

NOTES

THE UNIVERSAL PERIODIC REVIEW AS A FORM OF ALTERNATIVE DISPUTE RESOLUTION: STRENGTHS & SHORTCOMINGS

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I. INTRODUCTION

International Human Rights, as legally enforceable rights, were developed and enunciated in 1948, following the adoption of the Universal Declaration of Human Rights (“UDHR”).¹ This document was one of the results that flowed from the international community’s response to the atrocities of World War II.² As the Declaration is not legally binding on States, legal enforceability followed from the adoption of the International Covenant on Civil and Political Rights (“ICCPR”) and International Covenant on Economic, Social, and Cultural Rights (“ICESCR”)—both international treaties designed to implement the aspirations of the UDHR.³ The UDHR, and the adoption of treaties that followed, reflect the international recognition “that basic human rights and fundamental freedoms are inherent in all beings, inalienable and equally applicable to everyone”⁴

To ensure that the obligations assumed by States and imposed on the international community were adhered to, the United Na-

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¹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

² *Fact Sheet: International Human Rights Law and Sexual Orientation & Gender Identity*, UNITED NATIONS FREE & EQUAL, <https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf> (last visited Nov. 20, 2019) (“Human rights were developed and articulated in the Universal Declaration of Human Rights (1948) as a response to the atrocities of World War II.”).

³ *Human Rights Law*, UNITED NATIONS, <https://www.un.org/en/sections/universal-declaration/human-rights-law/> (last visited Nov. 20, 2019) (“ . . . International Covenant on Civil and Political Rights – which built on the achievement of the Universal Declaration of Human Rights, using it as its foundation.”).

⁴ *Id.* (“It also acted as a forum where countries large and small, non-governmental groups and human rights defenders from around the world voiced their concerns”).

tions Commission on Human Rights was established in 1946.⁵ The Commission provided a forum where countries, non-governmental organizations, and human rights defenders were able to voice concerns.⁶ This forum proved highly controversial; while certain states were consistently targeted, others were consistently immune from scrutiny and criticism. In response to these concerns, the 2006 General Assembly Resolution 60/251⁷ was passed, replacing the Commission on Human Rights with the Human Rights Council (“HRC”), an “inter-governmental body within the United Nations system”⁸ Among other goals, the HRC set out “to promote ‘universal respect for the protection of all human rights and fundamental freedoms for all[,] . . . address situations of violations of human rights, . . . and make recommendations thereon.’”⁹

In order to support the HRC in carrying out this mandate, Kofi Annan, former Secretary-General of the United Nations, proposed a “peer review” mechanism to monitor the human rights situation of every UN Member State. The Resolution that established the HRC¹⁰ also outlines the foundation of this “peer review” mechanism: the Universal Periodic Review (“UPR”).¹¹ The UPR allows for an international body to periodically review the human rights records of all 193 UN Member States.¹²

The approach of the UPR reflects that of alternative dispute resolution (“ADR”), a variety of processes used to help parties resolve disputes without litigation. Through approaches and techniques directed toward non-confrontational dispute resolution,¹³ parties can bypass the undesirable costs and effects of litigation. Common forms of ADR include negotiation, mediation, and arbitration.¹⁴ As a means of resolving disputes, ADR appreciates the

⁵ *Introduction*, UNITED NATIONS HUM. RTS COUNCIL, <https://www.ohchr.org/en/hrbodies/chr/pages/commissiononhumanrights.aspx> (last visited Nov. 20, 2019).

⁶ *Id.*

⁷ G.A. Res. 60/251 (Mar. 15, 2006).

⁸ *Welcome to the Human Rights Council*, UNITED NATIONS HUM. RTS COUNCIL, <https://www.ohchr.org/en/hrbodies/hrc/pages/aboutcouncil.aspx> (last visited Nov. 20, 2019).

⁹ *UN Human Rights Council*, INT’L JUST. RESOURCE CTR., <https://ijrcenter.org/un-human-rights-council/> (last visited Nov. 20, 2019).

¹⁰ G.A. Res. 60/251, *supra* note 7, at 2.

¹¹ *Universal Periodic Review*, UNITED NATIONS HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> (last visited Jan. 20, 2020).

¹² *Id.*

¹³ *Mediation and Dispute Resolution Mechanisms*, UNITED NATIONS DEP’T OF ECON. AND SOC. AFF., https://www.un.org/waterforlifedecade/water_cooperation_2013/mediation_and_dispute_resolution.shtml (last visited Jan. 20, 2020).

¹⁴ *Id.*

reality that conflict inevitably arises between parties who hold interests that diverge in a given area. The ever-increasing use of this approach reflects the need to minimize the costs and negative effects that stem from confrontational resolution of these divergent interests.¹⁵ While resorting to litigation may be deemed essential when dealing with certain conflicts, the sensitivities that accompany assessment of a given State's human rights situation require a different approach. The UPR provides a system that allows for States to engage in intergovernmental dialogue while refraining from infringing upon a given state's sovereignty.

Throughout each cycle (a four-and-a-half year period within which all UN Member States are reviewed), the Human Rights Council facilitates the UPR through three key stages.¹⁶ First, reports are submitted by the State under Review ("SuR") and the Office of the UN High Commissioner for Human Rights ("OHCHR"). Next, the Working Group on the UPR, composed of the 47 Member States of the HRC, reviews the SuR.¹⁷ Both the HRC Member States and other UN Member States have the opportunity to partake in discussion and dialogue with the reviewed States.¹⁸

Once the review has concluded, the "troika of rapporteurs"¹⁹ and a member of the OHCHR collaborate to produce a report of the review. This report includes the recommendations that have been issued to the SuR during its review, as well as a summary of the proceedings.²⁰ Once the SuR has informed the troika of its decision to either accept or decline the recommendations, the report is presented to the Working Group for adoption. The final "Outcome Report" is debated and subsequently adopted in the following plenary session of the HRC. Last, the SuR sets out to implement the recommendations it has accepted and must follow up with the HRC accordingly.²¹

¹⁵ *Id.*

¹⁶ *UPR Review Process*, UNITED NATIONS HUM. RTS. COUNCIL, <https://www.ohchr.org/Documents/HRBodies/UPR/UPR-Review-banner2.pdf> (last visited Jan. 20, 2020).

¹⁷ *Basic Facts About the UPR*, UNITED NATIONS HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx> (last visited Jan. 20, 2020).

¹⁸ *Id.* ("The reviews are conducted by the UPR Working Group which consists of the 47 members of the Council; however any UN Member State can take part in the discussion/dialogue with the reviewed States.").

¹⁹ *Universal Periodic Review Process*, U.S. DEPARTMENT OF STATE, <https://www.state.gov/universal-periodic-review-process/> (Jan. 20, 2020) (the "troika of rapporteurs" is a group of three Human Rights Council members selected at random).

²⁰ *Id.*

²¹ *Id.*

Through analysis of the Universal Periodic Review—specifically the means that it employs, the responses that it solicits, and the degree of resulting implementation, or lack thereof—I will assess the efficacy of the UPR as a form of ADR, in furthering the object and purpose of the HRC, specifically with reference to the rights of individuals belonging to the LGBTI community. First, I will address the concept of LGBTI rights as human rights deserving of protection. Second, I will provide context with respect to the modes of confrontational approaches available to the international community. Next, I will expand on the history and purpose of the UPR and describe the procedures through which it is carried out. Then, I will analyze the efficacy of the UPR by looking to the concrete influence it has had on reviewed States. Last, I will set forth proposals for strengthening UPR machinery to more effectively promote human rights on the ground.

II. BACKGROUND

A. *LGBTI Rights as International Human Rights*

The UN Charter encourages “respect for human rights and for fundamental freedoms for all without distinction”²² Likewise, the UDHR expresses that, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind”²³ While there is no separate human rights instrument that deals explicitly with LGBTI rights,²⁴ all human beings are entitled to human rights by virtue of their humanity. Treaty bodies have progressively added discrimination based on sexual orientation and gender identity to the list of grounds for human rights violations. Charged with interpretation of human rights agreements, treaty bodies have construed these instruments as applicable to individuals of all sexual orientations.²⁵ For example, the International Covenant on Civil and Political Rights (“ICCPR”) sets out the principle of non-discrimination in Article 2(1):

²² U.N. Charter art. 1, ¶ 3.

²³ G.A. Res. 217 (III) A, *supra* note 1, at 72 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

²⁴ AUSTRALIAN HUMAN RIGHTS COMM’N., ADDRESSING SEXUAL ORIENTATION AND SEX AND/OR GENDER IDENTITY DISCRIMINATION 7 (2011).

²⁵ *Id.*

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁶

Additionally, the ICCPR sets out the right to equality in Article 26, as well as the right to privacy in Article 17—all relevant to the state’s obligation to respect, protect, and fulfill human rights.²⁷ Apart from the ICCPR, “United Nations Committees have recognized the right to non-discrimination on the basis of sexual orientation” under the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women.²⁸ Further, several United Nations statements support the view that international human rights are applicable to people of all sexual orientations.²⁹ For example, in 2011, the HRC issued a Joint Statement on Sexual Orientation and Gender Identity that received the support of 85 countries.³⁰ Notably, in 2006 a group of human rights experts developed a set of provisions called the Yogyakarta Principles.³¹ Although not “hard law,”³² these provisions constitute a comprehensive articulation of the human rights of LGBTI individuals as well as measures that states should undertake to protect those rights.

Despite the support for LGBTI rights as enforceable human rights, many UN Member States continue to criminalize same-sex relationships, and a significant number of States continue to exhibit discrimination against the LGBTI community.³³ In some states,

²⁶ International Covenant on Civil and Political Rights, art. 2, ¶ 1, Dec. 19, 1966, 999 U.N.T.S. 172.

²⁷ See *id.* at art 17, 26.

²⁸ AUSTRALIAN HUMAN RIGHTS COMM’N, *supra* note 24, at 8.

²⁹ *Id.*

³⁰ *Ground-Breaking Statement on Sexual Orientation and Gender Identity by Record Number of 85 States*, INT’L SERV. FOR HUM. RTS., (Mar. 23, 2011), <https://www.ishr.ch/news/ground-breaking-statement-sexual-orientation-and-gender-identity-record-number-85-states>.

³¹ THE YOGYAKARTA PRINCIPLES, THE YOGYAKARTA PRINCIPLES PLUS 10 (2017), http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf.

