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Using Universal Periodic Review Recommendations in UK Courts

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Introduction

1. This article is the first to demonstrate how the United Nations Universal Periodic Review (UPR) recommendations can be used in UK domestic law and courts. The UPR is a cyclical review of UN member states' human rights obligations. It is unique because it involves states (rather than judges or experts) scrutinising and making recommendations to one another on how they can improve human rights on the ground. These recommendations are then subject to a process of follow-up in the subsequent review, which will occur four to five years later when the state can then be scrutinised about their implementation of recommendations made in the previous cycle. The UPR was set up as an international political process, and as a consequence legal practitioners may be unaware of the UPR, or at least unfamiliar with its relevance to their work. Indeed, it has almost never featured in reported case law in England and Wales.[1] Yet, scholars have come to appreciate the UPR as more than just a diplomatic ritual with no legal consequence, and recent initiatives have sought to engage with the legal profession to understand how the UPR may contribute to their work.[2]

2. This article examines how UPR recommendations could be used in UK courts. We intend, foremost, for this to have practical utility for legal practitioners in this jurisdiction who will be exposed to the UPR and the value of recommendations, and potentially for those in other common law states. We provide practitioners with an understanding of the nature of UPR recommendations and the necessary tools so that they may find, analyse and apply them in court as they see fit. The analysis in this article has been limited to the construction of the metaphorical toolkit to use UPR recommendations in UK courts specifically, rather than ranging across the

[1]For case law references to date, see Amna Nazir, Alice Storey and Jon Yorke, 'The Universal Periodic Review as Utopia' in Damian Etone, Amna Nazir and Alice Storey (eds), *Human Rights and the UN Universal Periodic Review Mechanism: A Research Companion* (Routledge 2024).

[2]'The UPR and the Legal Professions – A discussion on how members of the legal profession can utilise the UN's Universal Periodic Review' (*Mountford Chambers*, 2023) <https://www.mountfordchambers.com/the-upr-and-the-legal-professions-a-discussion-on-how-members-of-the-legal-profession-can-utilise-the-uns-universal-periodic-review/> accessed 4 July 2024; 'Side Event: Contribution of legal professions to the UPR' (*UPR Info*, 2023) <https://www.upr-info.org/en/news/side-event-contribution-legal-professions-upr> accessed 4 July 2024.

wider case studies of how the UPR impacts various aspects of international human rights law or has helped shape human rights policy in different jurisdictions. The literature in this area is vast[3] but ultimately does not really help with the practicalities of how the UPR may be used in UK courts. We do not offer guidance as to the likelihood of success or failure were UPR recommendations to be used in a particular area of practice. The individual practitioner knows their field best. However, as scholars of the UPR process, we identify how recommendations can be used both as a source to identify what international human rights law is, or ought to be and as a statement, in respect of the recommendations made to the UK, in relation to how international law ought to be interpreted and what the position of the government is with respect to current and future obligations.

3. Where and how UPR recommendations can be used in UK courts is also important in addressing the broader scholarly debate, some of which is touched on below, on the legal status of UPR recommendations. What international human rights law is and what it ought to protect is something that has always been contested, and the UPR's universality makes it an important body for assessing the evolution of human rights law. More broadly, we see this as an opportunity further to reveal the evolving nature of the UPR[4] and to engender an understanding of it as a *legal* as well as political process. The UPR process is structured to incentivise changes in a state's domestic law and policy, and the follow up of recommendations from the previous cycles is designed to incentivise changes in state behaviour. Part of that involves the domestic legal system, which can help scrutinise at the domestic level the fulfilment of a state's international human rights obligations. The way that domestic jurisdictions have used the work of treaty bodies has been the subject of previous research.[5] What has not been examined before is how the UPR can be used in domestic courts. To these ends, this article proceeds as follows.

4. Part 1 is an overview and discussion of the UPR and, more importantly, the recommendations made during the process. A firm grasp of these matters is necessary to appreciate the domestic legal significance of UPR recommendations. Part 2 turns to consider recommendations *in aggregate*. We propose that groups or strings of recommendations can be used to (1) identify or interpret the rules of customary international law and (2) reveal the existence of international practice in a particular area. We explain how this exercise can be done with reference to the recommendations

[3]Kate Gilmore et al, 'The Universal Periodic Review: A Platform for Dialogue, Accountability, and Change on Sexual and Reproductive Health and Rights' (2015) 17 *Health & Human Rights Journal* 167; Sarah Tufano, 'The Holy Trinity of the United Nations Universal Periodic Review: How to Make an Effective Recommendation Regarding Women's Rights' (2018) 21 University of Pennsylvania Journal of Law & Social Change 187. See also some of the studies presented in James Gomez and Robin Ramcharan (eds), *The Universal Periodic Review of Southeast Asia: Civil Society Perspectives* (Palgrave Macmillan 2018).

[4]Kathryn McNeilly, 'The Universal Periodic Review as an Evolving Process' in Damian Etone, Amna Nazir and Alice Storey (eds), *Human Rights and the UN Universal Periodic Review Mechanism: A Research Companion* (Routledge 2024).

[5]See Shaha Alam, 'Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study' (2006) 53 Netherlands International Law Review 399; Rachel Murray and Christian De Vos, 'Behind the State: Domestic Mechanisms and Procedures for the Implementation of Human Rights Judgments and Decisions' (2020) 12 Journal of Human Rights Practice 22.

database maintained by UPR Info.[6] A consideration of how customary international law is applied in the UK then reveals the utility of this exercise in domestic courts. Part 3 then explains the role of *individual* recommendations. A single recommendation, we suggest, may be applicable in domestic law in two ways: (1) as an interpretative aid for human rights treaties and (2) as the basis of a legitimate expectation. Both methods and their relevance in domestic law are explored in turn. We also explain how to find applicable recommendations using the UK's UPR reports. Finally, in part 4, we review the importance of these insights and the necessity for lawyers and judges to consider the relevance of the UPR in their work.

