NEW MECHANISMS OF THE UN HUMAN RIGHTS COUNCIL

Rosa Freedman*

Abstract

The United Nations Human Rights Council was created in 2006 to universally protect and promote human rights. Failures of the Council's predecessor, the Human Rights Commission, had been attributed to politicisation and bias. In order to overcome these and other Commission failings, two new mechanisms were created to assist the new body with fulfilling its mandate. Universal Periodic Review provides a mechanism for examining the human rights records of all UN Member States during a four year cycle. Special Sessions enable the Council to deal with grave human rights crises as they occur. However, these mechanisms have been used by States and regional groups to achieve political aims. This article examines these mechanisms in order to assess whether the Council is adhering to its founding principles and whether it is effectively protecting and promoting human rights.

Keywords: human rights; Human Rights Council; international human rights; international law; Special Sessions; United Nations; Universal Periodic Review

1. INTRODUCTION

The UN Human Rights Council was established in 2006 to replace the UN Commission on Human Rights. The Commission's demise was largely due to the politicisation that increasingly dominated its proceedings and impacted upon its work. Politicisation, that is pursuit of States' national agendas or regional groups' common objectives, took the form of selectivity, partiality and bias. One key example of the impact of politicisation was the Commission's failure to address many gross and systemic country-specific human rights violations whilst simultaneously devoting vastly disproportionate attention to other situations. For example, during the Commission's

* Rosa Freedman, (Doctoral Candidate, Faculty of Laws, Queen Mary University of London, LL.M London 2006, LL.B (hons) London 2005) is a Fellow at the Birmingham Law School, University of Birmingham. Rosa has attended UN Human Rights Council sessions in Geneva as part of her ongoing research on the Council. All the websites were last visited 4 August 2011.

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60 years, one quarter of its country-specific resolutions focused on Israel while not one resolution dealt with human rights abuses in China.

Lyons, Baldwin and McNemar defined politicisation of international organisations as when countries, seeking to further their own political agendas, introduce unrelated controversial issues.[1] Such politicisation occurred throughout the Commission's existence, but was a growing concern during the body's latter years and, ultimately, contributed to its demise. Heinze argues, however, that politicisation does not just occur at the discursive level, although that level may make the politicisation more overt.[2] State actions at the Commission, for example voting in blocs and selectivity regarding country-specific human rights situations, demonstrate politicisation throughout the body's existence.[3] Acceptance that domestic agendas are always present is different to tolerating political conflicts subsuming a body. Problems arise where an organisation ceases to fulfil its mandate because of politicisation overshadowing, or preventing, successful work.

Another method by which politicisation occurred at the Commission was through regionalism. Regional groups and alliances are utilised in order to place national or collective policies on the agenda. Commission membership was allocated to the UN's five regional groups: the African Group; the Asian Group; the Latin American and Caribbean Group (GRULAC); the Western European and Other Group (WEOG); and the Eastern European Group. The five regional groups are used by the UN to ensure proportionate geographic representation when apportioning seats or membership to UN bodies.[4] However, although States tend to form alliances with other countries from the same region, geographic groups are not the only form of alliances at the UN.

Political alliances, according to a study conducted by Russett in 1967, are formed based on social and cultural homogeneity, similar attitudes or external behaviour, political interdependence, economic interdependence and geographic proximity.[5] Developing States have formed much stronger political alliances than developed nations, perhaps owing to a far greater need for collective strength on their part. Developing nations have formed subgroups, within or across regional groups, asserting collective strength to pursue collective aims. Weiss argues that the end of

1 Lyons, G.M., Baldwin, D.A., & McNemar, D.W., 'The "Politicization" Issue in the UN Specialized Agencies', *Proceedings of the Academy of Political Science,* Vol. 32, No. 4, 1977, pp. 81–92, at p. 89.

2 Heinze, E., 'Even-handedness and the Politics of Human Rights', *Harvard Human Rights Journal*, Vol. 21, No. 7, 2008, pp. 7–46, at p. 41.

3 *Idem*.

4 The five regional groupings were established in 1963. See, generally, Thakur, R., *What is Equitable Geographical Distribution in the 21st Century*, United Nations University, New York, 1999.

5 Odum, H.W., 'A Sociological Approach to the Study and Practice of American Regionalism', *Social Forces*, Vol. 20, No. 4, 1942, pp. 425–436, at pp. 430–431.

East-West tensions, with the fall of the Soviet Union, saw a shift to another world rift, this time between the North and the South.[6]

Two main political alliances with strong influence within various UN bodies are the Non-Aligned Movement[7] (NAM) and the Organisation of the Islamic Conference[8] (OIC). The NAM and OIC dominated the Commission's proceedings and work after the end of the Cold War. The increase of overt politicisation, selectivity and bias at the Commission can be attributed largely to those political alliances. Collective agendas were pushed using group tactics, for example blocking action being taken, and voting as a bloc in order to pass resolutions.

Reform proposals sought to alter radically the principal UN human rights body in order that the Council would overcome the Commission's flaws.[9] However, many of the more radical reforms were not implemented, resulting in the new body greatly resembling its failed predecessor. Membership was reduced from 53 to 47, despite a strong case being made for a smaller body, which would avoid the politicisation prevalent at the Commission.[10] Similarly, calls for elected members to demonstrate their commitment to human rights were all but ignored, with only soft criteria required for membership.[11] The similarities between membership of the Commission and Council have resulted in similar group tactics occurring at the new body as had dominated its predecessor. The OIC, with members and allies within four of the five regional groups,[12] and the African Group have used group tactics to block action being taken against Sudan, a member of both groups, on the human rights situation in Darfur.[13] Similarly, regional and political alliances have used collective influence

6 Weiss, T.G., *What's Wrong with the United Nations and How to Fix It*, Polity Press, Cambridge, 2008, pp. 50–51.

7 NAM developed from the Asian-African Conference, a political gathering held in Bandung, Indonesia, in April 1955. The conference was convened in part due to frustration by many newly self-determined countries unable to secure UN membership due to Cold War politics. The group's name indicates that its membership was comprised of States not involved in the Cold War – that is not aligned to either the US or the Soviet Union.

8 The OIC was established in 1969 to unite Muslim countries after the 1967 War in which Israel conquered Jerusalem. The OIC is the largest alliance of States within the UN with 57 members in 2008: 21 Sub-Saharan African, 12 Asian, 18 Middle Eastern and North African States, 3 Eastern European and Caucasian, 2 South American, and 1 Permanent Observer Mission. See Organisation of the Islamic Conference, 'Permanent Missions of OIC Member States to the United Nations in New York', *available at*: www.oicun.org/categories/Mission /Members/.

9 See, for example, Report of the Secretary-General, 'In larger freedom; towards development, security and human rights for all', 21 March 2005, A/59/2005 (on reform proposals). See Hampson, F.J., 'An overview of the reform of the UN human rights machinery', *Human Rights Law Review*, Vol. 7, No. 1, 2007, pp.7–27 (on reform proposals and alternatives).

10 Weiss, *op.cit.* note 6, pp. 146–147.

11 General Assembly Resolution 60/251, 'Human Rights Council', 15 March 2006, UN Doc. A/RES/60/251, paras. 8 and 9.

12 The OIC has members in all regional groups except the Western European and Others Group.

13 Freedman, R., 'Improvement on the Commission?: The UN Human Rights Council's Inaction on Darfur', *University of California-Davis J. of Int'l Law & Policy*, Vol. 16, No. 1, 2009, pp. 81–129.

to ensure the Council devotes disproportionate attention to countries, such as the United States, in order to further political agendas.[14]

Despite similarities between the Council and its predecessor, two new mechanisms were created to overcome key criticisms of the Commission. These mechanisms are the Universal Periodic Review and the Council's Special Sessions. Establishment of these mechanisms signalled the desire to move away from politicisation, selectivity and bias, and towards fulfilment of the mandate to universally protect and promote of human rights. Both of these new mechanisms will be examined in order to assess whether they have overcome the Commission's failings and have assisted the Council's ability to fulfil its mandate of protecting and promoting human rights.

2. UNIVERSAL PERIODIC REVIEW

A key criticism of the UN Commission on Human Rights had been its selective and politicised treatment of country-specific situations. Universal Periodic Review (UPR) directly deals with such criticisms through its universality.[15] Sweeney and Saito comment that the UPR is the one completely innovative mechanism that distinguishes the new body from the Commission.[16] However, although the UPR has been put forward, and widely accepted, as an innovative mechanism,[17] Alston draws a historical parallel between the UPR and a 1950 proposal for a periodic review.[18] Although that parallel has been criticised,[19] it which will be used as a starting point for the UPR's background.

In 1950, France proposed a system to examine States' adherence to their human rights commitments. Yugoslavia raised the issue of capacity-building during these discussions, insisting that assistance be given to States lacking the national resources to implement human rights standards.[20] That issue is still raised in relation to human rights and the expectations placed on weaker, particularly developing, States. Cold

14 Freedman, R., 'The United States and the Human Rights Council: An Early Assessment', *St. Thomas Law Review*, Vol. 23, No. 1, 2010, pp. 23–70.