³² *Term: Hard Law/Soft Law*, THE EUR. CTR. FOR CONST. AND HUM. RTS., <https://www.ecchr.eu/en/glossary/hard-law-soft-law/> (2019) (last visited Nov. 20, 2019) (“Hard law refers generally to legal obligations that are binding on the parties involved and which can be legally enforced before a court.”).

³³ Juneau Gary & Neal S. Rubin, *Are LGBTI Rights Human Rights? Recent Developments at the United Nations*, AM. PSYCHOL. ASS’N: PSYCHOL. INT’L (June 2012), <https://www.apa.org/inter-national/pi/2012/06/un-matters>.

the laws that criminalize same-sex relationships are not enforced—however, the mere retention of such provisions implies that the state does not recognize the identities of LGBTI individuals.³⁴ At a Human Rights Council meeting in March of 2012, the then-Secretary General of the UN, Ban Ki-moon, referred to a OHCHR report that documented “disturbing abuses in all regions.”³⁵ Ki-moon acknowledged a “pattern of violence and discrimination directed at people just because they are gay, lesbian, bisexual or transgender.”³⁶ In this statement, the Secretary General criticized the “widespread bias at jobs, schools and hospitals, and appalling violent attacks.”³⁷ He stated that, “People have been imprisoned, tortured, even killed. This is a monumental tragedy for those affected – and a stain on our collective conscience. It is also a violation of international law.”³⁸

The recognition and acceptance of LGBTI rights has been slower than that of other rights due to the strength of political, religious, and cultural opposition flowing from many States. For example, Uganda’s treatment of LGBTI rights was addressed during the First Cycle of the Universal Periodic Review, on October 11, 2011.³⁹ During the presentation by Uganda, the delegation stated that the Constitution of Uganda (art. 31, para. 2(a)) prohibits marriage between persons of the same sex.⁴⁰ Additionally, §§ 145 and 146 of Uganda’s Penal Code criminalize same-sex relations.⁴¹ The delegation further indicated that, “While the Constitution, under chapter four, guaranteed the rights of all persons, the promotion and protection of human rights must be carried out within the social and cultural context.”⁴² Uganda is one of many UN Member States that has refused to recognize how the criminalization of same-sex relationships, and the inevitable implications that flow therefrom, violate the rights of those belonging to the LGBTI community. While many states do recognize LGBTI rights as human rights, Uganda’s position demonstrates how confrontational approaches are likely to prove futile when controversial or culturally

³⁴ Frederick Cowell & Angelina Milton, *Decriminalisation of Sexual Orientation Through the Universal Periodic Review*, 12 HUM. RTS. L. REV. 341, 341-42 (2012).

³⁵ Gary & Rubin, *supra* note 33.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Uganda*, at 3, U.N. Doc. A/HRC/19/16 (Dec. 22, 2011) [hereinafter U.N. Doc. A/HRC/19/16].

⁴⁰ *Id.* at 5.

⁴¹ *Id.* at 5.

⁴² *Id.* at 5.

sensitive topics are at issue. Instead, mechanisms such as the Universal Periodic Review may provide an alternative way to address these topics in a manner that emphasizes cooperation, rather than confrontation.

B. *The Role of State Sovereignty*

Domestic and International Law are viewed and enforced differently, primarily due to the obstacles that sovereignty presents on the international plane. In the early 19th century, international law was deemed to be what enabled international coexistence between sovereign States; international law dealt with both external and internal sovereignty. From border regulation to dispute settlement, international law addressed all areas pertaining to the organization of States' external sovereignty. By prohibiting intervention in another sovereign State and requiring restraint, international law protected internal sovereignty as well.

The second part of the 20th century corresponded to a new conception of international law as a means of cooperation between sovereign States.⁴³ The United Nations ("UN") was created in 1945; since then, the UN as well as other international organizations and institutions have proliferated at the regional and global levels to enhance international cooperation. With increased interdependence and cooperation among States, international law has come to apply to areas that were previously within the province of the domestic sphere. One of these areas is International Human Rights Law. Further, international law has seen the emergence of new forms of "relative normativity," through which States can be bound by legal norms they have not consented to. Relative normativity concerns "the nature, structure, and content of the international legal system[.]" and "involves issues of hierarchy and implicates the rules of recognition by which law is distinguished from norms that are not legally binding."⁴⁴ Thus, "peremptory norms," fundamental principles of international law that are accepted by the international community of States, will override

⁴³ Samantha Besson, *Sovereignty*, in MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L., <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472> (last updated Apr. 2011).

⁴⁴ Dinah Shelton, *International Law and 'Relative Normativity,'* in INTERNATIONAL LAW, 137, 137 (Malcolm D. Evans ed., 4th ed. 2014).

other norms and bind all States.⁴⁵ Examples of peremptory norms include prohibitions against both genocide and crimes against humanity. Further, States may not derogate (i.e. suspend or restrict certain obligations under the State's Human Rights Convention in times of crisis) from peremptory norms.⁴⁶

International law is not the law of a global State or political community, but of many national and regional institutions.⁴⁷ Through the creation of international organizations, the subject-matter that international law has come to encompass, and its relative normativity, sovereignty is often said to have been circumscribed in the second half of the 20th century. For example, many limitations to sovereignty are no longer consent-based, instead, these limitations may stem from customary norms or general principles. These norms are the result of the accretion of gradual recognition of such norms at the domestic level by modern democracies. Understood as a reflection of the "minimal common denominator to the practice of all democratic sovereign States,"⁴⁸ once internationalized, those norms may contribute to the development of international standards themselves. Another way in which State sovereignty has been limited is through the rise of material and economic interdependence between States. In turn, this has meant increased institutional cooperation and the creation of corresponding international organizations. In delegating sovereign power to these organizations, increased integration in international organizations has given rise to new channels of political decision-making as well as new mediums of human rights protection beyond the State. A paradigm example is the gradual democratization of decision-making processes by the European Union.

Notions of political and legal sovereignty are intrinsically connected. Whether at the national or international level, the law is a political creation and remains a political instrument. Although political and legal sovereignty are conceptually distinct and can exist separately, these notions are not logically separable in the long run and each legitimizes the other in many ways. Political sovereignty

⁴⁵ Anne Lagerwall, *Jus cogens*, OXFORD BIBLIOGRAPHIES, <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml> (last reviewed Nov. 7, 2017).

⁴⁶ Natasha Holcroft-Emmess, *Derogation from the Human Rights Convention—in Plain English*, HUM. RTS. NEWS, VIEWS & INFO (June 13, 2017), <https://rightsinfo.org/derogation-human-rights-convention-plain-english/>.

⁴⁷ Besson, *supra* note 43.

⁴⁸ *Id.*

is difficult to conceive without rules to exercise and constrain the exercise of that sovereignty, while legal sovereignty is hard to fathom without a political power to establish legal rules in the first place. Sovereignty being at once political and legal, the interrelation between these dimensions could be wielded as a tool for enforcing human rights. Despite the limits imposed on State sovereignty throughout the 20th century, sovereignty remains a major consideration, and at times a major obstacle, to enforcing international law.

C. Confrontational Mechanisms in the International Human Rights Realm

In order to hold States responsible for human rights violations, confrontational mechanisms including criminal prosecutions, civil lawsuits, and sanctions, may be used in the international rights realm.

1. Litigation in Connection with International Human Rights Law

The notion of litigation in connection with international human rights law operates as more of a means for punishment or redress than as a means for enforcing human rights obligations.

Criminal prosecutions can take place in domestic courts, ad hoc tribunals, or the International Criminal Court (ICC). Although States are charged with the obligation to prosecute human rights abuses within their jurisdictions, there are many reasons why this obligation is often not carried out. The Geneva Conventions require that States implement domestic laws protecting human rights and punishing violations. While most States have complied with these international obligations, some have not. Without domestic legislation addressing the human rights violation, victims in those States may have no cause of action on which to sue. If a State has complied and legislation has been enacted, victims may be able to seek redress in the civil courts of their State. However, even where legal protections have been implemented into domestic law, a State may nevertheless fail to bring a perpetrator to justice. Courts may be weak or corrupt, or prosecutors could refuse to pursue a case. This is especially so when the perpetrator is a government official. Moreover, even if ultimately prosecuted, domestic

amnesty or immunity laws could allow the perpetrator to escape accountability.

Although regional human rights courts and systems, both civil and criminal, have been established by intergovernmental organizations as well, the jurisdiction of these courts is narrow in scope. For example, the European Court of Human Rights,⁴⁹ established by the European Convention on Human Rights,⁵⁰ began operating in 1959 under the auspices of the Council of Europe.⁵¹ The European Court has jurisdiction to decide only those complaints submitted by States and individuals that “concern violations of the Convention allegedly committed by a State party to the Convention and that directly and significantly affect[] the applicant.”⁵² A “substantial majority” of applications submitted to the Court are disregarded for failure to meet one or more of the stringent admissibility requirements,⁵³ including exhaustion of domestic remedies.⁵⁴

Moreover, the International Criminal Court (ICC),⁵⁵ governed by the Rome Statute,⁵⁶ is the world’s first permanent international criminal court.⁵⁷ The ICC is a “court of last resort,”⁵⁸ and entertains only those cases concerning the most serious human rights violations⁵⁹—its jurisdiction is extremely narrow and rarely asserted. The Rome Statute authorizes the ICC to exercise jurisdiction over four main crimes: genocide, crimes against humanity, war crimes, and crimes of aggression.⁶⁰ Even if the crimes alleged are of “sufficient gravity,” the ICC will only prosecute a case if doing

⁴⁹ John G. Merrills, *European Court of Human Rights*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/European-Court-of-Human-Rights> (last updated Mar. 14, 2016).

⁵⁰ Council of Europe, *European Convention*, EUROPEAN CT. OF HUM. RTS., (1950), https://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁵¹ *The European Court of Human Rights*, INT’L JUST. RESOURCE CTR., <https://ijrcenter.org/european-court-of-human-rights/> (last visited Sept. 20, 2019).

⁵² *Id.*

⁵³ *European Court of Human Rights to Begin Implementing Stricter Requirements for Individual Applications in 2014*, INT’L JUST. RESOURCE CTR. (Dec. 16, 2013), <https://ijrcenter.org/2013/12/16/european-court-of-human-rights-to-begin-implementing-stricter-requirements-for-individual-applications-in-2014/>.