1. Understanding the UPR and recommendations

5. Every four-and-a-half years, a UN member state will undertake its UPR. Conducted by a working group of the UN Human Rights Council, the UPR is a peer-review mechanism whereby states scrutinise the fulfilment of one another's human rights commitments.[7] This is informed by a national report, submitted by the state under review, submissions by stakeholders (typically civil society organisations), and the findings of other UN mechanisms and agencies. During a UPR working group, the state under review will begin by presenting its national report; this is typically self-congratulatory and will present a mostly positive picture of human rights in the state. This is followed by an 'interactive dialogue' whereby the state receives recommendations from peers and an opportunity to relay preliminary responses. This dialogue, along with a full list of recommendations, is formally compiled in its working group report. These can be found on each country page.[8] These recommendations are a significant product of the UPR and necessitate further discussion before we can appreciate their utility in domestic law. It is necessary to (a) define recommendations with reference to relevant UN resolutions, (b) typify recommendations as they appear in practice, and (c) consider how their significance has been understood to date. Each of these matters is now dealt with in turn.

1.1 Defining recommendations

6. Recommendations are not explicitly described in the 2006 UN General Assembly resolution setting up the HRC.[9] They are instead contained in HRC Resolution 5/1 which establishes the principles and modalities of the UPR.[10] This states that.

[6]'UPR Info Database' (*UPR Info*, 2024) at <https://upr-info-database.uwazi.io/en/> accessed 4 July 2024.
[7]The basis of this review is the corpus of international human rights law that has emerged primarily since the advent of the United Nations in 1945: the UN Charter, the Universal Declaration of Human Rights, treaties to which the state is a signatory, any voluntary commitments made by the state, and applicable humanitarian law. See UN Human Rights Council, 'Resolution 5/1 Institution-building of the United Nations Human Rights Council' (2007) UN Doc A/HRC/5/1, para 1.
[8]'Universal Periodic Review – United Kingdom of Great Britain and Northern Ireland' (UN Human Rights Council 2024) <https://www.ohchr.org/en/hr-bodies/upr/gb-index> accessed 4 July 2024.
[9]UN General Assembly, Resolution 60/251 'Human Rights Council' (2006) UN Doc A/RES/60/251.
[10]UN Human Rights Council, 'Resolution 5/1 (n 7).

> [r]ecommendations 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 […] 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.[11]

7. Notable is that states have a choice whether to 'support' or 'note' each recommendation, the latter implying no commitment to implement.[12] In any case, failing to implement a UPR recommendation does not entail any punitive consequence or other international sanctions.[13] Rather, as emphasised by the then UN High Commissioner for Human Rights and groups such as the International Commission of Jurists, implementation should be assessed in subsequent UPR cycles.[14] Recommendations could thus be categorised as 'soft law', in a similar fashion to the findings of other UN bodies (yet, this is perhaps an unhelpful label and posits recommendations as being in some way less important or effective compared with 'hard law', such as treaties).[15]

8. Nevertheless, it is clear that UPR recommendations were intended to be different from the outputs of other processes, such as recommendations from treaty bodies to state parties about the implementation and interpretation of human rights treaties. The 2006 General Assembly Resolution says that the UPR 'shall complement and not duplicate the work of treaty bodies' and whilst UPR recommendations have helped reinforce and support treaty bodies there is not much evidence of conflict between the two processes.[16] Additionally, whilst the coverage of treaty bodies relies on the prior ratification of states, the UPR is a mechanism with universal coverage. The principle of universality is central to the UPR and is realised in two ways. First, all states are subject to the UPR and, in practice, no state to date has failed to engage with the UPR – this means that all necessary reports have been submitted, and every state has participated in the interactive dialogues. Second, all states' human rights obligations are open to scrutiny. Recommendations may therefore pertain to any and all human rights concerns. As will be seen in part 2 of this article, this breadth of coverage enables the UPR to be used as a tool for identifying customary international law and existing state practice.

[11]ibid 32–33.

[12]On the difference in level of implementation of supported and noted recommendations, see 'Beyond Promises: The Impact of the UPR on the Ground' (*UPR Info*, 2014) <https://upr-info.org/sites/default/files/documents/2014-10/2014_beyond_promises.pdf> accessed 4 July 2024.

[13]This has been understood as a necessary compromise to secure full engagement with the process by all UN member states: see Edward McMahon and Marta Ascherio, 'A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council' (2012) 18 Global Governance 231, 234.

[14]'International Committee of Jurists Position Paper on the Review of the Human Rights Council' (International Committee on Jurists 2011) <http://www.icj.org/wp-content/uploads/2012/06/ICJ-humanrightscouncil-advocacy-2011.pdf> accessed 4 July 2024.

[15]Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99 AJIL 581.

[16]Valentina Carraro, 'Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies' (2019) 63 International Studies Quarterly 1079; Ibrahim Salama, 'Proliferation of Treaty Bodies or Expansion of Protection?' (2011) 105 Proceedings of the Annual Meeting: American Society of International Law 515.

9. Nevertheless, the repetitive process of following past recommendations from cycle to cycle is similar to other scrutiny processes and gives a form of reputational pressure and sanction to the entire process.[17] There are a number of other peer review processes run by international organisations, such as the International Monetary Fund's (IMF's) Financial Sector Assessment Program (FSAP) and the OECD Working Group on Bribery set up to monitor the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business, all of which issue recommendations and can follow up on states' performance in implementing those recommendations.[18] Peer review processes in international law gain their legitimacy in part through their proceduralism, their own internal rules on how the reviews are conducted, and in how they ensure the procedural equality of states as they participate in the process, both as the state under review and as they conduct a review of other states.[19]

1.2 Typifying recommendations in practice

10. The lack of explicit definition in HRC Resolution 5/1 has meant that states have significant flexibility as to the language and content of the recommendations they make. Normally, a decision will be made by a recommending state following careful reflection upon, inter alia, the aforementioned documents submitted to inform the review, conversations with civil society, its relationship with the recipient state as well as its own human rights practices. The latter reflects that it would be unwise for a state to make recommendations to peers to improve an area of rights if its own performance in that area is poor. As a state-led exercise, it is also unsurprising that some recommendations can be politically charged, and in some circumstances do not concern human rights at all.[20]

11. Their inherent diversity makes it difficult to identify a 'typical' recommendation, but by way of example, we can refer to the most common category of recommendation, which are those relating to treaty obligations. Notably, the UK has been recommended at all four of its reviews to date to 'Ratify the International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families'

[17]For descriptions of this see Jane Cowan, 'The Universal Periodic Review as Public Audit Ritual: An Anthropological Perspective on Emerging Practices in the Global Governance of Human Rights' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press 2015); Elvira Domínguez-Redondo and Edward R McMahon, 'More Honey Than Vinegar: Peer Review as a Middle Ground Between Universalism and National Sovereignty' (2014) 51 Canadian Yearbook of International Law/*Annuaire canadien de droit international* 61.