15 Callejon, C., 'Developments at the Human Rights Council in 2007: a reflection of its ambivalence', *Human Rights Law Review*, Vol. 8, No. 2, 2008, pp. 323–342, at p. 334.

16 Sweeney, G. & Saito, Y., 'An NGO assessment of the new mechanisms of the UN Human Rights Council', *Human Rights Law Review*, Vol. 9, No. 2, 2009, pp. 203–223, at p. 203.

17 See, for example, Callejon, *loc.cit*. note 15, p. 334.

18 Alston, P., 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council', *Melbourne Journal of International Law*, Vol. 7, No. 1, 2006, pp. 185–224, at p. 207.

19 Although see Abebe, A.M., 'Of shaming and bargaining: African States and the universal periodic review of the United Nations Human Rights Council', *Human Rights Law Review*, Vol. 9, No. 1, 2009, pp. 1–35, at p. 5, arguing that there are few similarities between the two mechanisms.

20 'Yugoslavia: Amendments to the Draft Resolution on Annual Reports (E/CN.4/L.266) Submitted by the United States of America', UN Doc. E/CN.4/L.305/Rev.1 (1953) in 'Report of the Ninth Session of the Commission on Human Rights', UN Doc. E/2447 (30 May 1953), p. 266.

War tensions initially blocked the proposal, with Western and Latin American States fearing that 'democratic states' would be the sole countries to submit reports.[21] In 1953, however, the US built upon France's proposal, suggesting annual voluntary State reports on particular human rights issues.[22] In particular, the US proposal focused on fact-finding, information-sharing, and the role of administrative staff and States in providing peer-led practical advice and guidance on implementing human rights standards.[23]

Neither proposal bore fruit until 1956. Even then, Alston comments, they were watered down in an effort to achieve compromise, resulting in a number of failings of the reporting system.[24] These failings are key to understanding the UPR and the potential problems that it faces. State reports to the Commission regularly downplayed or ignored issues of compliance.[25] The potential for such abuse stems from allowing States, rather than independent experts, to submit reports on their human right situations. Another main flaw was that rather than allowing the Secretary-General to analyse State reports, he was only mandated to summarise them. Alston comments that this undermined the reporting system's effectiveness.[26] A third problem relevant for the UPR was that recommendations were qualified by the requirement that they be 'general and objective', thus limiting the ability of the mechanism to deal with specific human rights issues or situations.[27]

The Commission's reporting procedure lasted for 25 years, but made little impact on the protection and promotion of human rights. Alston comments that the procedure's 'achievements could readily be measured in terms of trees destroyed'.[28] Its main success was to give the impression that governments were cooperating with the Commission. One of the UPR's main tasks will be to ensure that it does more than merely giving the appearance of human rights protection.

Alston summarises four main lessons that the Council can learn from the Commission's review system: transparency and fairness; strong and reliable information; concise, focused recommendations tailored to individual situations; tangible outcomes.[29] This section examines the UPR, State positions taken during its creation, and its early sessions, in order to assess whether it has achieved its objectives, adhered to its mandate, and avoided the pitfalls of its predecessor.

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21 Commission on Human Rights, 'Report of the Sixth Session of the Commission on Human Rights', 19 May 1950, UN Doc. E/1681, p. 8; Alston, *loc.cit.* note 18, p. 208.

22 *Ibidem,* pp. 208–209.

23 *Ibidem,*. p. 209.

24 *Ibidem,* p. 211.

25 *Ibidem*.

26 *Ibidem,* p. 212.

27 *Ibidem*.

28 *Ibidem,* p. 213.

29 *Ibidem,* p. 214.

2.1. BACKGROUND

Adoption of a 'peer review' was first proposed by the then Secretary-General Kofi Annan in April 2005 during the Commission's final Session.[30] The concept was introduced as part of Annan's proposal to replace the Commission.[31] The mechanism was intended to implement universal and indivisible human rights.[32] The review was expected to assist the UN human rights machinery to overcome the Commission's politicisation and selectivity.[33]

Alston notes the proposal's main attractions: universality; avoidance of the politicisation that had undermined the Commission; and provision of practical human rights support and advice.[34] Peer review was expected to overcome selectivity by assessing every State's fulfilment of human rights obligations.[35] Annan proposed that each country be reviewed periodically to ensure regular and universal application.[36] Thus, the mechanism would avoid selectivity and politicisation as it would not single out known human rights abusers for scrutiny.[37] Rather than eliminating country scrutiny altogether, as had been advocated during the Commission's latter years,[38] the review would place the burden of scrutiny on 'peers' – other Member States.[39] Similarly, as countries had previously sought Commission membership to avoid human rights scrutiny, the proposal was seen as the embodiment of a genuinely reformed human rights body.[40]

Alston comments that 'peer review' has no meaning other than involvement of other States,[41] despite the term's frequent use within international organisations. Annan did not expand upon the 'peer' element of his proposal, and the term 'peer review' was absent from Resolution 60/251,[42] which instead required the Council to 'undertake a universal periodic review'.[43] Change from 'peer' to 'periodic' appears to have had little impact on the mechanism which, as shall be explored, undertakes

30 Speech of Secretary-General Kofi Annan to the Commission on Human Rights, 'Reforming UN Human Rights Machinery', 7 April 2005, UN Press Release SG/SM/9808 HR/CN/1108.

31 Schrijver, N., 'The UN Human Rights Council: A New "Society of the Committed" or Just Old Wine in New Bottles', *Leiden Journal of International Law*, Vol. 20, Vol. 4, 2007, pp. 809–823, at p. 814.

32 Addendum to 'In larger freedom', Human Rights Council: Explanatory note by the Secretary-General, 23 May 2005, UN Doc. A/59/2005/Add.1, para. 6.

33 *Idem*.

34 Alston, *loc.cit.* note 18, p. 207.

35 UN Doc. A/592005/Add.1, *supra* note 32.

36 *Ibidem*, paras. 6 and 7.

37 Gaer, F.D., 'A voice not an echo: universal periodic review and the UN treaty body system', *Human Rights Law Review*, Vol. 7, No. 1, 2007, pp. 109–139, at p. 111.

38 Particularly by the Like-Minded Group, led by China.

39 Gaer, *loc.cit.* note 37, p. 110.

40 *Idem*.

41 Alston, *loc.cit.* note 18, p. 207.

42 Gaer, *loc.cit.* note 37, p. 112.

43 GA Resolution 60/251, *supra* note 11, para. 5(e).

a periodic and peer review of all States. It does, however allow other stakeholders to participate alongside States in the review,[44] although that participation is limited. Change in language perhaps reflects concerns regarding the phrase's lack of definition, or counters any potential State arguments about who constitutes a 'peer'.

Gaer comments that Annan, supported by Louise Arbour, had 'a grand vision' in which various UN mechanisms would be utilised to implement UN human rights norms and standards.[45] However, little discussion occurred on the review's modalities, nor how it would achieve the stated aims.[46] As with the Council's founding principles,[47] expectations of the new body were expressed with little regard to the practicality, nor even the possibility, of implementation. Indeed, Annan failed to discuss whether or how the UPR, itself an inter-governmental mechanism, might avoid the same politicisation that it sought to help the UN human rights body to overcome.[48] It appears as though Annan did not consider the very possibility that UPR was always going to be placed under pressure as an inter-governmental mechanism mandated to conduct itself without politicisation.

In keeping with Annan's aims, the General Assembly's first pronouncement on the new mechanism stated that the 'Council shall have the ability to periodically review the fulfilment of all human rights obligations of all Member States'.[49] The August draft similarly called for periodic review of all human rights obligations of all States.[50] However, the September draft downgraded the review from fulfilment of human rights obligations to compliance with such obligations.[51] Observers have noted the fundamental difference between 'fulfilment' and 'compliance',[52] arguing that the former requires States to take proactive steps to ensure individuals' rights.[53] These early changes mirror the Commission's review procedure, whereby key elements for

44 Callejon, *loc.cit.* note 15, p. 334.

45 Gaer, *loc.cit.* note 37, p. 113.

46 See, for example, Sweeney & Saito, *loc.cit.* note 16, p. 204.

47 GA Resolution 60/251, *supra* note 11.

48 Sweeney & Saito, *loc.cit.* note 16, p. 204.

49 Draft released by the General Assembly President, dated 3 June 2005; General Assembly Report, 'Draft Outcome Document of the High-level Plenary Meeting of the General Assembly of September 2005 submitted by the President of the General Assembly', 8 June 2005, UN Doc. A/59/HLPM/CRP.1, para. 88; See UN Press Release, 'Assembly President Previews Possible Outcome of Summit on UN Reform', 3 June 2005, *available at*: www.un.org/news.