⁵⁴ INT’L JUST. RESOURCE CTR., *supra* note 51, at 21.

⁵⁵ *About*, INT’L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Nov. 20, 2019).

⁵⁶ INTERNATIONAL CRIMINAL COURT, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2011).

⁵⁷ *About*, *supra* note 55.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *How the Court Works*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works> (last visited Nov. 20, 2019).

so is consistent with the principle of complementarity. According to this principle, “the ICC has secondary jurisdiction after national courts, and can only act in a given situation if the relevant States are unwilling or unable to prosecute the crimes within their jurisdiction.”⁶¹ Thus, the ICC will assume jurisdiction only if all domestic options have been exhausted; it is not intended to replace national criminal systems.⁶²

Additionally, the International Court of Justice (ICJ), the principal judicial body of the UN, facilitates settlements of legal disputes submitted by States and issues advisory opinions.⁶³ The ICJ does not have jurisdiction over complaints brought by individuals—only States may be parties to contentious cases brought before this Court.⁶⁴ Further, a U.N. Member State may compel another State to appear before the ICJ only if, the State compelled is also a member of the UN and has consented to being subject to the ICJ’s jurisdiction.⁶⁵

Civil lawsuits may be an option if a victim (or group of victims) is seeking compensation and the State has the appropriate machinery in place to provide redress. Of concern, however, is the potential for an unfavorable precedent that lawsuits concerning contentious issues risk setting. Even more concerning, litigants could be subject to danger for bringing an action.

2. Other Confrontational Approaches

Sanctioning States that violate their human rights obligations is another confrontational approach increasingly used to further political goals in a non-violent way.⁶⁶ In restricting trade and travel for human rights violators, sanctions allow States to engage in economic combat.⁶⁷ However, sanctions are controversial and criticized as detrimental to citizens of the sanctioned State as well as the wider world economy⁶⁸—the “enforcement of countermeasures

⁶¹ *Complementarity Principle*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, <https://www.ecchr.eu/en/glossary/complementarity-principle/>.

⁶² *How the Court Works*, *supra* note 60.

⁶³ *The Court*, INT’L CT. OF JUST., <https://www.icj-cij.org/en/court>.

⁶⁴ *How the Court Works*, *supra* note 60.

⁶⁵ LOUIS HENKIN ET AL., HUMAN RIGHTS (2d ed. 2009).

⁶⁶ *Sanctions*, GOV’T OF THE NETH., <https://www.government.nl/topics/international-peace-and-security/compliance-with-international-sanctions>.

⁶⁷ *Id.*

⁶⁸ Elvira Dominguez-Redondo, *The Universal Periodic Review - Is There Life Beyond Naming and Shaming in Human Rights Implementation?*, 4 NEW ZEALAND L. REV. 673 (2012).

tends to inflict further suffering on those who . . . [were] intend[ed] to [be] protect[ed].”⁶⁹

Other confrontational approaches are similarly unlikely to prove effective. The UN Charter explicitly proscribes the use of force between Member States, unless such use of force is in self-defense.⁷⁰ This is so even when the intervention would serve the purpose of ending a mass atrocity. Rather, the UN Charter authorizes the Security Council of the UN to compel action as may be necessary to maintain or restore international peace and security.⁷¹ Despite the significant authority conferred upon the Security Council, such authority extends only to threats to “international peace and security,”⁷² a threshold that most human rights abuses will not meet.

Given the paradoxical relationship between the international community’s stance on human rights and the constraints imposed by the notion of state sovereignty, confrontational approaches are often inadequate or ineffective. While confrontational mechanisms may be available to prosecute or seek redress for human rights violations, enforcing human rights obligations presents an even greater challenge. As there is no international police force, and confrontational means are not available to address enforcement of human rights obligations, the utility of the non-confrontational Universal Periodic Review is enhanced. The Universal Periodic Review has the potential to target the structure of systems in place that allows human rights abuses to occur with a view toward improving human rights conditions all over the world.

D. *The Universal Periodic Review*

The Universal Periodic Review undertakes to analyze and address the human rights situation in each of the 193 UN Member States during each cycle, or approximately every five years.⁷³ The first cycle of the UPR took place between 2008 and 2011, the second cycle took place between 2012-2016, and the third began in 2017 and will be completed in 2021. The second and subsequent

⁶⁹ *Id.* at 697.

⁷⁰ See U.N. Charter art. 2; *see also* U.N. Charter art. 51.

⁷¹ U.N. Charter art. 39.

⁷² *Id.*

⁷³ *What is the UPR?*, UPR INFO, <https://www.upr-info.org/en/upr-process/what-is-it> (last visited Feb. 10, 2020).

cycles of the UPR focus on “the implementation of accepted recommendations and the development of [the] human rights situation[] in the State under review[.]”⁷⁴ As such, a State that accepts a recommendation is implicitly agreeing to be evaluated as to the implementation of such recommendations during subsequent cycles of the UPR.

1. The Development of the Universal Periodic Review

Human rights are legal rights—the violation of human rights constitutes a breach of law. For a legal right to carry weight, remedies for infringement upon that right must be available. Generally, a breach of the law is deemed subject to redress through adjudication of responsibility. Difficulties may arise when States with historical, socio-cultural, and religious norms that conflict with certain international human rights standards are obligated to adhere to those standards. In this context, the disputes stem from conflict between those international standards and the standards that a given State may deem appropriate, as opposed to conflict between the States themselves. Despite the significant interest that the international community has in safeguarding human rights, another fundamental interest exists—that of State Sovereignty.⁷⁵

While the concept of human rights has been around for centuries,⁷⁶ the international regime of human rights law, established after the Second World War, is relatively new. Traditionally, the highest form of legal authority has been that of the State—not the community of states or international mechanisms. Before international human rights law was established, States maintained the position that no one from State A could tell State B how to conduct its internal affairs, a critical limitation. In attempting to universalize adherence to human rights, this regime of international law represents a shift from the notion that international law concerns only the relationship *between* States, to the idea that an individual is a rights holder who is able to assert rights and claim remedies within and against the State.⁷⁷ The development of a scheme of international legal regulation is evidence of the gradual chipping away of the prerogatives of sovereignty. Still, sovereignty remains a rele-

⁷⁴ Human Rights Council, U.N. Doc. A/HRC/DEC/17/119, at 1 (Jul. 17, 2011).

⁷⁵ HENKIN ET AL., *supra* note 65.

⁷⁶ *A Brief History of Human Rights*, UNITED FOR HUM. RTS., <https://www.humanrights.com/what-are-human-rights/brief-history/> (last visited Nov. 20, 2019) (explaining that the first king of ancient Persia, Cyrus the Great, conquered Babylon in 539 B.C. He freed the slaves, declared that all people had the right to choose their own religion, and established racial equality.).

⁷⁷ HENKIN ET AL., *supra* note 65.

vant consideration when addressing a given state's conduct, and controversy remains surrounding the willingness and capacity of certain UN Member States to comply with certain obligations imposed by human rights law. As such, the Human Rights Council—charged with “preventing human rights violations, securing respect for all human rights, promoting international cooperation to protect human rights, coordinating related activities through the United Nations, and strengthening and streamlining the United Nations system in the field of human rights”⁷⁸—has no simple task. The HRC must attempt to strike a balance between respect for the sovereignty of a SuR and adherence to its ultimate goal: improvement of the human rights situation in each of the UN Member States.⁷⁹

Before the Human Rights Council and Universal Periodic Review were established, the Commission on Human Rights was criticized for its politicization and selectivity. Ultimately, the HRC replaced the Commission in an effort to reform the practices that led to the Commission's demise. In order to facilitate this objective, the then-Secretary General, Kofi Annan, proposed a “peer review” mechanism based on intergovernmental dialogue, along with the participation of other stakeholders. The Universal Periodic Review was established and began operating in March 2008. Positive changes to domestic legislation and policy, stemming from recommendations made during the Universal Periodic Review, demonstrate the potential efficacy of this approach. However, the cooperative and “dialogic nature” of the UPR⁸⁰ implies that this process is necessarily slow. Particularly, the reform of LGBTI rights has been characterized by more limited development. While this reality is undesirable, the cooperative approach exemplified by the UPR makes this unsurprising. The controversial nature of LGBTI rights in many parts of the world, coupled with the inherently non-confrontational character of the UPR process, assumes that reform to LGBTI human rights will not be immediately realized. Instead, anticipated progress must account for the sensitivity surrounding this topic and changes must occur incrementally, over time.

⁷⁸ *Who We Are*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/ABOUTUS/Pages/Mandate.aspx>.

⁷⁹ *What is the UPR?*, *supra* note 73.

⁸⁰ Cowell & Milton, *supra* note 34, at 352.

2. The Three Stages of the Universal Periodic Review

The human rights obligations of each State under Review are assessed based on the extent to which said State complies with the obligation set forth in: (1) the UN Charter; (2) the Universal Declaration of Human Rights (UDHR); (3) any human rights treaties to which the SuR is a State Party; (4) any voluntary pledges undertaken and/or policies implemented by the SuR; and (5) applicable international humanitarian law.⁸¹

i. Stage 1: Preparation for Universal Periodic Review

Three documents guide the review of any given Member State:⁸² (1) a report submitted by the SuR; (2) a report by the OHCHR, based on a compilation of information contained in the reports of treaty bodies as well as other relevant UN documents; and (3) a compilation of additional credible and reliable information provided by other relevant stakeholders, for example, non-governmental organizations⁸³ and national human rights institutions.⁸⁴

ii. Stage 2: The Review of the Working Group

Throughout a given cycle, 42 UN Member States are reviewed per year during three Working Group sessions—and each session is dedicated to reviewing the human rights situations of 14 UN Member States.⁸⁵ Further, each Working Group is comprised of all members of the HRC. During each Working Group Session, time is allocated to allow the delegation for the SuR to present the current state of their human rights situation to the Working Group. The remainder of the Session involves interactive dialogue between the SuR and any UN Member State or Organization that wishes to ask questions and voice its concerns.⁸⁶ Next, three members of the HRC (i.e. the “troika of rapporteurs”)⁸⁷ and a member of the OHCHR collaborate to produce a report based on an accurate and objective assessment of the Working Group Session, along with any recommendations provided to the SuR.⁸⁸ The SuR may

⁸¹ *Basic Facts About the UPR*, *supra* note 17.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Basic Facts About the UPR*, *supra* note 17.

