifying OP-CEDAW and OP-CAT	Yes OP-CEDAW - Australia (noted) OP-CAT – Denmark, Tunisia (noted)
CAT recommended ratifying OP-CAT and making the declarations envisaged under articles 21 and 22 of the Convention	Yes, Denmark, Tunisia (noted)
UNCT and the Human Rights Committee (HR Committee) encouraged to ratify ICCPR-OP 2 and ICCPR-OP 1	ICCPR-OP 1 – no ICCPR-OP 2 – Australia, Uruguay (noted)
CESCR and UNCT urged to ratify OP-ICESCR	Yes, Portugal (noted)
UNCT urged to expedite ratification of OP-CRC-IC	Yes, Portugal (noted)

[1076] UNHRC 'Compilation: Yemen' A/HRC/WG.6/18/YEM/2 (n 804).
[1077] This recommendation also included ratifying OP-CAT and may have been noted on that basis.

CAT and OHCHR urged to consider ratifying the Rome Statute of the International Criminal Court	Yes, recommended by: Botswana, Republic of Korea, France, Slovenia, Switzerland, Slovakia, Uruguay, Latvia, and Australia (supported)
CRC and UNCT encouraged to ratify the UN Convention against Transnational Organized Crime and the Protocols thereto	Yes, Slovenia (noted)
UNHCR recommended that Yemen fulfil its 2011 pledge to accede to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness	No
CRC urged Yemen to finish harmonizing its legislation with OP-CRC-SC	No
Deputy High Commissioner regretted that the appointment of members of the Commission of Inquiry into the 2011 events was still pending	Linked, Maldives, Netherlands, UK, Thailand (all supported)
Ratify Rome Statute of the International Criminal Court	Yes, recommended by: Botswana, Republic of Korea, France, Slovenia, Switzerland, Slovakia, Uruguay, Latvia, and Australia (supported)

Compilation report reference	UPR second cycle recommendation made
Yemen ratify CPED	Yes, Argentina (supported), Tunisia (noted)[1079]
Yemen ratify Rome Statute of the International Criminal Court	Yes, recommended by: Botswana, Republic of Korea, France Switzerland, Slovakia, Uruguay, Latvia, and Australia
Yemen enhance cooperation with the UN, including by implementing the recommendations of the treaty bodies, the universal periodic review, the special procedures and the Secretary-General on children and armed conflict	Yes, recommended by: Montenegro
Yemen take immediate action to end attacks against civilians and civilian targets by security forces, in full compliance with its obligations under international human rights law particularly those concerning the use of firearms	Yes, recommended by: Mexico
Yemen refrain from any action intended to deprive the population of basic services such as electricity, fuel and water	No

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[1078] UNHRC Compilation A/HRC/WG.6/18/YEM/2 (n 804).
[1079] This recommendation also included ratifying OP-CAT and may have been noted on that basis.

Appendix 9: Table 9 - OHCHR Stakeholder summary and related second cycle recommendations (sample)[1080]

Stakeholder reference	UPR second cycle recommendation made
Become a party to OP-CEDAW (Amnesty International (AI))	Yes, Australia (noted)
Remove reservations to Article 29(1) of CEDAW (AI and others)	Yes, Belgium (supported)
Ratify the international human rights instruments including OP-ICESCR, ICCPR-OP 1, ICCPR-OP 2, OP-CEDAW, OP-CAT, ICRMW and CRPD (JS5)	Yes, Australia (ratify OP-CEDAW) (noted); Denmark and Tunisia (ratify OP-CAT) (noted); Portugal (ICCPR-OP 1) (noted); Uruguay and Australia (ICCPR-OP 2) (noted); Philippines (ICRMW) (all noted). Linked, Djibouti (supported);[1081] Qatar (supported).[1082]
Ratify the Rome Statute of the International Criminal Court (Human Rights Watch (HRW))	Yes, Australia, Botswana, France, Latvia, Republic of Korea, Switzerland, Slovakia, Slovenia, Tunisia, Uruguay (all supported)
Ratify UNESCO Convention against Discrimination in Education (JS3)[1083]	No
Repeal amnesty law guaranteeing impunity for those responsible for violations committed during the 2011 adopted in 2012 (Alkarama / AI)	No
Amend laws regarding journalists and human rights activists (JS5)	Yes, Lithuania, Canada (both supported)