50 General Assembly Report, 'Revised Draft Outcome Document of the High-level Plenary Meeting of the General Assembly of September 2005 submitted by the President of the General Assembly, 10 August 2005, UN Doc. A/59/HLPM/CRP.1/Rev.2, para. 139.

51 Gaer, *loc.cit.* note 37, p. 111.

52 See, for example, *Idem*.

53 For more on this see Committee on Economic, Social and Cultural Rights General Comment No. 16, 'The equal right of men and women to the enjoyment of all economic, social and cultural rights (Article 3)', 11 August 2005, UN Doc. E/C.12/2005/4; and Human Rights Committee General Comment No. 31, 'The Nature of the General Legal Obligations Imposed on States Parties to the Covenant', 26 May 2004, UN Doc. HRI/GEN/1/Rev.7, para. 192.

protecting and promoting human rights were undermined or downplayed in order to maintain State support for the fledgling proposal.

All States identified the UPR as a mechanism that would deal with the UN human rights machinery's credibility issues after the Commission's demise. As a universal procedure it was expected that no States, not even powerful or well-connected countries, would be able to avoid scrutiny.[54] However, the North-South divide demonstrated different motivations for wanting the UPR and different expectations for the mechanism's outcomes. Steiner, Alston and Goodman comment that the UPR was heralded by developing countries, particularly the LMG, as they had opposed the Commission's selective focus on grave violations within a few States.[55] UPR offered a universal mechanism that would focus on a range of human rights abuses, not just gross and systemic situations. Western governments and NGOs also welcomed UPR as an opportunity to hold regular, in-depth reviews on all States' human rights records.[56] Alston comments that in practice, there will be divergence between North and South expectations. Western States will seek probing reviews resulting in critical country-specific recommendations. Developing States will seek a general, open-ended, non-condemnatory process.[57] Alston, writing before the UPR's first cycle, argues that the mechanism will ultimately be shaped by States not aligned with the North or South,[58] such as Latin American countries and those African States not members of the OIC. That assertion was correct to a certain extent, as shall be demonstrated through examining the debates on the UPR's creation and modalities, as well as its early sessions.

2.2. UPR CREATION

Canada circulated two non-papers on Peer Review during 2005.[59] The first offered two approaches for the review – the Comprehensive Approach and the Interactive Dialogue.[60] Gaer explains that the Comprehensive Approach[61] suggested the compiling of a comprehensive State report, giving recommendations, a formal interactive dialogue, and publication of conclusions.[62] The Interactive Dialogue proposed a three-hour discussion of a State's pre-published statement on its national

54 Gaer, *loc.cit.* note 37, p. 110.

55 Steiner, H.J., Alston, P., & Goodman, R., *International Human Rights In Context*, 3rd edition, Oxford University Press, New York, 2008, p. 806.

56 *Ibidem.*

57 Alston, *loc.cit.* note 18, p. 206.

58 *Idem.*

59 Gaer, *loc.cit.* note 37, p. 113. Non-papers are authoritative but unofficial documents used to present ideas about and test State reactions to policies.

60 *Ibidem,* p. 114.

61 Based on OECD, ILO, and World Trade Organisation peer review mechanisms, as well as the African Peer Review Mechanism.

62 Gaer, *loc.cit.* note 37, p. 114.

human rights situation, with extra information made available by the OHCHR,[63] with a published summary to which concerned States could respond within six months.[64] The latter was a simpler but less rigorous approach.[65]

Canada's second non-paper offered an approach combining the two approaches. OHCHR would compile all available information on the reviewed State to which that State would respond. A committee 'of experts appointed by the [12] "peer states"' would hold an interactive dialogue, with a State presentation, questions and comments, and State response.[66] A summary would be published to which the State could respond. All documents would then be submitted to the Council.[67]

Canada's proposals clearly guided and shaped the UPR, as will be demonstrated when examining the mechanism's modalities. Although not explicitly stated by Canada, that country hoped that UPR would enable the UN human rights body to move away from politicisation and towards cooperation.[68] Canada, a Western and developed State, aligned itself with a typically South position that naming, shaming and blaming States achieves less than encouraging a cooperative culture of practical assistance. Canada does have a strong reputation at the UN for its peacekeeping initiatives, and is seen as a benign Western nation by many developing countries and groups. Therefore, Canada's taking up the South's mantle in this regard is not wholly surprising.

Canada has nevertheless found itself ostracised at the Council by some developing groups.[69] Negative tactics against Canada have resulted from its position on Israel. Canada has not defended Israel from criticism of its human rights record, but has strongly opposed that country being singled out by OIC members and its allies.[70] Canada's general position against naming, shaming and blaming, and its interest in avoiding politicisation particularly regarding country-specific issues, was mirrored in its proposals for the UPR.

The UPR's general outline was established by Resolution 60/251 and stipulates that the mechanism's primary objective is to improve human rights situations.[71] However, the modalities were left to the Council, with only guiding principles and concepts set out in paragraph 5(e), which says that the Council shall:

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63 Such as treaty body reports, information from other procedures, and statements from interested parties.

64 Gaer, *loc.cit.* note 37, p. 114.

65 *Ibidem*.

66 *Ibidem*, p. 113.

67 *Ibidem*, p. 115.

68 *Ibidem*.

69 See Freedman, *loc.cit.* note 13, pp. 127–128.

70 *Ibidem*.

71 Human Rights Council Resolution 5/1, 'Institution Building of the United Nations Human Rights Council', 18 June 2007, UN Doc. A/HRC/RES/5/1, para. 4(a).

> Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session.[72]

Alston comments that Resolution 60/251 'faithfully reflects' Annan's vision.[73] However, as with Annan's original proposal, the Resolution sets out nothing more than the mechanism's general skeleton.[74] Annan's Explanatory Note on the Council's creation added a similarly vague and broad statement;[75] that the UPR should give 'an evaluation of fulfilment of all human rights for all persons'.[76] The language used can be found in other UN documents. That language reflects the principles and expectations upon which the Council was created. However, Ghanea comments that such language is 'worrisome'.[77] She suggests that the requirement for cooperation will reduce the Council's ability to deal with the gross and systemic human rights situations where an abuser State is unlikely to cooperate with the Council.[78]

Rather than dealing with the UPR's specifics, Resolution 60/251 directs the Council on certain fundamental criteria that it should fulfil: it should be based on objective and reliable information; it must review State fulfilment of human rights obligations and commitments; the review must ensure universality of coverage and equal treatment of all States, with consideration given to a State's capacity-building needs; it shall be a cooperative mechanism; and it involves an interactive dialogue with the State's full involvement.[79]

Interpreting this language, and ensuring practical implementation of these requirements, presented various difficulties. Disagreements occurred on the information to be used, the formal reports to be submitted, and the degree of State involvement in the review process. Discussions also focused on how to ensure universal coverage and equal treatment, as well as the UPR's interactions with Council

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72 *Ibidem,* para. 5(e).

73 Alston, *loc.cit.* note 18, p. 207.

74 GA Resolution 60/251, *supra* note 11, para. 5(e).

75 Secretary-General Report Addendum (2005), *supra* note 32, para. 6.

76 *Idem.*

77 Ghanea, N., 'From UN Commission on Human Rights to UN Human Rights Council: one step forwards or two steps sideways?', *International and Comparative Law Quarterly*, Vol.55, No. 3, 2006, pp. 695–705, at p. 703.

78 *Idem.*

79 Although the UPR's relationship with treaty body mechanisms shall not be explored in this article, it must be noted that Resolution 60/251 went beyond earlier stipulations that the mechanism not interfere with the system of reporting to treaty bodies, instead directing that the procedure 'shall complement and not duplicate the work of the treaty bodies'.

plenary sessions. North-South tensions existed from the outset, with developing nations and groups taking very different positions to Western and other developed countries. One example was the debate on whether non-ratified treaty obligations should form part of the review. Reviewing a State's universal coverage of human rights obligations was innovative, and can be contrasted with treaty body reviews which only deal with States' obligations under ratified treaties.[80] Treaty ratifications vary greatly.[81] Gaer comments, for example, that many Asian States are not parties to the Convention Against Torture.[82] Unsurprisingly, States arguing that the UPR should not examine obligations under non-ratified treaties were invariably themselves, or allied with States, not party to such treaties. Algeria (African Group) said that '[n]o State can be held accountable for obligations pertaining to a treaty that they have [sic] not ratified'.[83] Singapore insisted that the resolution 'clearly precludes' non-ratified treaties from the review process owing to States neither having committed to such treaties nor being obligated to fulfil them.[84] Singapore stressed that the review should focus on 'broader obligations under the Universal Declaration of Human Rights as well as commitments made by individual States, such as the voluntary pledges made while seeking membership in the [Council]'.[85]

2.3. FINALISING THE UPR

One of the Council's initial tasks was to establish the UPR's modalities. An open-ended working group,[86] comprised of State delegates rather than independent experts, was established to create the mechanism's modalities. Morocco's Ambassador Mohammed Loulichki was appointed as facilitator. It held numerous meetings and consultations, including a one-day conference in Switzerland, during which Canada's proposals were examined at length and presentations given on similar review processes.[87] The modalities were drafted over three sessions in 2006–2007, and were observed to have been 'the least contentious component of the institution-building phase'.[88]

Political agendas have dominated the Council's institution-building process. Abebe, an Ethiopian delegate to the Council, comments that institution-building was heavily dominated by political agendas, with only 'a minimal professional and

80 Gaer, *loc.cit.* note 37, p. 125.

81 For example, 192 States are party to the CRC, 141 to CAT and only 34 to the CMW.

82 Gaer, *loc.cit.* note 37, p. 125.

83 Algeria, Oral Statement (on behalf of the African Group), 21 July 2006.

84 Singapore, Oral Statement, 21 July 2006.

85 *Idem*.