⁸⁷ *Id.*

⁸⁸ *Id.*

accept or decline to implement the recommendations set forth, and must inform the HRC of its decisions. Finally, in the following plenary session of the HRC, the outcome report of each SuR is debated for one hour.⁸⁹ During this hour, the SuR, UN Member States, and certain human rights organizations, are each afforded 20 minutes to express their views and concerns.⁹⁰ It is at this time that the SuR has the opportunity to “reply to questions and issues that were not sufficiently addressed during the Working Group and respond to recommendations that were raised by States during the review.”⁹¹ The final Outcome Report is then adopted.

iii. Stage 3: Implementation of Recommendations & Follow-Up

Following the acceptance of recommendations by the SuR, the State has the “primary responsibility to implement the recommendations contained in the final outcome.”⁹² When each UN Member State is subsequently reviewed during the next UPR Cycle, that State must present information concerning the steps that have been taken in implementing and enforcing these recommendations. With reference to States that fail to adhere to these recommendations, the OHCHR has stated that “the Council will address cases where States are not cooperating.”⁹³

3. The Legal Effects of the Universal Periodic Review

While the UPR is deemed a primarily political, rather than legal, process, legal implications of the review exist and are often overlooked. Rights imply entitlement to remedies, and the provision of remedies require mechanisms for accountability. Rather than examination of cases by judges, the UPR is conducted by States as “peers.” As such, the cooperative nature of the UPR has been criticized as a deficient mechanism that is “wholly dependent upon the good will of the State under review[,]” thereby having little impact on “those who are not really willing to participate”⁹⁴ While true that the success of the UPR depends largely on the extent to which a given State is willing to cooperate, these criticisms overlook the less obvious legal effects of this mechanism.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Basic Facts About the UPR*, *supra* note 17.

⁹³ *Id.*

⁹⁴ Olivier de Frouville, *Building a Universal System for the Protection of Human Rights: The Way Forward*, in *NEW CHALLENGES FOR THE UN HUMAN RIGHTS MACHINERY* 241, 253 (M. Cherif Bassiouni & William A. Schabas eds., 2011).

While treaties represent “hard law,”⁹⁵ in that a State Party to a given treaty is legally bound by the obligations imposed by that treaty, the UPR mechanism can be viewed as a form of “soft law,”⁹⁶ in that it does not have a directly binding effect on the states that are reviewed.⁹⁷ Despite this distinction between “hard” and “soft” law, scholars have advocated the view that these two forms of law should be seen as existing along a continuum, rather than as binary choices.⁹⁸ In other words, a recommendation that a SuR accepts does not create a new legal obligation that is binding on that state. Instead, these recommendations may attain legal status in two ways.

First, the subject-matter of some recommendations may provide evidence of an emerging consensus among states as to “the scope and application” concerning an existing legal right.⁹⁹ The UPR produces normative effects by encouraging states to adopt new political and legal obligations. While this mechanism is not viewed as an international law-making process, the influence it may have on State behavior has the potential to define the scope and application of legal obligations over time. In addition to treaties that States agree to be legally bound by, obligations may come from international customary law.¹⁰⁰ For example, if a State has not signed or ratified a treaty prohibiting torture, that State is nevertheless prohibited from engaging in torture as a matter of customary law. Legally binding obligations are recognized as a matter of customary law when “both the emergence of a state practice and also the presence of *opinio juris*” are established.¹⁰¹ The second element required in order to give customary legal effect to a rule, *opinio juris*, refers to the requirement that States obey a given rule out of a sense of obligation—i.e. States adhere to the rule because they consider themselves legally bound rather than because of tradition or convenience.¹⁰² If a recommendation regarding the scope and application of a given law is met with a pattern of acceptance,

⁹⁵ Kenneth W. Abbot & Duncan Snidal, *Hard and Soft Law in International Governance*, INT'L ORG., (Summer 2000), at 421–22.

⁹⁶ *Id.* (“The term soft law is used to denote agreements, principles and declarations that are not legally binding”).

⁹⁷ Cowell & Milton, *supra* note 34.

⁹⁸ Kenneth W. Abbot & Duncan Snidal, *supra* note 95.

⁹⁹ Frederick Cowell, *Understanding the Legal Status of the Universal Periodic Review Recommendations*, 7 CAMBRIDGE INT'L. L.J. 164, 167 (2018) [hereinafter Cowell, *Understanding*].

¹⁰⁰ *What is Customary International Law?*, AUSTL'S MAGNA CARTA INST. (Mar. 14, 2017), <https://www.ruleoflaw.org.au/customary-international-law/>.

¹⁰¹ Cowell & Milton, *supra* note 34.

¹⁰² *What is Customary International Law?*, *supra* note 100.

this emerging trend could represent evidence of a new interpretive norm, or “state practice,” concerning the law in question.¹⁰³ When this state practice is accompanied by the presence of *opinio juris*, a new legally binding norm may emerge as customary international law. Rather than creating a right, recommendations accepted through the UPR, and ultimately adhered to, could potentially shape the scope of an existing commitment by establishing this legally binding norm.¹⁰⁴

The second way in which recommendations may obtain legal status is through their function as an enforcement mechanism for existing international obligations and norms.¹⁰⁵ Through participation in the UPR process, a SuR is consenting to the function of the review as an enforcement mechanism for that State’s existing legal obligations.¹⁰⁶ Many of the recommendations that are made to States throughout any given cycle of the UPR concern existing obligations which States are not complying with. While the UPR is not a law-making process, these recommendations serve to encourage compliance with existing human rights law. Through publicizing the ways in which a SuR is failing to comply with an obligation, these recommendations perform the function of “naming and shaming”—public criticism “that serves to attract attention to actions perceived as wrongful”—in order to pressure that State to change its behavior.¹⁰⁷

Further, by highlighting the lack of compliance with an existing obligation of a SuR, a recommendation forces the State “to account for its non-compliance.”¹⁰⁸ An example of this function can be seen when a recommendation is made concerning the failure of a SuR to submit reports to human rights treaty bodies, as required by membership to that treaty. Failure to report is a form of non-compliance—this lack of cooperation effectively weakens a

¹⁰³ Cowell & Milton, *supra* note 34.

¹⁰⁴ Detlev Vagts, *International Relations Looks at Customary International Law: A Traditionalist’s Defense*, 15 EUR. J. INT. L. 1031 (2004) (“... the awareness that a pattern of state behavior has settled into a rule of law introduces a new element into the situation, tending to make the pattern more stable and reliable. Custom lives.”).

¹⁰⁵ Cowell & Milton, *supra* note 34.

¹⁰⁶ Heather Collister, *Rituals and Implementation in the Universal Periodic Review and the Human Rights Treaty Bodies*, in HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RITUALS AND RITUALISM 109 (Hilary Charlesworth and Emma Larking eds., 2014).

¹⁰⁷ Katrin Kinzelbach & Julian Lehmann, *Can Shaming Promote Human Rights? Publicity in Human Rights Foreign Policy*, EUROPEAN LIBERAL FORUM (2015) (“Shaming seeks to increase the costs for offenders and thus acts as a deterrence mechanism. . . It can also serve as one of several mechanisms of human rights change. . .”).

¹⁰⁸ Cowell, *Understanding*, *supra* note 99.

treaty body.¹⁰⁹ Another significant function of the UPR in enforcing existing obligations comes into play by virtue of acceptance of a recommendation by a SuR. In effect, the State is agreeing to be scrutinized as to the implementation of that recommendation during the subsequent UPR. In situations of non-compliance, recommendations by other States encouraging compliance implicate the reputation of the SuR. Such recommendations portray the SuR as incapable and unreliable in the context of future international activity.¹¹⁰ Although the UPR does not create law, the function of the review as an enforcement mechanism plays a legal role in enforcing existing obligations.

Several theories concerning compliance of international human rights obligations lend support to the indirect legal effects that the UPR may produce. Constructivist theorists, who argue that “repeated interactions, argumentation, and exposure to norms characterize and construct state practice,”¹¹¹ have examined how the socialization of States within organizations can improve the States’ compliance with that organization. This serves to encourage norm adherence which effectively stimulates the development of legalism—in turn, the organization itself can be viewed as a source of law.¹¹²

Another noteworthy theory concerning compliance is the interactional account of international law.¹¹³ This theory looks to how legal commitments “arise in the context of social norms based on shared understandings,” and asserts that these commitments are preserved through enduring practices.¹¹⁴ The UPR is a mechanism that stimulates interaction through its “peer review” approach. Proponents of interactional theory stipulate that the organization’s practice has a legitimizing or delegitimizing effect on a State’s actions—thereby creating “a feedback loop . . . whereby actors within

¹⁰⁹ NIHAL JAYAWICKRAMA, *THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE* 132 (2002).

¹¹⁰ Andrew Guzman, *A Compliance Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

¹¹¹ Elizabeth Stubbins Bates, *Sophisticated Constructivism in Human Rights Compliance Theory*, 25 EUR. J. INT’L L. 1169 (2014).

¹¹² Cowell, *Understanding*, *supra* note 99; Jutta Brunnée & Stephen Toope, *Constructivism and International Law*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 119 (Jeffrey L. Dunoff & Mark A. Pollack, eds., 2012).

¹¹³ JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* (2010).

¹¹⁴ *Id.* at 15.

global society can learn collectively to value the rule of law more highly[.]”¹¹⁵

Assessing the efficacy of the UPR requires the understanding that the mechanism is primarily political and its legal effects serve to complement, rather than replace already-existing human rights machinery. The reality that enforcement tools of international law are imperfect,¹¹⁶ and that States remain the principal actors in the enforcement of international laws, must be recognized in order to appreciate the legal value of the Universal Periodic Review.

Despite the positive ways in which the UPR process allows for monitoring and assessing State compliance with human rights obligations, this mechanism is not without flaws. The necessarily slow pace at which the UPR can bring about change can make this approach futile for a State where flagrant human rights violations require an immediate solution. Any resulting legal effects will take time to realize.