[18]Georgios Dimitropoulos, 'Compliance Through Collegiality: Peer Review in International Law' (Max Plank Institute Luxembourg Working Paper 3, 2014) <https://www.mpi.lu/fileadmin/mpi/medien/research/Dimitropoulos_Compliance_through_Collegiality_WPS_3_2014.pdf> accessed 4 July 2024.

[19]See Valentina Carraro and Hortense Jongen, 'Leaving the Doors Open or Keeping Them Closed? The Impact of Transparency on the Authority of Peer Reviews in International Organizations' (2018) 24 Global Governance 615.

[20]For instance, see UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: United Kingdom of Great Britain and Northern Ireland (2023) UN Doc A/HRC/52/10, para 43.110, recommendation by Venezuela to 'cease the use of the justice system for the continued and shameless theft of the 31 tons of gold belonging to the Central Bank and the Venezuelan people, which prevents their social investment'. On politicisation and the UN Human Rights Council and UPR more generally, see Rosa Freedman and Ruth Houghton, 'Two Steps Forward, One Step Back: Politicisation of the Human Rights Council' (2017) 17 HRLR 753.

(ICRMW).[21] From this, we can identify that a recommendation will usually have an 'action' (in this case 'ratify') and an object (the ICRMW). Notably, UPR Info's database, which will be deployed on various occasions in this article, uses a system developed by Edward McMahon to categorise recommendations based on their action.[22] Recommendations classed as category five will often use legal verbs such as 'abolish', 'adopt' or 'implement', and recommendations classed as category four will also have similar terms such as 'ensure', 'guarantee' or 'take action'.[23] By contrast lower action categories of recommendations, such as category two, contain words 'emphasizing continuity' from the state under review such as 'continue', 'maintain' or 'sustain', which are broadly about non-action from state parties and the continuance of existing practices.[24] This system will be revisited later as it can be used for identifying recommendations that may evidence the emergence of customary international law.

1.3 The significance of recommendations

12. Scholars have foremost understood the UPR as having primarily political (non-legal) significance. Hence, work to date has sought to reveal the significance of the UPR recommendations by looking at their ability to promote peer pressure,[25] name and shame,[26] or facilitate the mobilisation of civil society.[27] Recommendations' *legal* significance, however, has been comparatively less explored. This is perhaps unsurprising. Formalist theories on the sources of international law would likely not consider the UPR a law-making process, or that recommendations could be used as a source of international law.[28] Nevertheless, UPR reports have been used by UK courts as an authoritative source on the human rights record of a country. The Divisional Court in *R(AAA) v Home Secretary*, the judicial review of the government's 'Rwanda policy' of deporting asylum seekers to claim asylum in Rwanda, heard from the Home Secretary's counsel that 'in the July 2020 "Universal Periodic Review" the UNHCR described the 2014 Law relating to Refugees as "fully compliant with international standards"'.[29] The Court noted that in the UPR Outcome report there was nothing of 'concern of the order that might prompt the conclusion that Rwanda could not be relied on to comply with its obligations under the Refugee Convention'.[30] What the rest of this

[21]See the UK's four Working Group Reports in 2008, 2012, 2017 and 2022 (n 8).
[22]'UPR Info's Database: Action category' (*UPR Info*, 2014) <https://www.upr-info.org/sites/default/files/general-document/2022-05/Database_Action_Category.pdf> accessed 7 July 2024.
[23]ibid.
[24]ibid.
[25]Damian Etone, 'Theoretical Challenges to Understanding the Potential Impact of the Universal Periodic Review Mechanism: Revisiting Theoretical Approaches to State Human Rights Compliance' (2019) 18 Journal of Human Rights 36.
[26]Rochelle Terman and Erik Voeten, 'The Relational Politics of Shame: Evidence from the Universal Periodic Review' (2018) 13 Review of International Organizations 1.
[27]Michael Lane, 'The Universal Periodic Review: A Catalyst for Domestic Mobilisation' (2023) 40 Nordic Journal of Human Rights 507.
[28]Frederick Cowell, 'What Is the UPR? Thinking About the UPR as a Source of International Law' in Damian Etone, Amna Nazir and Alice Storey (eds), *Human Rights and the UN Universal Periodic Review Mechanism: A Research Companion* (Routledge 2024).
[29]*R (AAA) v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin), [2023] HRLR 3 [55].
[30]ibid [70].

article demonstrates is that recommendations contained in the outcome report can go beyond an authoritative description of a country's human rights commitments or practice. They can, in a number of ways, have legal significance in domestic law.

2. Using UPR recommendations in aggregate

13. This section principally concerns how multiple UPR recommendations, which have been made to a number of different countries across UPR cycles, can be used in two different ways to establish a proposition about international human rights law in court. First, as set out in section 2.1, chains of recommendations can be used to identify the rules of customary international human rights law and help clarify the emergence of new norms, or the interpretation of existing established norms. Second, as set out in section 2.2, chains of accepted and noted recommendations can be used to evidence the existence of international practice in a particular policy area. Whilst not necessarily legal, this can help establish what a commonly accepted mechanism for discharging a legal obligation is or establish what the outer limits of state conduct may be in a particular area. Both scenarios involve using recommendations in aggregate, which means identifying linguistically similar recommendations that cover the same subject area and then extrapolating an appropriate conclusion from this general trend. There are specific rules for identifying custom, which are outlined further below, but identifying a practice means simply identifying a chain of recommendations.