86 Human Rights Council Decision 1/103, 'The Universal Periodic Review', 30 June 2006, UN Doc. A/HRC/DEC/1/103.

87 Scannella, P., & Splinter, P., 'The United Nations Human Rights Council: A Promise to be Fulfilled', *Human Rights Law Review*, Vol. 7, No. 1, 2007, pp. 41–72, at pp. 63–64.

88 Sweeney & Saito, *loc.cit.* note 16, p. 205.

expert input'.[89] Creating the UPR mechanism followed similar patterns to, but to a lesser extent than, other institution-building tasks, perhaps owing to the central importance of ensuring the mechanism's success. Key areas of divergence included concern about the roles of NGOs and independent experts, the sources of information to be used, and the composition of the Working Group facilitating the review.[90] It was determined that the UPR would be an evolving mechanism, with its modalities reviewed at the end of the first four-year cycle.[91]

The facilitator's final non-paper was reproduced in the IBP to enshrine the UPR's modalities.[92] Sweeney and Saito argue that consensus on this document was easily achieved as the mechanism's success was recognised as key for the Council's success.[93] The need for consensus, emphasised during all Council proceedings, was particularly important to give credibility to this new mechanism which essentially encompassed the ideals and aims of the new body. Without such consensus the UPR would have been weakened both in practice and in the eyes of the UN and observers.

2.3.1. How It Works

UPR is not based on a treaty or legal instrument; its legal foundations are Resolution 60/251 and the IBP. As Resolution 60/251 simply set out the UPR's general principles and objectives, the IBP must be examined to understand how the mechanism works. Part I of the IBP identifies the roles, functions, principles and objectives of the review. It then sets out the modalities, including: periodicity and order of the review, process and modalities of the review, documents to be used, and the review's outcome and follow-up. Each UPR Working Group session reviews 16 States. Three reviews take place per year, thus covering 48 States, with all States reviewed during the four year cycle.

The first stage involves gathering and collating information on the reviewed State's human rights situation. State cooperation is an essential component of the process. Many States viewed UPR as a cooperative rather than confrontational mechanism, as is reflected in the IBP's emphasis on cooperation.[94] It has been generally accepted that States are obligated to participate in the process, and as such there are no provisions for how to deal with a State that does not engage with the mechanism.[95] However,

89 Abebe, A.M., 'Of shaming and bargaining: African States and the universal periodic review of the United Nations Human Rights Council', *Human Rights Law Review*, Vol.9, No. 1, 2009, pp. 1–35, at p. 3.

90 For critical summaries, see ISHR's 'Overview reports of the Working Group sessions' and 'Daily Highlights of the final session of the Working Group', *available at*: www.ishr.ch/index.php?option=com_content&task=view&id=248&Itemid=444).

91 Callejon, *loc.cit.* note 15, p. 337.

92 Non-paper on the universal periodic review mechanism, 27 April 2007, A/HRC/5/14.

93 Sweeney & Saito, *loc.cit.* note 16, p. 205.

94 Callejon *loc.cit.* note 15, p. 335.

95 Abebe, *loc.cit.* note 89, p. 7.

it has been argued that requiring a 'cooperative mechanism' may cause problems as much of the UPR's success, or otherwise, depends on the nature and quality of the documents used to conduct the review.[96] State cooperation is key to the collation of such material. Gaer argues that the UPR's ambiguity on State cooperation, and the conflicting visions of the Council's general role in protecting and promoting human rights, casts doubt on whether such issues will be adequately resolved to allow the UPR to achieve its objectives.[97]

States' national reports are limited to twenty pages. The General Guidelines require a brief description of a State's human rights situations, the challenges it faces and the assistance it requires.[98] Abebe comments that requiring States 'to present a colossal and factually dense report' would have been burdensome.[99] This is particularly true for poorer countries. Presenting a major report would also take longer, thus limiting the number of reviewed States per session. The General Guidelines require national reports to set out the 'broad consultation process followed for the preparation of information provided'.[100] Alongside the national report, the review considers the OHCHR's compilation ten-page report of UN information and the OHCHR's ten-page summary of 'credible and reliable information provided by other relevant stakeholders'.[101] As Callejon notes, the OHCHR has a difficult task in condensing the collated information into ten pages.[102]

The UPR Working Group, consisting of all Council members and Observer States, conducts the three-hour review, led by the Troika of Rapporteur States. The Troika consists of three Council members,[103] drawn by lots, each from different regional groups. Conducting the review with all Council members sitting as a Working Group rather than at a plenary session was a compromise to allow all members to participate without taking time away from other Council matters.[104] A reviewed State may request that one troika member be from its own region, enabling countries to have a regional ally that understands its cultural sensitivities and/or issues relating to capacities for

96 Gaer, *loc.cit.* note 37, p. 137; Callejon, *loc.cit.* note 15, p. 336.

97 Gaer, *loc.cit.* note 37, p. 137.

98 'As their name indicates, the guidelines include general requirements, *inter alia* the normative and institutional framework, particularly the scope of international human rights obligations identified as the basis of the review and their implementation, identification of achievements, best practices, challenges and constraints. The guidelines also include a description of the methodology and the consultation process at the national level, which should ensure consultation of civil society by the concerned State'. Callejon, *loc.cit.* note 15, p. 337.

99 Abebe, *loc.cit.* note 89, p.10.

100 Human Rights Council Decision 6/102, 'General Guidelines for the Preparation of Information Under the Universal Periodic Review', 27 September 2007, UN Doc. A/HRC/DEC/6/102, para. A.

101 HRC Res 5/1 (2007), *supra* note 71, para. 15(b), stating 'information contained in the reports of treaty bodies, special procedures, including observations and comments by the State concerned, and other relevant official United Nations documents'.

102 Callejon, *loc.cit.* note 15, p. 337.

103 HRC Res 5/1 (2007), *supra* note 71, para. 18(d).

104 Callejon, *loc.cit.* note 15, p. 334.

human rights protection and promotion. All African countries, bar Ghana, selected for review did indeed request a regional rapporteur during the UPR's first two sessions.[105] Conversely, a State may decline a position on the troika, as occurred in February 2008 when Pakistan declined to be part of the Troika reviewing India due to long-standing political tensions between those countries.

The reviewed State's presentation is followed by comments, questions and recommendations from other States which the concerned State may respond to at any stage. NGOs do not actively participate in the review.[106] The OHCHR compiles an outcome report within two days for the troika's and the reviewed State's approval. The report summarises which, if any, recommendations the State initially accepts or rejects. The State may reserve judgement on any or all recommendations. The report is then presented to the UPR Working Group for editing and adoption. At the next scheduled Council Session, the report is considered and adopted. The reviewed State has two minutes to present its acceptance, rejection or reservation on recommendations and reasons, which are recorded in an amendment to the original draft as are States' written submissions. Member and Observer States are allowed to make comments on the outcome of the review and NGOs make 'general comments'. These contributions are summarised in the report of the Council session and included in the final report, which is then formally adopted by the Council.

2.3.2. Basis of the Review

UPR is based on a number of instruments: the UN Charter, the UDHR, UN human rights treaties to which a State is party, a range of human rights regardless of treaty ratification, and States' voluntary pledges and commitments.[107] Redondo emphasises the review's comprehensiveness as it incorporates legally binding and non-legally binding human rights standards. For example, voluntary commitments and pledges, take on a greater importance during the UPR than, for example, as membership criteria. Some countries argued for international humanitarian law to be included,[108] whereas other States insisted that the review's basis should be exclusively human rights norms.[109] The IBP provides that UPR should take IHL into account.[110] However, IHL often relates to issues such as conflict situations, and its relationship with human rights is not agreed upon by all States, thus its inclusion could cause difficulties. Callejon

105 Abebe, *loc.cit.* note 89, p. 14.

106 NGOs are entitled to observe the review in the room, and may conduct parallel events at the time of the review in the Working Group, but they are only entitled to take the floor later during the consideration and adoption of reports in the Council plenary.

107 HRC Res 5/1 (2007), *supra* note 71, para. 1.

108 For example, Switzerland.

109 Including members of the African Group and some Western countries such as the US. See, Abebe, *loc.cit.* note 89, pp. 5–6.