[1080] The stakeholder summary also contains reference to matters of concern raised, including the lack of independence of the judiciary, concern about the existence of a Specialized Press and Publications Court tasked with trying all press offences since May 2009, UNHRC 'Stakeholder summary: Yemen' A/HRC/WG.6/18/YEM/3 (n 17).
[1081] 'Continue the efforts in the field of the promotion and protection of the rights of vulnerable groups of the population, particularly children, women and persons with disabilities'
[1082] 'Continue the support, care and the rehabilitation of disabled persons and those with special needs, and continue to support them directly or through associations and specialized rehabilitation centres'
[1083] 'JS' refers to a recommendation having been made as part of a joint submission between two or more CSOs, often a combination of international, regional and domestic NGOs. The coding used here follows the stakeholder summary for ease of cross referencing.

	Linked, United States;[1084] France;[1085] Colombia;[1086] Lithuania;[1087] (all supported)
Full equality between men and women - bring all laws, practices, policies and procedures into conformity with international human rights law and standards (AI and JS5)	Yes, Chad, Switzerland (supported)
Adopt legislation to criminalize the practices of persecution, exclusion and discrimination against the Muhammasheen and to develop policy measures (JS1)	No
Produce urgent legal measures and related policies to stop the cultural violence that lead to Muhammasheen displacement (JS1)	No
Establish an independent, impartial and thorough commission of inquiry, with international experts and assistance, to investigate human rights violations committed prior to 2011 (AI)	Yes, Maldives, Netherlands, UK, Thailand (all supported)
Hope that Yemen be invited to establish a mechanism to monitor the implementation of recommendations of treaty bodies, in coordination with all stakeholders (JS3)	Linked, Montenegro;[1088] Republic of Korea;[1089] (supported)
Issue a standing invitation to the UN Special procedures, particularly to the Special Rapporteur on Human Rights Defenders (HRD's), Special Rapporteur	Yes, Tunisia (noted) Linked, Latvia[1090] (supported)

[1084] Recommendation states 'Bolster the investigation of cases of gender-based violence and violence against journalists', extracted from UPR Info: Database of Recommendations (n 125).
[1085] 'Take all necessary measures to protect journalists, particularly by prosecuting perpetrators of violence or intimidations against them', ibid.
[1086] 'Take appropriate measures to ensure the lives and security of journalists and human rights defenders'
[1087] 'Ensure prompt and effective investigation of intimidation and threats against journalists'
[1088] 'Enhance cooperation with the United Nations treaty bodies system and special procedures, through implementation of the recommendations of the treaty bodies and the universal periodic review'
[1089] 'Establish and implement a comprehensive action plan to further improve and promote women's rights'
[1090] '…eventually consider extending a standing invitation to all the special procedure mandate holders'

on Freedom of Expression, and Special Rapporteur on Freedom of Peaceful Assembly and Association (JS2 and JS3)	
Protect women and girls from domestic violence and investigate all cases; ensure that forced marriages are prohibited in all circumstances; in the case of the marriage of a child under the age of 18, Yemen must establish that the child gives full, free and informed consent and has sufficient mental capacity to fully comprehend the consequences and obligations of marriage and that they are not forced to drop school (AI and JS5)	Domestic violence: Yes, Belgium; Czech Republic; Germany; Lithuania; Republic of Congo; Spain; Thailand (supported) Forced / child marriage: Yes, Belgium; Canada; Denmark; Ecuador; Germany; Guatemala; Ireland; Italy; Japan; Libya; Lithuania; Mexico; Netherlands; Norway; Spain; Vietnam (supported)
In 2009, human rights organizations and activists organized campaigns to demand the minimum age of marriage be raised to 18. This led to a bill raising the minimum age for girls to 17. However, this bill has not yet been signed by the President of the Republic. President to sign it urgently (JS5)	No specific reference
Honour crimes against women and honour killings are widespread - repeal mitigating factors, lower standards, and lessened sentences currently in the Penal Code for honour killings; pass laws to criminalize honour crimes (JS5)	No specific reference to honour crimes
Criminalize the practice Of FGM and enforce articles 41 and 42 of the Penal Code (JS5)	Yes, Botswana; Uruguay; Guatemala; Germany; Spain; Italy; Thailand (all supported)[1091]

[1091] References in recommendations to ending / eradicating harmful traditional customs / practices and direct reference to FGM in recommendations from

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