Additionally, States often make broad recommendations, allowing the State under review to assert that it is in compliance. Vague recommendations can be impossible to monitor with accuracy and can inhibit the international community from holding that State accountable. For example, there is no clear difference between recommendations concerning commitments that the SuR has already made, and those relating to new commitments. Upon reviewing the legal effect of the UPR in 2009, Nadia Bernaz noted that the primary problem with the mechanism was the fact that the UPR treated binding and non-binding norms equally in accomplishing the review.¹¹⁷ Further, UN Member States often make recommendations that concern “what” issues warrant reform, rather than “how” States can actually implement reform. Even when a State demonstrates its support for a given recommendation, the implementation of a State’s accepted recommendations remains one of the UPR’s greatest challenges.

Due to the political nature of the Universal Periodic Review, neither of its constituent instruments¹¹⁸ set out mechanisms for enforcement. There is currently no formal process in place to consist-

¹¹⁵ *Id.* at 10.

¹¹⁶ Frederic L. Kirgis, *Enforcing International Law*, AM. SOC’Y OF INT’L L. (Jan. 22, 1996), <https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law>.

¹¹⁷ Nadia Bernaz, *Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review Mechanism*, in *NEW INSTITUTIONS FOR HUMAN RIGHTS PROTECTION* 75, 77 (Kevin Boyle ed., 2009).

¹¹⁸ G.A. Res. 60/251 (Mar. 15, 2006); Human Rights Council Res. 5/1, U.N. Doc. A/HRC/5/1 (June 18, 2007).

ently measure the level of implementation by a State under review. While civil society organizations, including non-governmental organizations, play important roles in this respect, the UPR in itself has the potential to take greater measures to facilitate implementation and accountability.

III. DISCUSSION

A. UPR Recommendations & Responses

The UN resolution, through which the Human Rights Council was created, instructed the HRC to “[u]ndertake 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[.]*”¹¹⁹ In the area of LGBTI rights, compliance with the mandate to ensure universality and equal treatment, while desirable, has proven difficult in practice.

In order to identify the UPR’s concrete effects with respect to LGBTI rights in reviewed States, I will look to UPR recommendations that pertain to legislation; however, note that most human rights violations involve practices and policies that States engage in, absent legislation as a justification. Due to differences in history, culture, and value systems, Member States diverge in the degree of legal protections and obligations concerning the rights of those who identify with the LGBTI community. Accordingly, recommendations about discriminatory laws concerning the LGBTI community have received a wide range of responses from States under review. While some States have welcomed the commitment to repeal discriminatory laws, others have been reluctant to commit, but have left the possibility open; still, others remain entirely unwilling to repeal legislation that discriminates against the LGBTI community. Through my analysis of recommendations pertaining to legislation, I will identify the strengths and shortcomings characteristic of the Universal Periodic Review and propose means by which the UPR can better serve its stated purpose.

States’ responses to the recommendations received during the course of its review may be separated into three categories: recom-

¹¹⁹ G.A. Res. 60/251, *supra* note 118, at 3.

mendations that are accepted; recommendations that are “noted;” and recommendations that are resisted. The distinctions between these categories are often subtle—however, they are conducive to assessing the relative effect of the UPR’s recommendations.

1. States that Accept Recommendations

The term “acceptance” is used where a state has given clear indication of acceptance of a recommendation.¹²⁰ Although it may take time to implement a recommendation to repeal discriminatory laws domestically, acceptance reflects a commitment to ultimately accomplish that goal. Accepting such a recommendation is significant: “when a State has formally accepted UPR recommendations, it has committed to implement them before its next review when it will have to report on the measures it has undertaken to implement the accepted recommendations.”¹²¹ Thus, the reviewed State implicitly accepts to be subject to the UPR’s scrutiny concerning its adherence to that commitment, as well as to the subject-matter of the recommendation itself.

There are several ways in which a SuR may indicate its acceptance of a given recommendation. In 2011, following its first review, Sao Tome and Principe was the only State to procure its “full support” for the recommendation that it repeal all laws criminalizing sexual orientation.¹²² “Full support” for a recommendation is the most desirable and most rare response from a State. Generally, countries that respond with “full support” or make similar commitments are those where such penal provisions have remained in place as a matter of historical legacy, rather than as a reflection of the current government’s policy.

Alternatively, while Mozambique’s Penal Code did not explicitly criminalize LGBTI conduct, concern centered around the potential interpretation of a provision in the Code. That provision criminalized “unnatural vices” and ordered security measures against those who practice such “vices against nature.”¹²³ The delegate from Mozambique plainly stated that “homosexuality is

¹²⁰ PURNA SEN, *UNIVERSAL PERIODIC REVIEW: LESSONS, HOPES AND EXPECTATIONS* 81 (Wayzgoose ed., 2011).

¹²¹ *Universal Periodic Review*, CHILD RTS. CONNECT, <https://www.childrightsconnect.org/connect-with-the-un-2/universal-periodic-review> (last visited Sep. 24, 2019).

¹²² Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Sao Tome and Principe*, at 44, U.N. Doc. A/HRC/17/13 (2011).

¹²³ Emmerson Lopes, *The Legal Status of Sexual Minorities in Mozambique*, in *PROTECTING THE HUMAN RIGHTS OF SEXUAL MINORITIES IN CONTEMPORARY AFRICA* 183, 184, (Sylvie Namwase & Adrian Jjuuko eds., 2017).

not criminalized [in Mozambique], as there is no such definition in the Criminal Code, so that no one can be sanctioned for homosexuality.”¹²⁴ Although the delegation did not commit to repeal such laws, it stated a serious commitment to address the issue of discrimination on those grounds.

In 2012, Sao Tome and Principe adopted a new penal code. Although it is unclear whether the new code is actually in force, Sao Tome and Principe appear to have legalized and removed punishment previously in place for homosexual activity.¹²⁵ In 2015, Mozambique’s new Penal Code explicitly removed the provision concerning “vices against nature,” thereby leaving no ground for the criminalization of homosexuality.¹²⁶

2. States that “Note” Recommendations

All recommendations that are not clearly identified as “accepted” are considered “noted.”¹²⁷ This includes circumstances when States have not offered a clear position on their response to recommendations, or the response that is provided is ambiguous.¹²⁸ Additionally, a recommendation that is accepted *in principle* is considered “noted.”¹²⁹ This response does not operate as an acceptance or rejection—instead, the State is deemed to have reserved judgment as to a “noted” recommendation.

A “noted” recommendation can imply both the ultimate desire to repeal discriminatory laws, as well as resistance toward decriminalization. For example, when Chile recommended that Uganda take measures to “combat and prevent all forms of discrimination. . .including on the grounds of sexual orientation and gender identity,” Uganda agreed to examine the recommendation and provide a response in due time.¹³⁰ During the same cycle,

¹²⁴ Refugee Documentation Ctr. of Ir., *Is Homosexuality Legal in Mozambique? How are Homosexuals Treated in Mozambique? Do the Police Offer Protection to Homosexuals in Mozambique?*, REFWORLD (June 8, 2012), <https://www.refworld.org/docid/5061adb42.html>.

¹²⁵ *LGBT Rights in Sao Tome and Principe*, EQUALDEX, <https://www.equaldex.com/region/sao-tome-and-principe> (last visited Sep. 24, 2019).

¹²⁶ *LGBT Rights in Mozambique*, EQUALDEX, <https://www.equaldex.com/region/mozambique> (last visited Sep. 24, 2019).

¹²⁷ UPR INFO, UPR INFO’S DATABASE: METHODOLOGY RESPONSES TO RECOMMENDATIONS (2014), https://www.uprinfo.org/database/files/Database_Methodology_Responses_to_recommendations.pdf.

¹²⁸ SEN, *supra* note 120.

¹²⁹ UPR INFO, *supra* note 127.

¹³⁰ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Uganda*, U.N. Doc. A/HRC/34/10/Add.1 (Mar. 15, 2017) [hereinafter U.N. Doc. A/HRC/34/10/Add.1].

however, Uganda did not support Mexico’s recommendation that the State “repeal the law against homosexuality, which facilitates discrimination against lesbian, gay, bisexual and transgender people. . . and imposes sentences of life imprisonment for the offenses of homosexuality, same-sex marriage and ‘aggravated homosexuality.’”¹³¹

3. States that Resist Recommendations

A State cannot technically “reject” a recommendation. Instead, the State will resist the recommendation or stipulate that a given recommendation does not enjoy its support.¹³² In effect, such a statement functions as a rejection of that recommendation—however, abstaining from categorizing it as such allows the matter to come up again in subsequent review cycles.¹³³

In large part, the States that resist decriminalization of homosexual conduct cite their national culture and tradition as a way to “legitimise [sic] the existence of provisions[.]”¹³⁴ The difficulty in promoting LGBTI rights in States that assert their domestic culture as a “barrier” to achieving further progress is evidenced by provisions of Uganda’s Penal Code.¹³⁵ During the first cycle of the UPR, the delegation from Uganda did not support recommendations that the State amend its Penal Code to allow for the rights of the LGBTI community to be realized. Recommendations set forth by Canada, Slovenia, Belgium, Switzerland, Australia, Brazil, Spain, Sweden, and The Netherlands all called for Uganda to repeal any discriminatory legislation against consensual same-sex relationships, and asked that it abstain from passing legislation of such a discriminatory nature.¹³⁶ The delegation demonstrated resistance against these proposals. The review of Uganda during the second cycle of the UPR took place approximately five years later. The delegation indicated that the Anti-Homosexuality Act had been declared unconstitutional and annulled by the Supreme Court of Uganda in 2014.¹³⁷ The delegation stated, “[a]ll Ugandans [are] treated equally, without discrimination. [LGBTI] persons who

¹³¹ *Id.*

¹³² UPR INFO, *supra* note 127.

¹³³ Cowell, *Understanding*, *supra* note 99.

¹³⁴ *UPR of Uganda: Allegations of Torture by Security Forces, and Criminalisation of Same-Sex Relations*, INT’L SERV. FOR HUM. RTS. (Oct. 19, 2011), <https://www.ishr.ch/news/upr-uganda-allegations-torture-security-forces-and-criminalisation-same-sex-relations>.

¹³⁵ *Id.*

¹³⁶ U.N. Doc. A/HRC/19/16, *supra* note 39.

¹³⁷ U.N. Doc. A/HRC/34/10/Add.1, *supra* note 130.