110 HRC Res 5/1 (2007), *supra* note 71, para. 2.

comments that inclusion of IHL was outside of the Council's mandate as it does not have the competency to deal with this body of law.[111]

A broad consultation is undertaken with NGOs and other stakeholders, as set out in the General Guidelines. OHCHR summarises and publishes these submissions on its website. The summary is an official UN document, giving it more weight than NGO submissions to other treaty bodies. Sweeney and Saito note that most NGOs are satisfied with these summaries.[112] The African Group, alongside other developing nations, argued against NGO involvement, emphasising the need for a peer-led mechanism.[113] Such positions were perhaps motivated from fear that NGO submissions would disproportionately affect developing nations. Poorer States and countries with newer and weaker democracies, let alone those with autocratic rule, invariably have graver and more widespread human rights violations than richer, more democratic – that is, Western – States. Developing nations might also argue that many of the main NGOs follow Western, liberal notions of human rights, and are funded by supporters and governments that push such rights. Although NGO involvement was enshrined in the IBP, the deadline for submissions has been far earlier than for State submissions.[114] There are a number of practical considerations for this discrepancy, but it has caused some difficulties.[115] Clearly, despite involvement, NGOs are not equal players in the UPR process.

The OHCHR's role includes overall supervision of the process, advice to the Troika, as well as collection and compilation of information. A number of States contested such strong involvement, arguing that the process should be peer-led rather than directed by an administrative body. African countries argued that the OHCHR 'is not adequately accountable to Member States of the United Nations and its function is highly influenced by members of the Western Group and civil society organisations'.[116] Despite this argument, the OHCHR's role remains integral. However, such discussions demonstrate the North-South divide, and developing nations' ongoing position that the UN was set up by imperialist, Western States for imperialist, Western States.

2.3.3. UPR and Politicisation

Gaer notes that, from the outset, States and non-State actors hoped that the UPR would ensure fair scrutiny of human rights in all States, and as such enhance UN

111 Callejon, *loc.cit.* note 15, p. 336.

112 Sweeney & Saito, *loc.cit.* note 16, p. 207.

113 Abebe, *loc.cit.* note 89, p. 10.

114 The deadline for the 3rd and 4th sessions was five months prior to the review. It is six months prior to the review for the 5th session and seven months for the 6th session, see: www.ohchr.org/EN/HRBodies/UPR/Pages/NewDeadlines.aspx.

115 Sweeney & Saito, *loc.cit.* note 16, p. 207.

116 Abebe, *loc.cit.* note 89, p. 8.

human rights' credibility.[117] In particular, the requirement for all Member States to be reviewed was central to fulfilment of these expectations.[118] Universality and equal coverage distinguishes UPR from the treaty body review mechanisms already in place. However, the UN tends to view universality as devoting equal time, treatment and resources.[119] That view is problematic, as it can result in too much attention being devoted to States which do not proportionately require it while gross and systemic violations are occurring elsewhere.[120] The need for proportionate treatment is in many ways more important than equality.

As a State-driven mechanism, UPR is an inter-governmental mechanism. Abebe comments that it is therefore 'a profoundly political undertaking'.[121] Although the OHCHR plays a supervisory and information-sharing role and NGOs are consulted during the process, UPR remains a State-led process. Indeed, human rights experts are deliberately excluded from direct participation,[122] leaving States to analyse the information and prepare the outcome reports and recommendations. It is analysis that is key to the process, as much of the information used in the UPR has already been shared within the UN human rights machinery.[123] Clearly, the modalities leave much room for potential politicisation, either through direct tactics used to protect allies, or indirectly through lack of expertise amongst the Troika.

Indeed, the Troika Rapporteur States placed a large reliance on their Geneva-based diplomats, particularly developing States which could not afford to bring experts over to Switzerland for the review. This reliance on diplomats impacted upon the expertise and effectiveness of the Troika, resulting in visible discrepancies depending on the Troika's composition.[124] The outcome of each review depends on the Troika's knowledge and expertise, and their protection from pressure or influence from the reviewed State or its allies. Council proceedings thus far have demonstrated tactics used by regional and political groups to protect their allies or to further their objectives.[125] Gaer argues that the UN secretariat's role in this regard is essential, as is the information and expertise provided by NGOs and other relevant stakeholders.[126]

117 Gaer, *loc.cit.* note 37, p. 135.
118 *Ibidem.*
119 *Ibidem,* p. 137.
120 *Ibidem.*
121 Abebe, *loc.cit.* note 89, p. 8.
122 *Ibidem.*
123 Gaer, *loc.cit.* note 37, p. 136.
124 Abebe, *loc.cit.* note 89, pp. 22–23.
125 See, for example, Freedman, *loc.cit.* note 13; Freedman, *loc.cit.* note 14.
126 Gaer, *loc.cit.* note 37, p. 136.

2.4. THE FIRST CYCLE

The first UPR session was delayed from 2007 until April 2008. Thirty-two States[127] were selected for the first two review sessions.[128] The first review took place despite various procedural issues remaining.[129] A majority of States wished to begin the exercise whilst simultaneously conducting negotiations and consultations on the remaining issues.[130] The Working Group made a number of procedural decisions, on issues where the IBP was silent, during the first session in order to enable the reviews to take place.[131]

Although Switzerland and Colombia volunteered for review during the first session of the UPR Working Group, the order of review for other States was done by drawing lots. OHCHR designed a mathematical model for selection that take into account considerations such as regional representation, reviewing the Council's members during their term of membership and accommodating volunteers.

Reviewed States mainly had large delegations often including ministerial level representatives,[132] demonstrating the seriousness afforded to the process.[133] Abebe notes that the Council, OHCHR and States stressed the importance of ministerial representation, although the general feeling was that States should determine, rather than be directed, who to send.[134] The types of Ministers representing States signified how the countries viewed the UPR. For example, Ministers of Foreign Affairs sent

127 States under review at the first session were, in order: Bahrain, Ecuador, Tunisia, Morocco, Indonesia, Finland, the United Kingdom, India, Brazil, Philippines, Algeria, Poland, the Netherlands, South Africa, the Czech Republic and Argentina. States under review at the second session were, in order: Gabon, Ghana, Peru, Guatemala, Benin, Republic of Korea, Switzerland, Pakistan, Zambia, Japan, Ukraine, Sri Lanka, France, Tonga, Romania and Mali. See the OHCHR extranet at: http://portal.ohchr.org/portal/page/portal/HRC_Extranet/6thSession/OralStatements/210907/Tab16 and ISHR, Daily Update, 21 September 2007, *available at*: www.ishr.ch/hrm/council/daily_updates/session006/21september2007.pdf.

128 The selection process, which accounts for geographical representation, the percentage of Council member and observer States and the status of development of States, was inordinately complex and required the creation of an algorithmic software programme that many delegations found very difficult to comprehend. For a summary explanation, as well as State and NGO responses, see 'Main steps to be taken regarding the establishment of the UPR work programme (for the first year): draft Note from the Secretariat – version 11, 12 September 2008' on the OHCHR extranet. For a summary of the simulation process, see ISHR, Daily Updates, 12 and 19 September 2008, *available at*: www.ishr.ch/index.php?option=com.content&task=view&id=115&Itemid=176.

129 Abebe, *loc.cit.* note 89, p. 8.

130 For example, the Troika members' responsibilities prior to the actual review, the length of States' speaking time, and the preparations of the report of the Working Group, all required last-minutes decisions.

131 Abebe, *loc.cit.* note 89, p. 9.

132 For example, India – Solicitor General, the Netherlands – Secretary of State for Justice, Ecuador – Minister of Justice, Tunisia – Minister of Justice, Morocco – Minister of Justice, Finland – Secretary of State, and the United Kingdom – Minister of State.

133 Sweeney & Saito, *loc.cit.* note 16, p. 209.

134 Abebe, *loc.cit.* note 89, p. 12.

by Bahrain, Indonesia and Algeria showed that they viewed the UPR as a foreign relations exercise.[135] Other States sent Ministers of Justice, thus affording the process the national legal clout that it deserved.

Although each report was allocated one hour,[136] Argentina, Ghana, Peru, Sri Lanka and Romania[137] used at least double the allocated 20 minutes when presenting their reports, reducing the time for interactive dialogue.[138] Time constraints, particularly where State presentations overran the allocated period, resulted in many States being unable to participate in the interactive dialogue.[139] Some reasons for this will be examined in the following subsections, particularly in terms of regional and political tactics being used to fill a State's allocated time.