14. Methodologically both ways of using UPR recommendations require identifying a number of recommendations, which can be easily accomplished using a database, like that developed by UPR Info,[31] and then assessing among both accepted and noted recommendations common linguistic trends. As noted above, the classification methodology devised by Edward McMahon divides recommendations into five categories based on the level of action required by the recommendation and the words used in relation to that action. Recommendations classed as category five will often use legal verbs such as 'abolish', 'adopt' or 'implement', and recommendations classed as category four will also have similar terms such as 'ensure', 'guarantee', or 'take action'.[32] By contrast lower action categories of recommendations, such as category two contain words 'emphasizing continuity' from the state under review such as 'continue', 'maintain' or 'sustain', which are broadly about non-action from state parties and the continuance of existing practices.[33] There have been a number of criticisms made of this type of classification system, not least because it does not distinguish the different types of states making and accepting recommendations, but also because it does not really distinguish the object or subject matter of the recommendation, focusing instead on

[31]'UPR Info Database' (n 6).
[32]'UPR Info's Database: Action category' (n 22).
[33]ibid.

action expected from the state party.[34] There is some basis to this as on particular issues, such as the laws surrounding marriage or the death penalty, states can in general be resistant to an international body or international human rights law and human rights institutions interrogating these issues. However, identifying what states are expected to do from a recommendation in terms of substantive action is a way of usefully matching recommendations together in order to examine general trends of recommendations. It is helpful perhaps not to view these categories as rigidly fixed and even though recommendations of action categories four and five may be the most relevant for the identification of custom, recommendations of action categories two and three may be of relevance for the purposes of establishing accepted international practice. Both means of using recommendations are now discussed in turn.

2.1 Using recommendations to identify customary international law

15. A rule of customary international law is traditionally identified, as Conclusion Two of the International Law Commission's (ILC) Draft Conclusions on the Identification of Customary International Law sets out by 'ascertain[ing] whether there is a general practice that is accepted as law (*opinio juris*)'.[35] The general principle regarding the application of customary international law was that from 'time to time' it formed part of English law.[36] In *Kuwait Airlines Corporation v Iraqi Airways Company* the House of Lords expanded on this, noting that the courts should give effect to clearly established principles of international law but that the acceptability of a provision of foreign law must be judged by contemporary standards.[37] There has been extensive consideration of customary international law in relation to particular types of disputes, particularly in relation to the doctrine of state immunity and employment law.[38] However, in other areas, customary international law's application by UK courts has limited the general proposition that customary international law automatically gives rise to equivalent justiciable standards under English law, with customary international criminal law being subject to the principle of *nullum crimen sine lege* (there is no crime unless expressly stated by law) by the courts.[39] As James Crawford summarises it, the position is not that 'custom forms part of the common law (how can foreign states of whatever legal tradition make the common law?)' but rather that it is a source of law that the courts can draw upon as required.[40] In relation to

[34]Subhas Gujadhur and Marc Limon, 'Towards the Third Cycle of the UPR: Stick or Twist' (Universal Rights Group 2016) <https://www.universal-rights.org/urg-policy-reports/towards-third-cycle-upr-stick-twist/> accessed 22 July 2024.
[35]International Law Commission, 'Draft Conclusions on Identification of Customary International Law' (2008) UN Doc A/CN.4/L.908, conclusion 2.
[36]*Trendtex Trading Corp Ltd v Central Bank of Nigeria* [1977] 1 All ER 881.
[37]*Kuwait Airways Corp v Iraqi Airways Co and others* [2002] UKHL 19, [2002] 2 AC 883 [28]; *Oppenheimer v Cattermole* [1976] AC 249, 278.
[38]Schona Jolly KC and Joshua Jackson, '*Buttet v United Kingdom*: A Missed Opportunity for the Court to Clarify the Relationship Between State Immunity and Article 6 ECHR in the Context of Employment Answering the Unresolved Question' [2022] EHRLR 469.
[39]*R v Jones and Milling* [2006] UKHL 16, [2007] 1 AC 136. For an analysis of the consequences of this case see Patrick Capps, 'The Court as Gatekeeper: Customary International Law in English Courts' (2007) 70 MLR 458.
[40]James Crawford, *Brownlie's Principles of Public International Law* (8th ed, OUP 2012) 68.

international human rights law, Lord Sumption in *Rahmatullah* set out where customary international law could be directly applied by UK courts as being 'the interpretation of ambiguous statutory provisions, guide the exercise of judicial or executive discretions'.[41] As Lord Sumption went on to outline, even though in such cases 'courts are not bound … to take account of international law' they are 'entitled to do so if it is appropriate and relevant', especially in the context of policy areas which are 'influenced by international law'.[42]

16. For the purposes of a claim involving the UPR recommendations therefore it would be necessary to establish that it was relevant to the interpretation of human rights law domestically and that it is appropriate to draw on an aggregate of UPR recommendations in establishing custom because recommendations represent existing practice of states. Both the ILC's Draft Conclusions and the International Law Association report on the formation of custom have identified that statements made within international organisations, both in terms of affirmative resolutions but also in terms of statements of intent made by state parties, can constitute state practice for the purpose of identifying custom.[43] The formal nature of acceptance of recommendations, as well as the follow-up procedure by the UNHRC through the mid-point review is all indicative that recommendations are more than mere statements made by state parties, which can also be argued in the negative – states specifically avoid accepting recommendations as well, indicating the UPR process as a whole is viewed as consequential. Recognising UPR recommendations as a means of identifying custom has been acknowledged by a number of scholars of the sources of international law, including William Schabas, and the International Committee of the Red Cross (ICRC) has used statements made by states at the UPR as evidence of custom.[44]

17. A potential example of custom as identified in UPR recommendations is the duty to set a minimum age of marriage, as a mechanism for preventing early or child marriage, which has been the subject of several UPR recommendations. There is no reference to early marriage in the Convention on the Rights of the Child (CRC), but the CRC's treaty body, the Committee on the Rights of the Child, set out in General Comment 4 that obligations under art 4 of the CRC, to take 'appropriate legislative, administrative and other measures' to implement the rights contained within the CRC, would include setting a minimum age for marriage.[45] It was also, as the CRC

[41] *Belhaj and another v Straw and others; Rahmatullah (No 1) v Ministry of Defence and another* [2017] UKSC 3, [2017] AC 964 [252].

[42] ibid; see also on this point Lord Lloyd Jones, 'International Law Before United Kingdom Courts: A Quiet Revolution' (2022) 71 ICLQ 503, 505.

[43] International Law Association, 'Statement of Principles Applicable to the Formation of General Customary International Law' (ILA London Conference, 2000) 14–19, 15 <https://www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf> accessed 4 July 2024.