[are] discriminated against in accessing services or in the enjoyment of certain rights [can] petition the [Equal Opportunities] Commission for redress.”¹³⁸ The delegation then qualified its statement when it said that the country “could not accept activism or the promotion and public display of what people did in private[,]” as doing so would be “inconsistent with Ugandan culture, morals, and customs.”¹³⁹ While many recommendations that the delegation supported indicated a commitment to ensure that Uganda’s domestic laws were consistent with international human rights standards,¹⁴⁰ none of the recommendations that explicitly referred to the rights of LGBTI persons received the delegation’s support. Instead, recommendations set forth by 17 UN Member States concerning LGBTI rights were not supported. Similar to recommendations resisted during the delegation’s first review, the majority of recommendations [concerning the LGBTI community] that did not receive support from Uganda were those that called for the SuR to decriminalize consensual same-sex conduct.¹⁴¹

The Russian Federation similarly opposed recommendations that called on the State to repeal laws criminalizing sexual orientation. During the first cycle of the UPR, many countries raised particular concerns with respect to a federal bill proposed by Russia that outlawed “the so-called ‘propaganda of homosexuality’ among minors.”¹⁴² Denmark recommended that Russia “[t]ake effective steps to prevent arbitrary use of existing regulations to discriminate against LGBT[I] people”¹⁴³ In “accepting” this recommendation, the delegation stated, “[t]he law does not discriminate against LGBTI persons and does not allow for the arbitrary application of the relevant regulations.”¹⁴⁴ The delegation expressly resisted a recommendation from The Netherlands that Russia repeal legislation that enabled discrimination based on sexual orientation. In response, the delegation stated, “[t]he law does not discriminate against lesbian, gay, bisexual and transgender (LGBT) persons . . . [t]he law contains no measures whatsoever aimed at prohibiting or

¹³⁸ *Id.*

¹³⁹ *Id.* ¶ 57.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Russian Federation*, at ¶ 128, U.N. Doc. A/HRC/24/14 (July 8, 2013) [hereinafter U.N. Doc. A/HRC/24/14].

¹⁴³ *Id.* at ¶ 140.93.

¹⁴⁴ *Id.*

officially censuring homosexuality[.]”¹⁴⁵ Similar recommendations made by Canada, Belgium, Denmark, Slovenia, Sweden, and Spain were resisted as well.¹⁴⁶ The Russian “gay propaganda” law was passed on June 11, 2013 and enacted 19 days later. The “propaganda of homosexuality” bill essentially prohibits the mention of homosexuality in public.¹⁴⁷ Approximately five years later, Russia was reviewed during the third cycle of the UPR. During the portion of the session allocated to interactive dialogue, Denmark, Montenegro, and The Netherlands expressed concern regarding discrimination “based on sexual orientation and gender”¹⁴⁸ The delegation responded by pointing to the lack of evidence set forth to substantiate the claims and concerns that were raised. Russia declared that “investigations had revealed that there had been no incidents of discrimination against those persons.”¹⁴⁹ At the conclusion of its review, Italy recommended that Russia take concrete measures “to combat all forms of discrimination, including when based on religion or belief and on sexual orientation, in compliance with international obligations.”¹⁵⁰ In purportedly supporting Italy’s recommendation, the delegation for Russia stated that the current legislation prohibits any form of restrictions on the rights of citizens on social, racial, gender, ethnic, linguistic, religious or any other grounds.¹⁵¹ Recommendations from Ireland, Honduras, and Norway, urging the Russian Federation to adopt legislation prohibiting discrimination against LGBTI persons and their supporters, were not accepted. Instead, the delegation explained that “Russian legislation prohibits any form of restriction on the rights of citizens . . . [a]ny discriminatory act . . . is duly acted upon by the law enforcement agencies. The existing legal framework in the field under consideration is sufficient and needs no expansion at this point.”¹⁵² Russia similarly opposed Denmark’s recommendation that the State repeal “Federal Law No. 135-FZ by means of which ‘propaganda of non-traditional sexual

¹⁴⁵ U.N. Doc. A/HRC/24/14 ¶140.86.

¹⁴⁶ *Id.*

¹⁴⁷ Sewell Chan, *Russia’s ‘Gay Propaganda’ Laws Are Illegal, European Court Rules*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/2017/06/20/world/europe/russia-gay-propaganda.html>.

¹⁴⁸ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Russian Federation*, at ¶ 147.96, U.N. Doc. A/HRC/39/13, (July 12, 2018) [hereinafter U.N. Doc. A/HRC/39/13/AnnexE].

¹⁴⁹ *Id.* ¶ 139.

¹⁵⁰ *Id.* ¶ 147.90.

¹⁵¹ *Id.*

¹⁵² *Id.* ¶ 147.68.

relationships' is a criminal offence."¹⁵³ The delegation asserted that this recommendation was "factually inaccurate" as the "law in question introduced administrative liability . . . rather than a criminal one."¹⁵⁴ It further submitted that the law in question did not contradict Russia's international obligations and "needs no abolition."¹⁵⁵

In resisting recommendations concerning the rights of the LGBTI community, other reasons cited by States include a lack of financial resources as well as the risk of potential backlash.¹⁵⁶ For example, Togo stipulated that the issue was "too controversial for a fragile nation[.]"¹⁵⁷ and Singapore retained its discriminatory legislation, reasoning that societal attitudes "could not be changed by legislation alone."¹⁵⁸ Still, other States met similar recommendations with stronger opposition. For example, Gambia maintained that it had "cultural values, norms and practices. . ." distinctive from those of other countries, and "sexual orientation as a universal human right[]" was not a human right that the country recognized.¹⁵⁹ Many of the justifications provided by resisting States reflect a denial of the prevalence of human rights abuses aimed at the LGBTI community. Further, many of these states deny the existence of a national LGBTI community altogether.

B. *The Universal Periodic Review as a Form of Alternative Dispute Resolution*

1. A Case Study: Save the Children

A case study, "Universal Periodic Review: Successful examples of child rights advocacy,"¹⁶⁰ was published by Child Rights

¹⁵³ *Id.* ¶ 147.70.

¹⁵⁴ U.N. Doc. A/HRC/39/13/AnnexE, *supra* note 146 ¶ 147.70.

¹⁵⁵ *Id.*

¹⁵⁶ Cowell, *Understanding*, *supra* note 99.

¹⁵⁷ *UPR of Togo: Willingness to Improve but "no" to Decriminalisation of Same-sex Relations*, INT'L SERV. FOR HUM. RTS. (Oct. 13, 2011), <https://www.ishr.ch/news/upr-togo-willingness-improve-no-decriminalisation-same-sex-relations>.

¹⁵⁸ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Singapore*, at ¶ 82, U.N. Doc. A/HRC/18/11, (July 11, 2011) [hereinafter U.N. Doc. A/HRC/18/11].

¹⁵⁹ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Gambia*, at 63, U.N. Doc. A/HRC/14/6 (March 24, 2010).

¹⁶⁰ Diarra Diop, *Universal Periodic Review: Successful examples of child rights advocacy*, SAVE THE CHILDREN (2014), <https://resourcecentre.savethechildren.net/library/universal-periodic-review-successful-examples-child-rights-advocacy>.

Governance Global Initiative in January of 2014. The case study centers around Save the Children (“STC”), a non-profit organization that fights for the realization of children’s rights and documents the concrete influence that the Universal Periodic Review can have on discriminatory legislation. STC seeks to strengthen government systems and Civil Society Organizations (CSO) to ensure that States effectively implement the UN Convention on Rights of the Child (UNCRC).¹⁶¹ This organization first engaged in the UPR during the first cycle in 2008, seizing “the opportunity of the UPR from the outset to raise the profile of children’s rights, by engaging directly in reporting and advocacy or supporting child rights coalitions.”¹⁶²

In its participation of Pakistan’s review,¹⁶³ Save the Children demonstrated how the UPR can act as a catalyst in speeding up national policy and legislative initiatives that have been pending for years. STC’s active engagement in the UPR of Pakistan resulted in the passage of three bills between 2012 and 2013 that protect children’s rights.¹⁶⁴ The positive effects of these laws include prohibiting child corporal punishment, raising child protection standards in juvenile justice, and guaranteeing free education to all children aged five to sixteen.¹⁶⁵ By engaging with the media and influencing the issues that were raised during Pakistan’s review, STC was able to ensure that children’s issues were at the center of discussions.¹⁶⁶ The UPR is an integral part of STC’s child rights monitoring strategy, and a “powerful tool to hold States to account on their human rights record.”¹⁶⁷ By successfully wielding this tool, STC has achieved concrete results in changing legislation regarding children’s rights.

The Universal Periodic Review also provides a platform where a broader range of actors can engage with one another. In doing so, the UPR lays the foundation for strong relationships between embassies, human rights organizations, and the communities facing

¹⁶¹ *About Us*, SAVE THE CHILDREN, <https://www.savethechildren.org/us/what-we-do/global-programs> (last visited Nov. 20, 2019).

¹⁶² DIARRA DIOP, CHILD RIGHTS GOVERNANCE GLOBAL INITIATIVE, UNIVERSAL PERIODIC REVIEW: SUCCESSFUL EXAMPLES OF CHILD RIGHTS ADVOCACY (Jan. 2014) [hereinafter Diop, *UPR: Successful Examples of Child Rights Advocacy*].

¹⁶³ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Pakistan*, U.N. Doc. A/HRC/22/12, (Dec. 26, 2012).

¹⁶⁴ Diop, *UPR: Successful Examples of Child Rights Advocacy*, *supra* note 162.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

human rights violations. In Nepal, Save the Children trained 138 CSOs on how to use the UPR to hold the government to account on commitments to children.¹⁶⁸ Through coordinated advocacy at national and international levels, including meetings with embassies and trips to Geneva to ensure concerns would be raised during the UPR process, STC facilitated the adoption of the Child Rights Bill and National Child Policy and Comprehensive Standards for Child Care Homes in 2012. During the second UPR of Republic of Korea,¹⁶⁹ Save the Children along with two national organizations formed the coalition, “UPR Child Rights Network.” STC’s coordinated approach and concerted efforts with respect to reporting and advocating “brought a higher profile and greater visibility to children’s rights in the Republic of Korea,” indicating to many States involved in the UPR that these concerns required increased attention from national authorities.¹⁷⁰ Ross Oke, Coordinator for the UPR Child Rights Network, acknowledged that “[t]he UPR was a highly positive experience in terms of raising issues internationally and solidifying relationships while also forging new connections with other CSOs and government officials. The UPR recommendations can serve as a future advocacy tool with embassies on issues where they may not normally be involved.”¹⁷¹

2. The Strengths of the Universal Periodic Review

As stated above, the effects of the Universal Periodic Review have the potential to extend into the legal realm and operate as advocacy tools to create real change. The Universal Periodic Review provides a framework for dialogue and collaborative action at national and international levels between a broad range of actors. The limited availability of confrontational approaches to ensure that UN Member States adhere to their human rights obligations enhances the value in the UPR as a form of alternative dispute resolution. Through the non-confrontational nature of the UPR process, all UN Member States have the opportunity to both listen to and be heard by other States and interested organizations. The UPR process implicitly recognizes the sensitivity required to address the divergent views of States. This sensitivity is particularly evident when the sensitivities that correspond to LGBTI rights are

¹⁶⁸ *Id.*

¹⁶⁹ U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Republic of Korea*, U.N. Doc. A/HRC/22/10, (Dec. 12, 2012).