Another issue was how reviewed States dealt with questions submitted through the Troika. If States submitted written questions, the Troika could amalgamate similar questions, or ask them in such an order as to allow various issues to be addressed. However, written questions were used almost exclusively by Western States, and even these States sometimes took the floor to repeat the questions where the reviewed country had not allocated time to deal with written questions.[140] Most States did not allocate time for written questions, and even where States did do so such questions were far less likely to be answered by the reviewed State than questions posed from the floor. Only the Netherlands, the United Kingdom, Japan and South Korea directly responded to written questions.[141] Ireland, having noted the ineffectiveness in submitting written questions at the first session, changed tack and asked questions from the floor during the second session.[142] Sweeney and Saito argue that circumvention of the Troika changed those States' role from being independent rapporteurs to 'simply rubberstamp[ing] the draft outcome reports' after the review.[143]

2.4.1. The Initial Sessions

The UPR Working Group's First Session was held in April 2008. The first review, of Bahrain, saw a tactic that had been previously deployed in Council sessions whereby allied States fill the list of speakers in order to give positive responses to

135 Sweeney & Saito, *loc.cit.* note 16, p. 209.

136 Human Rights Council, 'Modalities and practices for the universal periodic review process', 9 April 2008, UN Doc. 8/PRST/1, para. 7. This was a more flexible approach than the initial allocation by the President of 30 minutes for the presentation and 30 minutes for responses to questions.

137 Whose Ambassador was the Council President who had allocated the time period for State presentation of national reports.

138 Sweeney & Saito, *loc.cit.* note 16, pp. 209–210.

139 Abebe, *loc.cit.* note 89, p. 13.

140 *Ibidem.*

141 Sweeney & Saito, *loc.cit.* note 16, p. 210.

142 See the compilation by UPR-info.org of State interventions related to human rights defenders, *available at*: www.upr-info.org/IMG/pdf/IA.HumanRightsDefenders_S1–2.pdf.

143 Sweeney & Saito, *loc.cit.* note 16, p. 210.

the State concerned. Such allies included Palestine, India, Pakistan, Qatar, Tunisia, the United Arab Emirates, Saudi Arabia, Turkey, Malaysia, Algeria, Libya and Cuba. Tunisia's review heard from so many of its allies[144] 'that it appeared an exercise in filibustering'.[145] This tactic undermined the process through blocking other States from asking questions or giving objective feedback. Moreover, it gave the impression that reviewed States were beyond reproach and required few, if any, recommendations. The UPR's main objective, to 'improve of the human rights situation on the ground', was severely undermined, as was the credibility of the mechanism. Both of these States are OIC members. OIC members often employ a tactic whereby group statements are repeated by many members in order to give the impression that the position is widely held.[146] Council sessions are limited in time, but not nearly as restricted as UPR sessions. The OIC succeeds in reducing the amount of time devoted to Agenda Items, such as Darfur, during Council sessions by using this tactic. Its impact was even stronger at the first UPR session, with few non-OIC members able to take the floor during these two States' reviews.

Tunisia's report demonstrated the lack of finalised modalities. An argument ensued on where to record recommendations rejected by the reviewed State. States disagreed with listing rejected recommendations in the paragraph containing final conclusions and recommendations as that would give rise to misperceptions. It was agreed instead that a separate paragraph would contain those recommendations rejected by the reviewed State.[147] That solution reflected the importance of achieving compromise in order to support the mechanism.

Another issue related to recommendations arose in regard to attribution to the State making them. Western countries, in particular, routinely made recommendations as part of their statements.[148] The African Group argued that including recommendations without attributing them to the recommending State gave the impression that it had been accepted by all Working Group members. This was especially problematic for politically sensitive issues such as recommendations on the right to sexual orientation. The solution provided a compromise acceptable to all. That allows factual reporting of proceedings rather than giving misleading perceptions.

The UPR Working Group's Second Session was held in May 2008. By the second UPR session, smaller States 'were less inclined to engage in interactive dialogues with States from regions other than their own',[149] perhaps due to disinterest in other regions'

144 The first 15 countries to speak in the interactive dialogue were Kuwait, Palestine, Pakistan, Philippines, Chad, Saudi Arabia, the Russian Federation, Slovenia, China, India, Madagascar, Ghana, Mauritania, Bangladesh and Angola, Human Rights Council, 'Report of the Working Group on the Universal Periodic Review on Tunisia', 22 May 2008, UN Doc. A/HRC/8/21, paras. 12–26.

145 Sweeney & Saito, *loc.cit.* note 16, p. 210.

146 See, Freedman, *loc.cit.* note 13.

147 Abebe, *loc.cit.* note 89, p. 15.

148 *Ibidem,* p. 16.

149 Sweeney & Saito, *loc.cit.* note 16, p. 211.

affairs, or reticence about offending more powerful States. Aside from Morocco, Algeria and Egypt, all of whom were influential OIC members with large numbers of political allies, African States rarely took part in non-African interactive dialogues.[150] To a lesser degree, GRULAC and Asian States, themselves slightly more powerful than African nations, stuck to dialogues on their respective regional groups.[151] However, EU States, major players on the world stage, tended to join most interactive debates. It is therefore somewhat surprising that Abebe argues that the UPR demonstrates that the Council offers African States the opportunity to go from being subjects of a condemnatory system to being participants in the human rights forum.[152]

A pattern emerges whereby weaker States, mindful of the power politics at stake and the potential ramifications of criticising other States, withdrew from the process, whereas stronger States felt better placed to voice opinions. Sweeney and Saito argue that lack of participation might reflect some States' lack of interest in human rights.[153] While this may be true to some extent, many weaker States do join Council discussions at regular sessions on topics unrelated to their national or political interests. It seems more likely that the UPR provides little incentive for weaker States to involve themselves in discussions which might affect other national interests. Unlike Council sessions, which are widely reported on and where taking a stance may further a State's reputation, the UPR sessions are less scrutinised and therefore criticisms earn little reward but carry a large risk to a State's foreign affairs.

States increasingly used tactics to shield allies from scrutiny at subsequent sessions. Known human rights violators demonstrated greater reticence about publicly accepting responsibility for human rights violations during the review process. Combined, these factors culminated in the UPR process doing little to assist the Council in fulfilling its mandate to promote and protect human rights.

China and Cuba were amongst the countries reviewed at the Fourth Session. Many States failed to address known violations within China and only a very small number, consisting solely of Western States, criticised China's gross and systemic human rights abuses. Indeed, some States supported China's State-sanctioned abuses. Sudan sought to justify China's 'Re-education through Labour' sanction by emphasising its roots in Chinese culture, its legal basis and its role in long-term rehabilitation.[154] Iran encouraged China to strengthen its internet censorship, arguing that the 'negative impact of the internet can never be underestimated'.[155] China, perhaps emboldened

150 For example, in the review of Gabon, 13 of the 36 States that provided comments were from the African Group, whereas in the review of Peru, Algeria was the only African State to provide comments.

151 Of the GRULAC States, only Brazil, Mexico and Cuba tended to continually engage cross-regionally. Of the Asian Group, consistent cross-regional engagement was evident from Indonesia, the Philippines, Malaysia and Azerbaijan.

152 Abebe, *loc.cit.* note 89, pp. 3–4.

153 Sweeney & Saito, *loc.cit.* note 16, p. 211.

154 Sudan, Oral Statement, 9 February 2009.

155 Iran, Oral Statement, 9 February 2009.

by its allies' deflecting criticism away from its human rights record, refused to accept responsibility for any human rights abuses and failed to accept any recommendations made during the review. Cuba began its review with a defensive presentation which denied various human rights abuses and asserted that Cuba would ratify key Covenants 'whenever it wishes to'.[156] States from NAM and the OIC repeatedly raised the US embargo on Cuba, thus limiting time spent discussing Cuba's human rights record, deflecting attention away from Cuba's violations, and, moreover, politicising the review.

2.4.2. Politicisation and Other Issues

Various tactics were used to deflect attention from sensitive issues or to protect States from particular scrutiny. These tactics will be explored with reference to how and by whom they were deployed, and whether such pitfalls can be overcome. For instance, problems pertaining to regionalism occurred within the UPR process. As a State-driven, inter-governmental mechanism, regional and political alliances wield the same power and influence as they do in other Council proceedings.[157] Regionalism was utilised by African and OIC members to protect allied States.

The use of multiple positive statements, often filling the allocated time, undermined the review's ability to improve human rights situations within reviewed States. Moreover, most statements contained both positive and critical comments and questions, with the positive aspects using valuable time that might better have been spent dealing with issues or offering practical advice. The first two sessions saw far more compliments than criticisms, with the percentage of positive comments by States far outweighing criticisms.[158] Sweeney and Saito note that the report on Sri Lanka, a State with gross and systemic abuses of human rights,[159] received more positive comments than critical interventions.[160] The tactic used to avoid critical comments could easily be overcome by restricting statements to questions, criticisms or practical assistance.

Another example of politicisation occurred, again, through an OIC member using 'cultural sensitivities' to undermine human rights. Ecuador did not object to the recommendation on sexual discrimination during its review. However, Egypt argued

156 Cuba, Oral Statement, 5 February 2009.

157 Abebe, *loc.cit.* note 89, p. 19.

158 In the case of Brazil, for example, positive comments were approximately ten times more numerous than critical observations.