[44] William Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021) 75–76; Frederick Cowell, 'Identifying Custom in Universal Periodic Review Recommendations' in Panos Merkouris, Jörg Kammerhofer and Noora Arajärvi (eds), *The Theory, Practice and Interpretation of Customary International Law* (CUP 2022); International Humanitarian Law Database, 'Practice relating to Rule 1. The Principle of Distinction between Civilians and Combatants', International Committee of the Red Cross <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule1> accessed 4 July 2024.

Committee reasoned, a necessary measure in order to promote the right to health care, particularly in relation to 'sexual and reproductive health, including HIV/AIDS' and the Committee noted that early marriage had a disproportionate impact on female children.[46] Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) states that State Party's are under an obligation to legislate 'to specify a minimum age for marriage' but does not say what that age should be, although General Recommendation 21 of the CEDAW Committee said that the 'the Committee considers that the minimum age for marriage should be 18 years for both man and woman'.[47]

18. The absence of a specific age as part of an obligation means that there is scope for a rule of interpretation based on state practice, which has been the subject of several UPR recommendations; for example, at Trinidad and Tobago's second review, after it was noted in interactive dialogue that early marriage was prohibited in the country, four states made recommendations in relation to setting the minimum age of marriage at 18.[48] According to the UPR Info database, around 1983 recommendations in categories four and five have been made by states from all different geographic groupings in the UN (although more from Western Europe than anywhere else), on raising the minimum age of marriage to 18. Of these recommendations, over 75% have been supported across all three full cycles to date. It would therefore be correct to say that in relation to the minimum age of marriage, state practice evidenced by the wide breadth of support of recommendations in this area and the sense of obligation in relation to those recommendations, as evidenced in the follow-up of their implementation in subsequent cycles, supports the idea that there is a customary rule that 18 ought to be the minimum age of marriage. In making an argument that there is a customary rule of this nature General Comment 4 from the Committee of the Rights of the Child would on its own not be enough to substantiate the claim of state practice, which is why UPR recommendations are important in demonstrating the existence of customary human rights rules.

19. The relevant steps for a practitioner therefore would be to first demonstrate under the two limbs of *Rahmatullah* that the issue in a given case is an area of policy 'influenced by international law' and that 'it is appropriate and relevant' to raise a customary rule. The second step would be to identify a chain of supported UPR recommendations which either are linguistically similar, or whilst linguistically different all support a conclusion about the status of international human rights

[45]Committee on the Rights of the Child, 'General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (2003) UN Doc CRC/GC/2003/4, para 4.
[46]ibid, para 16.
[47]CEDAW Committee, 'General Recommendation No. 21: Equality in Marriage and Family Relations' (1994) UN Doc A/49/38, para 36.
[48]These states were Norway, Seirra Leone, Slovenia and Botswana: see UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Trinidad and Tobago' (2016) UN Doc A/HRC/33/15, paras 108.53, 108.54, 108.56, 108.58.

made by a treaty body, or international organisation about international human rights law. When identifying customary rules of international human rights law, it is important to recognise, as Brian Lepard argues, that because of the nature of international human rights law – which aims to change state behaviour in the future and set out what ought to be the practice of the state parties – a rule ought to be considered customary if 'states generally believe that it is desirable now or in the near future to make a rule … legally authoritative for all members of the global community states'.[49]

2.2 Recommendations as evidence of wider international practice

20. The section above describes how UPR recommendations, in aggregate, can be used to demonstrate a rule of international human rights law which has customary legal status, a process which has a legal criterion for recognition as a source of international law. If the chain of recommendations does not meet these criteria, because for example they are not broadly based enough or their linguistic framing does not clearly articulate a rule of international human rights law, they can still be useful as evidence of a wider international standard or practice in a particular area. Interestingly it was the Divisional Court in *R (AAA)* which seemed to illustrate how this could be done by using the Outcome Report as a factual basis to describe the situation in Rwanda.[50] Using recommendations as evidence of wider state practice would follow this template and require showing a chain of recommendations as evidence of the human rights situation in a country. An interesting example is the thousands of recommendations on alternatives to the sentencing of children. Article 37 of the CRC prohibits 'capital punishment [and] life imprisonment without possibility of release' for individuals under 18 years of age, but does allow for the 'arrest, detention or imprisonment of a child … in conformity with the law' although emphasises that this should be 'a measure of last resort'.[51] The latter part of this is open to a considerable degree of interpretation and divergence in practice and the Committee on the Rights of the Child in General Comment 24 noted that 'the child justice system … [should] strictly limit the use of deprivation of liberty' at all stages of criminal proceedings right the way through to sentencing.[52]

21. Recommendations in this area have used a wide variety of different framings; for example Denmark's recommendation to Australia in the second cycle to 'develop alternatives to the mandatory sentencing laws placing children as young as 10 years of age in juvenile detention centres' was relatively specific about the domestic practice in question, although it was noted.[53] By contrast, Ireland's recommendation

[49]Brian Lepard, 'Toward a New Theory of Customary International Human Rights Law' in Brian Lepard (ed), *Reexamining Customary International Law* (CUP 2017) 262.
[50]*AAA* (n 29).
[51]Convention on the Rights of the Child 1989 art 37(b).
[52]Committee on the Rights of the Child, 'General Comment No. 24 (2019) on Children's Rights in the Child Justice System' (2019) UN Doc CRC/C/GC/24, para 19.

to Mexico in the first cycle (which was accepted) to 'devote sufficient resources to the criminal justice and prison systems in an effort to reduce sentencing' was less specific about the domestic practice it was targeting and was more aimed at the allocation of resources.[54] Other recommendations are more specific about the type of detention, for example Portugal's recommendation to Sri Lanka (which was supported) to 'apply alternatives to detention of irregular migrants, in particular for families and children'.[55] It is difficult to identify as clear a linguistic pattern or trend in recommendations of this type largely because, unlike what was described above, there is no clear practice being banned or a rule being clarified; rather this is about encouraging states to engage in alternate penal policy. This may not be able to meet the threshold set out in section 2.1 above, because many of the recommendations range over a wide area, but certain chains of recommendations can be identified – for example in the third cycle there were 15 supported recommendations from states calling for the end of immigration detention for children – which can be used to evidence wider international practice or a growing consensus in relation to a particular practice or policy area. This would not have the status of a rule, so there would not be a legal test to apply; but it would be useful when setting out the limits of discretion to specify where international practice in an area is headed.