¹⁷⁰ Diop, *UPR: Successful Examples of Child Rights Advocacy*, *supra* note 162.

¹⁷¹ *Id.*

at issue. In operating as a form of alternative dispute resolution, the UPR maintains a cooperative, rather than confrontational, approach to addressing human rights conditions on a global scale.

With regard to more controversial topics, such as the treatment of LGBTI rights in the international community, the political (as opposed to legal) nature of the UPR facilitates open and constructive dialogue. The Universal Periodic Review puts States in the spotlight to answer LGBTI-related questions. Even if a given State is unwilling to commit to addressing human rights violations, the UPR creates a forum where States, otherwise unwilling to even acknowledge these issues, are compelled to engage. The UPR may also serve its purpose by laying the foundation for change. For example, when confronted with criticism as to discriminatory legislation, States that criminalize LGBTI conduct may dismiss recommendations to decriminalize by asserting that the laws in question are not enforced. Even if that State is unwilling to repeal, a State declaration of non-enforcement may plant the seed for future arguments for repeal.

With respect to sovereignty, the UPR “reinforces through repetition not only the normality of being a sovereign state, but also the idea that it is the state, and its policies, which are responsible for both violations and the realization of human rights” on the ground.¹⁷²

IV. PROPOSAL

The Universal Periodic Review has been in practice since 2008¹⁷³ and, as with any new institution, its weaknesses will take time to realize and even more time to effectively address. While many States have embraced LGBTI rights as human rights, some have refused to entertain this notion. Fortunately, the need to end human rights violations, including those based on sexual orienta-

¹⁷² 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*, in *HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RITUALS AND RITUALISM* 42, 61 (Hilary Charlesworth and Emma Larking eds., 2014) [hereinafter Cowan, *The UPR as a Public Audit Ritual*].

¹⁷³ *Universal Periodic Review*, *supra* note 11 (information can be found at https://www.ohchr.org/Documents/HRBodies/UPR/UPR_timeline.pdf).

tion, has been increasingly recognized.¹⁷⁴ UPR recommendations have the potential to operate as advocacy tools to reinforce ongoing national efforts aimed at securing legal and policy change for the LGBTI community. In order to realize that potential and effectively serve the object and purpose of the Human Rights Council, there are several ways in which the UPR machinery could be strengthened. Among other considerations, States and interested stakeholders must have a reasonable period of time to express their positions, States must make specific recommendations in order to obtain concrete commitments, and transparency throughout the process must be prioritized. Further, collaboration is essential; the UPR can assist in building strong and unified civil societies with the capacity to collect evidence, monitor progress and influence policy and practice. Moreover, any steps taken to strengthen the UPR machinery must focus primarily on enhancing its impact on human rights on the ground.

A. *Timing and Specificity*

1. Time Allotted

In the name of efficiency and equality, a fixed quantity of time is allotted and a strict maximum page limit for formal documents is required. During the first cycle of the UPR, all reviews lasted three hours.¹⁷⁵ Of that time, one hour is designated to the delegation to respond to questions, comments, and concerns from the Human Rights Council, the delegations of 193 Member States, and other interested stakeholders.¹⁷⁶ When the number of speakers was high, the time was further-subdivided rather than extended.¹⁷⁷ In effect, the more people interested in addressing human rights issues in a given State, the less time each speaker was allotted. Further, time constraints of this nature frustrate a SuR's ability to respond to recommendations. Following the first cycle of the UPR, one South Asian diplomat complained that the time limits imposed by the UPR left the SuR with "not enough time to explain the rights issue at hand," and that some SuRs resorted to "cultural ar-

¹⁷⁴ *Born Free and Equal*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/NewsEvents/Pages/BornFreeAndEqual.aspx> (last visited Nov. 20, 2019).

¹⁷⁵ Cowan, *The UPR as a Public Audit Ritual*, *supra* note 172 at 60.

¹⁷⁶ *Member States*, UNITED NATIONS, <https://www.un.org/en/member-states/>. *Born Free and Equal*, *supra* note 174.

¹⁷⁷ Cowan, *The UPR as a Public Audit Ritual*, *supra* note 172.

guments as an unavoidable shorthand for issues with complicated historical, political, social and economic, as well as cultural, dimensions.”¹⁷⁸ With time constraints as strict as these, human rights issues are viewed in isolation and recommendations are made without necessary context. Moreover, one hour is hardly sufficient to address one human rights issue, let alone all the issues potentially prevalent in a single State. Allowing more time for States to voice their concerns would further allow states to bypass the selectivity in identifying pressing issues that often results in superficiality. When issues demanding more attention arise, an Alternative Dispute Resolution mechanism, such as negotiation, should be available to facilitate compromise. While the HRC would likely need to create more time to allow for negotiation, doing so could facilitate compromises on recommendations and the realization of human rights on the ground.

2. “SMART” Recommendations

UPR Info, a non-governmental organization with the stated mission “to utilise [*sic*] the United Nations Universal Periodic Review (UPR) to ensure cooperation among all actors. . .,”¹⁷⁹ suggests that recommending States should make “SMART (i.e. specific, measurable, achievable, relevant, and time-bound) recommendations. . .,”¹⁸⁰ bearing in mind the reality and background of every country. In this respect, the recommending States must play a greater role. In order to use the UPR to hold a SuR’s government to account on an accepted recommendation, States must make recommendations that are targeted and specific. In turn, a reviewed State’s concrete actions may be evaluated in relation to specific commitments that the SuR has made. In addition to facilitating accountability for implementation, making “SMART” recommendations would deter States from accepting recommendations that they have no intention of adhering to. Further, even when recommendations to repeal discriminatory laws are accepted and the laws are successfully repealed, an end to discriminatory practices does not necessarily follow. Thus, the need to implement protective

¹⁷⁸ HILARY CHARLESWORTH & EMMA LARKING, *HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW* (Cambridge Univ. Press 2014).

¹⁷⁹ *Vision & Mission*, UPR INFO, <https://www.upr-info.org/en/about/vision-and-mission> (last visited Nov. 20, 2019).

¹⁸⁰ UPR INFO, *BEYOND PROMISES* (2014), https://www.upr-info.org/sites/default/files/general-document/pdf/2014_beyond_promises.pdf.

measures, and the need for States to recommend those measures, must be recognized as well.

B. *Transparency*

1. Resolving Ambiguities

Often times, a delegation confronted with a call to address violations, allegedly occurring in its State, will dismiss an allegation or recommendation by making an ambiguous statement to the contrary. When a law is ambiguous, as was the prohibition against “unnatural vices”¹⁸¹ in Mozambique’s Penal Code, the delegation should be required to resolve the ambiguity so that rights and obligations conferred by the law are properly understood and the explanation is on the record for future reference. When the text of the law is less repressive than the effect of implementation by courts, a limited interpretation of the scope and application of a discriminatory law can make a significant difference.

Additionally, as more acceptance does not necessarily reflect fewer human rights violations, proposals with a view toward increasing the prevalence of acceptance would be misguided. Rather than attempt to procure more acceptances by more States, the UPR should adapt its structure so that human rights machinery is in place and ready to assist the SuR in making reforms upon acceptance. The UPR was established to serve a political purpose, and much of its power lies in its political nature. However, once a State chooses to accept a recommendation, acceptance should be explicit and qualified only to the appropriate extent, if at all. If this is not so, acceptance may not operate as an acceptance in fact. If acceptance is qualified, experts in the field and individuals that are adept at mediation should facilitate negotiation between stakeholders and States. As previously stated, reasons cited by States that resist recommendations in the context of LGBTI rights include a lack of financial resources and risk of potential backlash.¹⁸² Often, States with the most grave human rights conditions are also those least likely to have adequate resources, structurally or economically, to address those conditions.¹⁸³ If a State is willing to accept a recommendation and act accordingly, guide posts should

¹⁸¹ Lopes, *supra* note 123, at 184.

¹⁸² Cowell, *Understanding*, *supra* note 99.

¹⁸³ *Background Information on Preventing Genocide*, UNITED NATIONS, <https://tolerance.tavaana.org/en/content/background-information-preventing-genocide> (2015).

be in place so that all willing States have adequate resources to set change in motion.

2. Fact-Checking and Accountability

The UPR could better serve its purpose by ensuring that assertions made by a delegation are factually correct. For example, when the Russian Federation was met with criticism concerning a proposed law prohibiting the “propaganda of homosexuality,”¹⁸⁴ the delegation accepted a recommendation that the State take steps to prevent arbitrary application of discriminatory laws. In accepting, the delegation asserted that “the law does not discriminate against LGBTI persons and does not allow for the arbitrary application of the relevant regulations.”¹⁸⁵ However, approximately four years after the “gay propaganda” law passed, an article published by the Thomas Reuters Foundation stated that “hate crimes against [LGBT] people in Russia have doubled in five years.”¹⁸⁶ According to Svetlana Zakharova, a Russian LGBT Network board member, “[offenders] have become more aggressive and less fearful[.]”¹⁸⁷ On December 12, 2018, an article concerning the “gay propaganda” law was published by Radio Free Europe/Radio Liberty (RFE/RL),¹⁸⁸ a news source that specifically targets countries where a “free press is banned by the government or not fully established.”¹⁸⁹ RFE/RL journalists seek to provide “uncensored news, responsible discussion, and open debate.”¹⁹⁰ The article, “‘A Living Hell’: Russia’s ‘Propaganda’ Law Damaging LGBT Youth, HRW Finds,”¹⁹¹ sheds light on a 92-page report issued by Human Rights Watch (HRW), titled “Russia: ‘Gay Propaganda’ Law Endangers Children”¹⁹². The report termed the law a “classic example of political homophobia,”¹⁹³ targeting vulnerable sexual

¹⁸⁴ Dmitry Belyakov, *No Support: Russia’s “Gay Propaganda” Law Imperils LGBT Youth*, HUM. RTS. WATCH (Dec. 11, 2018), <https://www.hrw.org/report/2018/12/11/no-support/russias-gay-propaganda-law-imperils-lgbt-youth>.