159 See, for example, 'Sri Lanka: Silencing dissent', Amnesty International, 7 February 2008, Index Number: ASA 37/001/2008, examining ongoing gross and systemic violations occurring at the same time as Sri Lanka's UPR session.

160 Sweeney & Saito, *loc.cit.* note 16, p. 212. See, also, Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Sri Lanka', 5 June 2008, UN Doc. A/HRC/8/46. See: www.ishr.ch/hrm/council/upr/upr_2nd_session_2008/upr_002_sri¨lanka_final.pdf for a summary of positive and critical statements.

that sexual orientation did not fall within the terms of the review unless it was included in a particular State's 'voluntary pledges and commitments',[161] telling Ecuador that it could not accept the recommendation. That intervention undermined the UPR's central aim; effectively blocking the promotion of this right by diverting the discussion away from providing technical or advisory assistance. Egypt's underlying motivation was to ensure that issues of sexual discrimination would not be raised with regard to itself or its OIC or African Group allies, many of which routinely discriminate on the grounds of gender or sexual orientation. Once again, claims of 'cultural values' were used in an attempt to avoid scrutiny. Moreover, Sweeney and Saito comment that the intervention indicates attempts may occur for States to reject recommendations on the basis that, as Pakistan argued, they do not concern 'universally recognised human rights principles'.[162] However, Pakistan's assertion can be easily refuted, for example, by using the UN Human Rights Committee's jurisprudence which has clearly accepted the universality of the right to sexual orientation.[163]

One method employed to avoid scrutiny was ignoring an issue altogether. States are not required to answer questions during the interactive dialogue, resulting in selective responses to the issues raised. States often answered questions in clusters, thus allowing them to select questions. Some States allowed so many questions within each cluster that they avoided the majority of issues raised.[164] Sweeney and Saito note that in the second session Gabon took all of the questions at the end rather than in clusters, yet they too avoided addressing many issues raised.[165] As recommendations have already been made by the time of the interactive dialogue, States have little reason to answer difficult or sensitive questions as it will not affect the review's outcome.[166]

Certain States asked the same questions at each interactive dialogue, which were often too broad to be of direct assistance to the review. The UK, for example, included

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161 For a summary of this debate, see ISHR, Monitor, Universal Periodic Review, 1st session Ecuador – Adoption of the report at 7–9, *available at*: www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_001_ecuador_final.pdf.

162 Sweeney & Saito, *loc.cit.* note 16, p. 212. See, also, Human Rights Council, 'Report of the Working Group on the Universal Periodic Review – Pakistan', 4 June 2008, UN Doc. A/HRC/8/42, para. 108, referring to recommendations in paras 23(b) on repealing provisions criminalising non-marital consensual sex and failing to recognise marital rape recommendation made by Canada; 23(f) on decriminalising defamation (Canada); 30(b) on reviewing the death penalty with a view towards introducing a moratorium and abolishing it (United Kingdom); 30(d) on repealing the Hadood and Zina Ordnances (United Kingdom); 43(c) on declaring a moratorium on executions and moving towards abolition (Switzerland); 62(b) on decriminalising adultery and non-marital consensual sex (the Czech Republic); and 62(e) on prohibiting provisions of the Qisas and Diyat law in cases of honour killings (the Czech Republic).

163 See, for example, *Toonen vs Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), ruling that sexual orientation is protected under General Assembly Resolution 2200A (XXI), 'International Covenant on Civil and Political Rights', 16 December 1966, UN Doc. A/6316 (1966), *entered into force* 23 March 1976, Articles 17(1) and 2(1).

164 Including India, Brazil and Guatemala.

165 Sweeney & Saito, *loc.cit.* note 16, p. 211.

166 *Ibidem.*

a question on the role of civil society in the preparation of the national report while Slovenia asked a general question on gender integration. Standard, broad questions were perhaps aimed at avoiding selectivity, but they risk undermining the review's objective of dealing with each State individually. Interestingly, Western States frequently asked these broad questions, perhaps to pre-empt the South's assertion that developed nations use human rights machinery as a neo-colonial tool to single out developing nations.

Western States, despite their general power and strength, are in a minority at the Council. EU countries are particularly mindful to avoid conflict at the body. Western States' approach to the UPR has perhaps been overly careful to avoid accusations of selectivity or criticism of developing nations. That approach mirrors the position taken on issues such as Darfur. One serious implication of that tactic, according to Abebe, an Ethiopian delegate to the Council, is that States may believe there are no criticisms of their national human rights.[167] Interpreting the lack of criticism as tacit approval may negatively affect a State's human rights policies, possibly resulting in a worse situation than if the review had not taken place.

It has been argued that the UPR provides a mechanism that affords all States equal treatment,[168] but whether such equal treatment occurs in practice remains to be seen. Moreover, it is disproportionate for the Council to afford the same treatment and resources to, for example, Sweden and Somalia. As mentioned, equal treatment appears to have been interpreted as devoting equal resources, rather than using the same benchmarks to review each State. In order to improve the effectiveness and credibility of the main UN human rights body, proportionate treatment must be afforded to States and their performance examined according to a limited number of benchmarks.

A North-South divide has already been demonstrated. Developing nations seek to avoid condemnation, instead focusing on practical advice and assistance in implementing recommendation, while Western countries focus on tailored, specific recommendations.[169] Gaer argues that lack of trust at the Council will impact on the UPR's effectiveness and ability to achieve its objectives.[170] The Council is already divided on politically sensitive issues, with tensions and mistrust reminiscent of the Cold War era. That atmosphere has affected, although not fully obstructed, the Council's proceedings and action on some sensitive human rights issues. As the UPR examines all States, including politically sensitive countries, the North-South divide will have some impact upon the mechanism.

UPR has the potential to become further politicised in a number of ways. The mechanism is likely to demonstrate a lack of even-handedness through its treatment

167 Abebe, *loc.cit.* note 89, p. 20.

168 Gaer, *loc.cit.* note 37, p. 138.

169 Abebe, *loc.cit.* note 89, p. 31.

170 Gaer, *loc.cit.* note 37, pp. 138–139.

of different States, particularly those countries singled out as 'enemies' of the main groups at the Council. However, until the first full cycle has occurred, assessment cannot be undertaken on this aspect of the UPR. The first sessions demonstrate regional tactics consistent with other Council proceedings whereby developing States, particularly OIC members and their allies in NAM and the African Group, protect each other through various methods. Those States took the floor to compliment allies, thus using the allotted time and blocking other States from asking questions or making recommendations. Similarly, States from the South have constantly emphasised lack of capacity for human rights protection and promotion in order to shield allies from criticism.

Sweeney and Saito note another potential political tactic arising from the UPR, namely that States have claimed, subsequent to the first UPR sessions, that country-specific mandates, discussions and resolutions are no longer required.[171] Amongst others, this position has been taken by the DPRK (North Korea), the Philippines and China.[172] Abebe comments that UPR should not be used to block Council discussions or action on grave situations of gross and systemic human rights abuses, nor should the review process be used by States to avoid other human rights scrutiny.[173] However, developing States have long-sought to abolish country-specific resolutions, and shifting the focus onto the UPR displays a worrying trend which may impact the Council's ability to take other forms of country-specific action.

3. SPECIAL SESSIONS

The Council's second new mechanism, like the UPR, enables the body to address specific human rights situations. Ghanea comments that negotiations on Special Sessions were somewhat sidelined in favour of discussions on peer review. UPR was viewed as the mechanism that would combat the Commission's politicisation and selectivity, particularly regarding individual States.[174] However, the Council's ability to deal with crises was central to the new body, and Special Sessions were aimed at achieving that objective. Special Sessions allow the Council to meet outside of plenary sessions to discuss grave and crisis human rights situations, either country-specific or thematic. Special Sessions were specifically designed to combat criticism that the Commission did not have the time or flexibility to deal with grave or crisis situations.

171 Sweeney & Saito, *loc.cit.* note 16, p. 219.

172 See the debate around the extension of the mandate of the Special Rapporteur on the DPRK in ISHR, Daily Update, 27 March 2008, at 11–12, *available at*: www.ishr.ch/hrm/council/dailyupdates/session_007/27_march_2008.pdf.

173 Abebe, *loc.cit.* note 89, p. 31.

174 Ghanea, *loc.cit.* note 78, p. 703.

3.1. BACKGROUND

Resolution 60/251 mandates that the Council 'be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council'.[175] This was expanded upon in the IBP,[176] which sets out how requests for Special Sessions should be given. The Special Session must be convened between two and five days after the request and should not exceed six days. Attendance is open to Council members, concerned States, observers, NGOs, and other specified non-State parties. Modalities for draft resolutions and decisions are detailed in the IBP. It underlines that consensus must be sought wherever possible, and that the central importance of participatory debate which is 'results-oriented' with the outcomes able to be monitored and reported on.