3. Using individual recommendations

22. Whilst the focus in section 2 was on the legal utility of multiple recommendations made by different states, this section looks foremost at individual recommendations. As these have traditionally been understood not to confer any international obligations on states, it is perhaps controversial or at the very least peculiar to suggest that individual recommendations would have any legal significance in domestic law. Nevertheless, we offer two potential routes or avenues where this could be the case: to inform the interpretation of treaties and as the basis of legitimate expectations.

23. Before engaging with these matters, it is pertinent to note that a practitioner wishing to utilise individual UPR recommendations, after finishing this article, would benefit from reading the UK's working group reports; these contain the recommendations from the state's four UPRs to date (in 2008, 2012, 2017 and 2022), and its responses and reasons, found in the annexes to those reports.[56] This ensures that the practitioner is familiar with the breadth of recommendations that may be applicable to their practice area, and that the responses of the UK and the extent of its agreement are appreciated.

[53]UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Australia' (2016) UN Doc A/HRC/31/14, para 136.176.
[54]UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Mexico' (2009) A/HRC/11/27, para 42.
[55]UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Sri Lanka' (2017) UN Doc A/HRC/37/17, para 116.174.
[56]'Universal Periodic Review – United Kingdom of Great Britain and Northern Ireland' (n 8).

3.1 Recommendations as interpretative aids

24. Despite the dualist approach of the UK constitution, domestic courts routinely engage with and interpret human rights treaties.[57] This is most obvious in cases when a given treaty is incorporated and has direct effect, such as the European Convention on Human Rights (ECHR). But unincorporated treaties, too, can be relevant, foremost where a court seeks to ascertain the meaning of ambiguous legislation.[58] In any case, the application and thus the interpretation of treaties is a necessary function of domestic courts.

25. Individual UPR recommendations can inform the interpretation of a treaty because they can give insight into the practice or subsequent agreement of parties as to its correct application. The starting point is the Vienna Convention on the Law of Treaties (Vienna Convention), arts 31 and 32 of which set out the general rules of treaty interpretation.[59] These are relevant, of course, to international courts but also to domestic courts that should apply *international* rather than domestic rules of interpretation where a treaty is concerned.[60] Particularly relevant here is art 31 (3)(a), which elaborates that regard should be had to 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision'. Article 31(3)(b) further elaborates that such an agreement may be evidenced by states' 'subsequent practice'. Together, the objective of these provisions is to ascertain the 'common intention' of parties to the treaty.[61] For this purpose, scholars have emphasised the importance of looking beyond the observations of international courts and tribunals and instead at the 'broader array of state practice'.[62]

26. We suggest that UPR recommendations, as evidence of this 'broader array', may be relevant for deducing interpretation under these articles. Foremost, when states make recommendations to one another on the application of a treaty to which they are party, these represent an indication of those states' practices and thus

[57]On the increasing tendency of courts to engage with international law, see Lord Mance, 'International Law in the UK Supreme Court' (2017) para 7 <https://www.supremecourt.uk/docs/speech-170213.pdf> accessed 4 July 2024.
[58]There is a 'strong presumption' in favour of interpretations of statute that do not put the UK in breach of its international obligations: see *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976 [27] (Lord Hoffmann).
[59]Vienna Convention on the Law of the Treaties 1969.
[60]See eg *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 282 (Lord Diplock):

> [t]he language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament that deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it in *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (U.K.) Ltd.* [1978] A.C. 141, 152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation.'

[61]Mark E Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission' in Enzo Cannizzaro (ed), *The Law of Treaties: Beyond the Vienna Convention* (OUP 2011) 109.
[62]Sean D Murphy, 'The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 83.

inform a court's interpretation under art 31(3)(b). It would not appear relevant whether the relevant recommendation is made *to* or *by* the state in which the interpretation is taking place, but presumably, the other state must also be a party to the relevant treaty.[63] Unlike the potential uses of recommendations already explored, this approach has already been used on one occasion in the UK in *Al-Waheed*.[64] Here, it was queried whether the power to detain enemy combatants in Afghanistan in excess of 96 hours, conferred by various UN Security Council resolutions, could be reconciled with the right to liberty under art 5(1) of the ECHR. Whilst the majority reasoned that it could, Lord Reed, in his dissenting judgment, asserted that the Convention had extraterritorial effect and its obligations on states continued despite resolutions of the UN Security Council. To arrive at this conclusion, Lord Reed reflected on the Vienna Convention, and the importance of the 'subsequent practice' of state parties to the Convention. To this end, Lord Reed referred to a UPR recommendation made by Switzerland to the UK in 2008:

> statements by a number of contracting states confirm, without qualification, the continuing relevance of international human rights law and, in particular, of the Convention […] Switzerland has questioned the United Kingdom's claim that the provisions of the Convention need to be qualified, in the context of military operations overseas, in order to take SCRs into account, and *recommended that the United Kingdom should consider that any person detained by armed forces is under the jurisdiction of that state, which should respect its obligations concerning the human rights of such individuals*.[65]

27. Lord Reed's judgment reveals that individual recommendations can have real utility in UK law as interpretative aids. It is also important to observe that this recommendation was made in response to the UK's claim, in its National Report, that its human rights obligations 'may' apply to its armed forces overseas.[66] Switzerland's specific observation on the extraterritorial application of the ECHR was therefore prompted by the UK's UPR. In this way, we can observe that the mechanism is able to facilitate dialogue between states on important questions of treaty interpretation.

28. This example also reveals that one looking to identify relevant recommendations for this purpose should consult the UK's working group report to reveal the context in which recommendations are made, rather than, for instance, the UPR Info database. Switzerland's recommendation does not cite the ECHR – it is only when read in the context of its other comments, contained earlier in the working group report, that the link with the Convention is made apparent.

[63]Recommendations from 'third parties' would not appear relevant as these cannot reveal any common intention between the parties to a treaty: see Andrew D Mitchell and James Munro, 'Someone Else's Deal: Interpreting International Investment Agreements in the Light of Third-Party Agreements' (2017) 28 European Journal of International Law 669.
[64]*Abd Ali Hameed Al-Waheed and others v Ministry of Defence* [2017] UKSC 2, [2017] AC 821.
[65]ibid [311] (emphasis added). For the original recommendation, see UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: United Kingdom of Great Britain and Northern Ireland' (2008) UN Doc A/HRC/8/25, para 33.
[66]UN Human Rights Council, 'National Report: United Kingdom of Great Britain and Northern Ireland' (2008) UN Doc A/HRC/WG.6/1/GBR/1, para 119.