¹⁸⁵ U.N. Doc. A/HRC/24/14 ¶140.86.

¹⁸⁶ Daria Litvinova, *LGBT Hate Crimes Double in Russia After Ban on ‘Gay Propaganda,’* REUTERS (Nov. 21, 2017), <https://www.reuters.com/article/us-russia-lgbt-crime/lgbt-hate-crimes-double-in-russia-after-ban-on-gay-propaganda-idUSKBN1DL2FM>.

¹⁸⁷ *Id.*

¹⁸⁸ *About Us*, RADIO FREE EUR./RADIO LIBERTY, <https://pressroom.rferl.org/about-us>.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ “No Support: Russia’s ‘Gay Propaganda’ Law Imperils LGBT Youth,” HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2018/12/12/russia-gay-propaganda-law-endangers-children>.

¹⁹² *Id.*

¹⁹³ *Id.*

minorities for political gain.¹⁹⁴ While acceptance by all States is desirable, acceptance must be meaningful if it is to affect real reform. Acceptance is only meaningful if it is given in good faith with intent to act. If States are permitted to dismiss recommendations by making statements that directly conflict with well-documented evidence, as the Russian Federation did during its second review, the integrity of the UPR is greatly compromised. In order to maintain honesty and transparency, empty acceptances should not be entertained.

C. *Implementing and Enforcing Recommendations*

1. Collaborating with Existing UN Human Rights Machinery

In order to facilitate the implementation of accepted recommendations by a given State, collaboration with existing human rights machinery is essential. In addition to international treaty law, and domestic and regional mechanisms, the existing human rights machinery includes the principal organs of the United Nations, their subsidiary bodies, programs and funds, and related organizations. These UN bodies address a wide range of human rights issues, including the rights of LGBTI individuals and communities. Through non-adversarial approaches, these bodies extensively research and seek to identify the source of the human rights violation within their mandate. By working in conjunction with the existing human rights machinery, the Universal Periodic Review could better reform the structural deficiencies in States that enable these abuses to occur.

For example, the United Nations Development Programme¹⁹⁵ (UNDP) and the United Nations Population Fund (UNFPA)¹⁹⁶ are subsidiary bodies of the UN General Assembly. The work of both entities includes “combatting discrimination and violence based on sexual orientation, gender identity, sex characteristics and related work in support of [LGBTI] communities”¹⁹⁷ The UNDP

¹⁹⁴ *Id.*

¹⁹⁵ *The Role of the United Nations in Combatting Discrimination and Violence against Lesbian, Gay, Bisexual, Transgender and Intersex People*, UNITED NATIONS HUMAN RIGHTS OFF. OF THE HIGH COMMISSIONER (June 19, 2018), https://www.ohchr.org/Documents/Issues/Discrimination/LGBT/UN_LGBTI_Summary.pdf.

¹⁹⁶ *UNFPA in the UN System*, UNITED NATIONS POPULATION FUND, <https://www.unfpa.org/unfpa-un-system> (last visited Nov. 20, 2019).

¹⁹⁷ *The Role of the United Nations in Combatting Discrimination and Violence against Lesbian, Gay, Bisexual, Transgender and Intersex People*, *supra* note 195.

seeks to “help countries to develop policies, leadership skills, partnering abilities, institutional capabilities and build resilience in order to sustain development results.”¹⁹⁸ The UNDP 2016-2021 Strategy Note¹⁹⁹ on HIV, Health and Development reflects data and analyses of the impacts of inequality and exclusion on LGBTI people, and recognizes that “[h]omophobia and other forms of stigma, violence and discrimination against [LGBTI] people contribute significantly to their exclusion from society, limit access to health and social services and hinder social and economic development.”²⁰⁰ Similarly, the UNFPA seeks to apply basic human rights principles to “some of the most sensitive and intimate spheres of human existence.”²⁰¹ The UNFPA has recognized that achieving sustainable results with regard to these sensitive spheres entails “identifying the positive, as well as the challenging, cultural values, assets, expressions and power structures.”²⁰² In doing so, particularly when a given initiative is threatening to community values, UNFPA often partners with community and faith-based networks in an effort to reach “some of the most vulnerable and marginalized communities. . . .”²⁰³ Additionally, the United Nations Educational, Scientific and Cultural Organization (UNESCO), a specialized agency within the Economic and Social Council,²⁰⁴ seeks to develop educational tools and programs to “help people live as global citizens free of hate and intolerance.”²⁰⁵ Consistent with its mandate to ensure the right to quality education in safe learning environments, UNESCO works to prevent and address “homophobic and transphobic violence” in educational institutions.²⁰⁶ In 2012, the agency released a publication containing a summary of its findings from the first-ever UN international con-

¹⁹⁸ *About Us*, UNITED NATIONS DEV. PROGRAMME, <https://www.undp.org/content/undp/en/home/about-us.html> (last visited Nov. 20, 2019).

¹⁹⁹ UNITED NATIONS DEV. PROGRAMME, HIV, HEALTH AND DEVELOPMENT STRATEGY 2016-2021 (2016), <https://www.undp.org/content/undp/en/home/librarypage/hiv-aids/hiv—health-and-development-strategy-2016-2021.html>.

²⁰⁰ *Id.*

²⁰¹ *Culturally sensitive approaches*, UNITED NATIONS POPULATION FUND, <https://www.unfpa.org/culture> (last visited Nov. 20, 2019).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Eldon A. Winters, *UN Funds, Programmes, and Specialized Agencies: Making Sense of the Alphabet Soup*, AM. MODEL UNITED NATIONS (MAY 16, 2017), <https://www.amun.org/specialized-agencies/>.

²⁰⁵ *UNESCO in Brief – Mission and Mandate*, UNITED NATIONS EDUC., SCI. AND CULTURAL ORG., <https://en.unesco.org/about-us/introducing-unesco> (last visited Nov. 20, 2019).

²⁰⁶ *The Role of the United Nations in Combatting Discrimination and Violence against Lesbian, Gay, Bisexual, Transgender and Intersex People*, *supra* note 195.

sultation, convened to address homophobic bullying in educational institutions²⁰⁷; “[i]n 2017, UNESCO chaired the expert working group on education for the development of an international LGBTI Inclusion Index.”²⁰⁸

Similarly, other human rights organizations and institutions employ mechanisms with a view toward advancing favorable human rights conditions in the LGBTI community as well.²⁰⁹ Following the review of a given State, the Human Rights Council should have a mechanism in place to mobilize stakeholders such as Civil Society Organizations, the National Human Rights Commission, embassies, individuals, and the media and create coalitions for reviewed States (“UPR Coalition”). The NHRC and CSOs could ensure that information with respect to the status of implementation of accepted recommendations is authoritative and reliable. A reviewed State’s UPR Coalition should be invited to participate in forums with its government to disseminate recommendations and assist in creating a National Plan of Action. In addition, the UPR Coalition should disseminate UPR recommendations among LGBTI-led groups, and organize orientations about UPR mechanisms, raising awareness on a national level.

2. Implementing National Mechanisms for Reporting and Follow-Up

One measure that the Human Rights Council should do to assist States and their UPR Coalitions with implementation and enforcement would be the creation of a National Mechanism for Reporting and Follow-up (NMRF) for each UN Member State.²¹⁰ NMRFs serve to “enhance human rights expertise in a sustainable manner, stimulate national dialogue, facilitate communication within the Government, and allow for structured and formalized contacts with parliament, the judiciary, national human rights institutions and civil society.”²¹¹ The NMRF for a given State could

²⁰⁷ UNITED NATION EDUC., SCI. AND CULTURAL ORG., GOOD POLICY AND PRACTICE IN HIV AND HEALTH EDUCATION, BOOKLET 8: EDUCATION SECTOR RESPONSES TO HOMOPHOBIC BULLYING (2012).

²⁰⁸ *The Role of the United Nations in Combatting Discrimination and Violence against Lesbian, Gay, Bisexual, Transgender and Intersex People*, *supra* note 195.

²⁰⁹ *Advancing the Human Rights and Inclusion of LGBTI People: A Handbook for Parliamentarians*, UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP/PGA 2017).

²¹⁰ UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, NATIONAL MECHANISMS FOR REPORTING AND FOLLOW-UP: A PRACTICAL GUIDE TO EFFECTIVE STATE ENGAGEMENT WITH INTERNATIONAL HUMAN RIGHTS MECHANISM (2016).

²¹¹ *Id.*

include a board of human rights experts, reflective of the social, cultural, ethnic, and linguistic makeup of that State. These individuals could work closely with the UPR Coalition as well as victims of the human rights violation at issue in creating a National Plan of Action. Further, the Human Rights Council could ensure that alternative dispute resolution tools are consistently available throughout. When more sensitive subjects arise, specifically those human rights deemed contrary to the values of that State (as is often the case with LGBTI rights), NMRF board members could consult with expert bodies already in existence within the human rights machinery.

V. CONCLUSION

The Universal Periodic Review was primarily intended as a political process, focused on cooperation rather than confrontation. In practice, this political process has demonstrated that legal standards can be implicated as well. Significantly, the UPR has the potential to interpret and shape the scope and application of existing legal obligations. Through the use of Alternative Dispute Resolution mechanisms, the Universal Periodic Review can operate as a forum where States are empowered to affect real change. This mechanism enables States to learn from each other—and newfound understanding could result in the acceptance and implementation of human rights for all. Above all else, human rights are inherent in all people by virtue of their status as a human being.²¹² The words enshrined in the opening statement of the UDHR are unequivocal, “[a]ll human beings are born free and equal in dignity and rights.”²¹³

²¹² HENKIN ET AL., *supra* note 65.

²¹³ *Fact Sheet: International Human Rights Law and Sexual Orientation & Gender Identity*, *supra* note 2.