29. In any case, recommendations that are likely to be suitable for interpretative purposes may be identified by searching the working group reports for the treaty and/or the acronyms which are conventionally used in some cases (eg CEDAW). Relevant recommendations will foreseeably contain an action (eg 'cease X') and a reference to the relevant instrument (eg 'in line with the Convention on … '). Such would, as seen with Switzerland's recommendation to the UK, reveal a practice that the state considers to be required by the treaty. This evidence can then inform interpretation through art 31(3)(b) of the Vienna Convention.

3.2 Recommendations as legitimate expectations

30. The second way in which individual recommendations may have relevance in domestic law is as the basis of a legitimate expectation. Underlined by the requirement of good administration,[67] this concept enables courts, in defined circumstances, to hold public authorities to their promises. Public authorities ought not to act arbitrarily and resile nonchalantly from promises made to a person or group: Rather, they must act 'straightforwardly and consistently with the public'.[68] A legitimate expectation will typically arise where there has been an express promise, representation or assurance by a public authority that was 'clear, unambiguous and devoid of relevant qualification'.[69] This assessment is made upon a 'fair reading' of the promise and how this could 'reasonably have been understood'.[70] Whilst it is not impossible for a legitimate expectation to arise in the absence of a clear statement,[71] the test has been applied strictly, particularly concerning decisions in the 'macro-political' field.[72] If a legitimate expectation is deemed to have arisen, then the public authority has the burden of proving that it was justified in not fulfilling that expectation. In practice, this is a question of proportionality: whether 'denial of the expectation is in the circumstances proportionate to a legitimate aim pursued'.[73]

31. The forthcoming discussion reveals that supported UPR recommendations could, in narrowly defined circumstances, inform the finding of legitimate expectations. Before delving into this, it is important to acknowledge the potential controversy of this assertion. It has been argued that it is inherently undesirable to seek greater protection of human rights via legitimate expectation.[74] Additionally, and perhaps more

[67] On alternative justifications for legitimate expectations see Christopher Forsyth, 'Legitimate Expectations Revisited' [2011] JR 429.
[68] *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 [68] (Laws LJ).
[69] *R (MP) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1634, [2021] PTSR 1122 [53].
[70] *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397 [56] (Dyson LJ).
[71] ibid [72]. Dyson LJ explains that this would only be in 'exceptional' cases where the decision maker had 'acted with conspicuous unfairness such as to amount to an abuse of power'.
[72] Jack Watson, 'Clarity and Ambiguity: A New Approach to the Test of Legitimacy in the Law of Legitimate Expectations' (2010) 30 Legal Studies 633, 637–638.
[73] *Nadarajah* (n 68) [69] (Laws LJ). In *Re Finucane's Application for Judicial Review* [2019] UKSC 7, [2019] 3 All ER 191 [62], Lord Kerr referred to 'fairness' rather than proportionality; however this has been criticised for complicating the test to be applied by the court: see Mark Elliott, 'Legitimate Expectation: Reliance, Process, Substance' [2019] CLJ 260.
[74] Murray Hunt, *Using Human Rights Law in English Courts* (Hart Publishing 1997) 251–259.

significantly, there is considerable hesitancy across common law jurisdictions, especially in the UK, for courts to use legitimate expectations to give direct effect to international human rights, notably treaty obligations.[75] And quite right. International law has no direct effect in the UK without incorporation by Parliament. This dualist stance entails a separation of international and domestic legal spheres. For courts to use legitimate expectation as a means to bridge this gap would be to bypass the role of Parliament, introducing international law 'by the back door of legitimate expectation when the front door is firmly barred'.[76] Hence, judicial support for using legitimate expectations in this way is very limited.[77] Certainly, the Supreme Court's more recent approach reveals it has 'never seriously considered directly implementing international law'.[78] Nevertheless, it is important to distinguish between using legitimate expectations as a back door for treaty obligations, and what is proposed below. Supporting a UPR recommendation is a distinct form of promise, unlike ratification, which does not in itself create international obligations. To hold the government to that promise would not infringe the UK's strict dualism in the same way that holding it to ratification would – there is no risk of international law being introduced by the back door.

32. We suggest that UPR recommendations may give rise to a legitimate expectation but only where there is (a) the necessary clarity and unambiguity in the language of the recommendation, and (b) the government has supported that recommendation and thus indicated its intention to give effect to it. On (a), it is important to recall, from the initial section in this article, that recommendations vary considerably in their specificity. Whilst this is foremost an issue for stakeholders in measuring implementation, it also poses a problem for establishing the solid foundations necessary for a legitimate expectation. Nevertheless, it is not unforeseeable that a recommendation may meet the threshold of being sufficiently clear and unambiguous. To determine this, three aspects of a recommendation should be considered. First is the language of a recommendation. Specific verbs (eg 'cease') lack ambiguity and leave no doubt as to the course of action to be undertaken by the recipient government. Second is the precise issue that is the subject of the recommendation. One that relates to a human rights issue in the broad sense (eg 'migration') is not likely to be sufficiently clear. Instead, a recommendation would need to target a specific policy or another executive act. Finally, the recommendation would need to be expressly or impliedly restricted to specific persons or groups. Though there is no limit on how many people could rely on a legitimate expectation, it becomes easier for the public authority

[75]On the ratification of treaties constituting a legitimate expectation, see *Chundawadra v Immigration Appeal Tribunal* [1988] Imm AR 144, 173–174. Further rebuttals of legitimate expectations to enforce international law were laid out by Lord Bingham CJ and Laws LJ in the Court of Appeal in *R v Director of Public Prosecutions ex p Kebilene* [2000] 2 AC 326.
[76]*Chundawadra* (n 75) 173–174 (Glidewell LJ).
[77]Though see Lord Kerr in *R (SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16.
[78]Lewis Graham, 'The Supreme Court's Recent Approach to Unincorporated Human Rights Treaties' [2024] EHRLR 49.

to justify reneging if the class is wider.[79] A recommendation that relates to UK citizens generally would, therefore, be a very weak candidate for legitimate expectation.

33. On (b), it is necessary that the government indicates its intention to give effect to the recommendation. This would need to be something that could be 'reasonably understood' as entailing a promise to act on the terms of the recommendation. Such is most straightforwardly demonstrated, we suggest, by the act of supporting a recommendation. Supporting a recommendation is a commitment by the state to be reviewed on its progress at its next review, and thus the taking of appropriate action. Indeed, the UK government has previously specified, following its third cycle review, that 'support' meant the recommendation had already been implemented or that the government intended to do so thereafter.[80] This is further compounded by the nature of the UPR process and the circumstances in which the decision to support a recommendation is made.[81] In the UK's case, the government always reserves its right to provide responses shortly after the review, preferring instead to do so later after consulting with government departments and civil society.[82] Thus, careful consideration is given before the decision to support a recommendation is made. When responses are presented at the Human Rights Council plenary, some months later, the UK voluntarily supplies detailed reasoning which can further clarify the actions to be taken next, if any.[83] Although the act of supporting a recommendation may be sufficient, this reasoning may be useful to clarify the government's intentions and therefore confirm whether a legitimate expectation has crystalised.

34. Together, these two factors, if present, would indicate the existence of a legitimate expectation arising from the UPR process. It will in practice, however, be challenging to find recommendations that satisfy these criteria, especially (a) because of recommendations' tendency to be vague. In fact, our review of the UK's supported recommendations to date, of which there have been 341 across the four cycles,[84] reveals no strong candidates. Therefore, whilst in theory a legitimate expectation might arise in the way described above, it is doubtful whether this has in fact happened. This does not, of course, rule out the possibility of such circumstances arising with

[79] *R (Bhatt Murphy (a firm) v Independent Assessor; R (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755 [46].

[80] UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: United Kingdom of Great Britain and Northern Ireland. Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review' (2017) UN Doc A/HRC/36/9/Add.1, para 3.

[81] On the relevance of these factors for the finding of a legitimate expectation, see *In the matter of an application by Nick Rowsome for Judicial Review* [2003] NIQB 61 [26].

[82] 'The Implementation of Human Rights Recommendations in the UK' (Bingham Centre for the Rule of Law, 2023) <https://binghamcentre.biicl.org/projects/national-implementation-of-human-rights-global-survey-of-state-implementation-systems-and-processes> accessed 4 July 2024.

[83] 'Universal Periodic Review – United Kingdom of Great Britain and Northern Ireland' (n 8): see 'Outcome of the Review: Annex' for each of the UK's reviews.

[84] In cycle one, 22/35 (63%) recommendations were supported, 91/137 (66%) in cycle two, 96/234 (58%) in cycle three, and 134/331 (40%) in cycle four. See 'UPR Info Database' (n 6).

respect to recommendations made to other common law states where legitimate expectation is applied.[85] For now, though, the above framework is unlikely to have any immediate utility in the UK. Instead, individual recommendations can be said to have the most value as interpretative aids for the UK's treaty obligations.

4. Conclusion

35. As set out at the beginning of this article it is relatively clear from the formation of the UPR process in 2006 that this was not designed to be a legal process in international law. Yet, from the first review cycle onwards, recommendations that were issued as part of the review process have aimed to have an impact on a state's domestic practices, and hence its legal system. By the beginning of the third cycle, the UPR process was clearly having a distinct impact on international legal processes. Although there was never a formal mechanism spelt out for the application of recommendations across the UK, with implementation and follow-up being treated as a process run by the Ministry of Justice,[86] UPR reports have started to be used by UK courts, thereby recognising the status of the UPR process. However, this engagement is in its infancy. UPR documentation has been used almost solely as a means to identify individual state practice, yet the broader value of recommendations has yet to be appreciated. With the view of assisting legal practitioners to better grasp the utility of the UPR, this article has sought to formalise how recommendations can inform arguments in UK courts. It is important to re-emphasise that the aim here has not been solely to deduce from examples where recommendations have been successfully utilised in the past. Rather, we have drawn on domestic doctrine to provide the theory and tools so that practitioners can seek to use recommendations going forward. This will of course have implications for practitioners in the UK, but as the UPR is a mechanism with universal reach, those in other common law jurisdictions may also find these tools applicable.

36. There are several reasons why greater engagement with the UPR in courts is desirable. It covers all human rights obligations and, as a Charter-based mechanism, all UN member states. Hence, it is distinct from treaty bodies which rely on the prior ratification by a state of the treaty. The UPR is the closest the international community has got to a comprehensive, universal human rights accountability mechanism. All states have participated in each cycle of the UPR; this means that all states have had the opportunity to offer and receive recommendations, making the hundreds of thousands of UPR recommendations to date an invaluable source for understanding which rules, norms and practices ought to be universal. As international human

[85] Other common law systems protect legitimate expectations: see Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing 2017).

[86] 'The Implementation of Human Rights Recommendations in the UK' (n 82). See also Michael Lane, '"Administrative Clutter" or a Case for Centralising Human Rights? UN Human Rights Mechanisms and the UK Government' (*UK Constitutional Law Association*, 2024) <https://ukconstitutionallaw.org/2024/05/07/michael-lane-administrative-clutter-or-a-case-for-centralising-human-rights-un-human-rights-mechanisms-and-the-uk-government/> accessed 4 July 2024.

rights law increasingly fragments and there is concern that what are meant to be universal standards will be weakened,[87] the UPR's universality provides a way of establishing areas of convergence in international human rights law. A philosophical justification for reaching for the standards of international human rights law, in sentencing, immigration or judicial review hearings, is that it provides an applicable standard for how certain interests ought to be protected and can help ambiguities in domestic human rights law. Yet to do this effectively there needs to be clarity on the nature of universal standards and tools to identify and establish their existence. Legal professions globally must have an appropriate understanding of the relevance of international law foremost to contribute to its consistent application across states, the universality of human rights, and the international rule of law. Using the UPR in the ways explored herein will help clarify and standardise certain aspects of the domestic application of international human rights law.

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[87]The fragmentation of international human rights law across different institutions and treaty mechanisms has been widely commented on: see Mehrdad Payandeh, 'Fragmentation within International Human Rights Law' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: The ICJ's Role in the Reassertion and Convergence of International Law* (CUP 2015) 297–319; Adamantia Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices, and Lessons to be Learned from the Case Law of the European Court of Human Rights' (2015) 28 Leiden Journal of International Law 863.