Special Sessions are open to politicisation and selectivity. Requiring one third of Council members' support empowers dominant groups and alliances to use this mechanism to achieve political aims because the larger the group, the more easily the one-third threshold is achieved. Once again, this has manifested itself in the mechanism's use to keep the spotlight on Israel. This section shall focus on the Council's treatment of Israel.

Of the Council's first twelve Special Sessions, ten were country-specific and two were thematic. Arguably, there are more country-specific than thematic crises situations. Developing States typically called for country-specific Special Sessions despite the South's general position against country-specific focus. Of the first twelve Special Sessions, half were convened on Israel, two were thematic, and one each dealt with Darfur, Myanmar, the Democratic Republic of Congo, and Sri Lanka. Schrijver argues that when the Palestinian plight is considered, Western observations that the Council excessively focuses on Israel is questionable. However, Gaer comments that convening three Special Sessions on Israel in the Council's first six months raised serious concerns about the new body and its members.[177] Indeed, then Secretary-General Kofi Annan voiced his concerns at the Council's treatment of Israel in light of its silence on other grave situations.[178] The convening of Special Sessions reflected political agendas and the sessions were used to achieve political aims.

175 GA Resolution 60/251, *loc.cit.* note 11, para. 10.

176 HRC Res 5/1 (2007), *loc.cit.* note 71, Part V, Chapter D paras. 121–128.

177 Gaer, *loc.cit.* note 37, pp. 135–136.

178 See, for example, UN Press Release, 'Secretary General in Message to Human Rights Council Cautions against Focusing on Middle East at expense of Darfur, Other Grave Crises', 29 November 2006, UN Doc. SG/SM/10769-HR/4907; and Speech by Kofi Annan, 8 December 2006, in which he stated 'we must realize the promise of the Human Rights Council which so far has clearly not justified the hopes that so many of us placed in it'.

3.2. THE SPECIAL SESSIONS

The First Special Session, on the human rights situation in the Occupied Palestinian Territories, took place in July 2006 immediately after the Council's First Session. The Session was called by developing States[179] or their allies, such as Brazil and Russia, half of whom were OIC members. Many States took the floor over the two days, with the majority focusing on gross and systemic Israeli violations. South Africa, with its own history of gross and systemic human rights violations under apartheid, supported the session, arguing that 'foreign domination is a denial of the right to [Palestinian] self-determination [and] fundamental freedoms and human rights'.[180] India's support for the session was motivated by concerns about its own national security, with that country expressing 'grave concern at the deteriorating situation in West Asia'.[181] Sudan, perhaps seeking to deflect the spotlight away from its own abuses, argued that the 'Palestinian people should not be a sacrificial lamb caused by the silence of the international community'.[182] Cuba, Qatar, the Arab League, and OIC members all emphasised that inaction would affect the Council's credibility. Switzerland agreed with the OIC and its allies that violations in the OPT must be addressed, stressing that the body's credibility was at stake and reminding the Council of its mandate 'to respond to urgent situations of human rights'.[183]

Most Western States, while condemning Israeli violations, took a different position towards the convening of, and proceedings during, the session. Canada criticised the one-sided proceedings, arguing that it 'cannot accept the focus of the Council only on Israel'.[184] France criticised the Council for divisive proceedings,[185] insisting that Special Sessions should not be convened solely for political motives. The US expressed 'regret that we have to be here', arguing that Special Sessions 'should not face only one side of a conflict'.[186] Israel asserted that the session was convened for political reasons, mirroring Commission practices, saying 'it only took 2 weeks to bring us to the old Commission culture'.[187]

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179 Algeria; Azerbaijan; Bahrain; Bangladesh; Brazil; China; Cuba; Gabon; India; Indonesia; Jordan; Malaysia; Mali; Morocco; Pakistan; Russian Federation; Saudi Arabia; Senegal; South Africa; Sri Lanka; and Tunisia – Human Rights Council Report, 'Report on the First Special Session of The Human Rights Council', 18 July 2006, UN Doc. A/HRC/S-1/3.

180 South African delegate, 1st Special Session, 5 July 2006.

181 *Ibidem,* Indian delegate.

182 *Ibidem,* Sudanese delegate.

183 *Ibidem,* Swiss delegate.

184 *Ibidem,* Canadian delegate.

185 *Ibidem,* French delegate.

186 *Ibidem,* American delegate.

187 *Ibidem,* Israeli delegate.

Finland, speaking on behalf of the EU, requested a vote on the session's draft resolution. The Resolution[188] was adopted by 29[189] votes to 11,[190] with 5 abstentions.[191] All Western countries voted against the Resolution, bar Switzerland who abstained. Brazil, Argentina and Uruguay emphasised that, despite their support for the resolution, they hoped the Council would not emulate the Commission by passing multiple resolutions on one situation.[192] Japan argued that the 'text is one-sided and non-constructive', saying 'this way of conducting business does not serve the Council or this particular issue'.[193] Pakistan, and member of the OIC, 'could not understand the rationale of those who opposed or abstained', expressing 'dismay that […] some Council members have political considerations' which affected their vote.[194]

One month later, the Council convened its Second Special Session. It again focused on Israeli violations, this time within Lebanon. Of the States which called for the First Special Session, only Brazil, Gabon, India, Mali, and Sri Lanka did not call for the Second Special Session. All States calling for the session were OIC members, with three exceptions:[195] Russia, a long-standing critic of Israel, particularly due to Israel's ties with America; Cuba, a strong OIC ally and fierce US critic; and South Africa, which strongly identified with the Palestinian cause. OIC States calling for Council action in Lebanon were joined by, amongst others, Argentina, Zambia, India, DPRK, and Ecuador. Cuba attacked the US and EU for supporting Israel, asserting that the resolution should be adopted by consensus or overwhelming majority to 'send out a clear signal to the world'.[196] China commented that 'if the Council doesn't act, people will ask what is the point of the Council'.[197] Sudan attacked the US and the Security Council for investigating the situation in Darfur but not acting on Lebanon.[198]

Switzerland again supported the session, although this time arguing for 'a non-discriminatory approach'.[199] Finland neither condemned nor supported the session,

188 Human Rights Council Resolution S-1/Res.1, 'Human rights situation in the Occupied Palestinian Territory', 6 July 2006, UN Doc. A/HRC/Res/S-1/1.

189 Algeria, Argentina, Azerbaijan, Bahrain, Bangladesh, Brazil, China, Cuba, Ecuador, Ghana, Guatemala, India, Indonesia, Jordan, Malaysia, Mali, Mauritius, Morocco, Pakistan, Peru, Philippines, Russian Federation, Saudi Arabia, Senegal, South Africa, Sri Lanka, Tunisia, Uruguay, Zambia.

190 Canada, Czech Republic, Finland, France, Germany, Japan, Netherlands, Poland, Romania, Ukraine, United Kingdom of Great Britain and Northern Ireland.

191 Cameroon, Mexico, Nigeria, Republic of Korea, Switzerland.

192 Brazilian delegate, 1st Special Session, 5 July 2006.

193 *Ibidem,* Japanese delegate.

194 *Ibidem,* Pakistani delegate.

195 Algeria, Azerbaijan, Bahrain, Bangladesh, China, Cuba, Indonesia, Jordan, Malaysia, Morocco, Pakistan, Russian Federation, Saudi Arabia, Senegal, South Africa and Tunisia – Human Rights Council Report, 'Report of the Human Rights Council on its Second Special Session', 11 August 2006, UN Doc. A/HRC/S-2/2, Part II, para. 3.

196 Cuban delegate, 2nd Special Session, 11 August 2006.

197 *Ibidem,* Chinese delegate.

198 Although that investigation was terminated.

199 *Ibidem,* Swiss delegate.

but called for 'peaceful cooperation' and promotion of 'universal human rights without distinction'.[200] Australia was 'distraught by the one-sided nature of this session', arguing that holding a Special Session was unhelpful, particularly as the Security Council was dealing with the situation.[201] The US supported Australia's assertions, calling the session 'unhelpful and potentially unproductive' and reminding the Council of the need for impartiality and non-selectivity.[202] The session's Resolution[203] was adopted by 27 votes[204] to 11,[205] with 8 abstentions.[206]

The Third Special Session, on Israeli violations in Beit Hanoun, took place in November 2006. States calling for the session were again from the South, OIC members, or allied States.[207] Pakistan (OIC) stated:

> It is under exceptional circumstances that the OIC and the Arab League have requested this session. Some say that too frequent special sessions will devalue the Human Rights Council, but if the human rights machinery cannot respond to violations around the world it will devalue the Council. It is eerie how gross and systematic human rights violations take place before, during, and after Council special session relating to Israel. Convening the Council is not an abuse. Not convening the Council would be far worse.[208]

Other OIC States regretted the Council's failure to ensure its previous resolutions were implemented. Algeria, a member of the African Group, called on the Council 'to rise to the challenge of its mandate and confront these gross human rights violations'.[209] Switzerland again supported convening the session, arguing that it 'shows that we are willing to meet on acute world situations'.[210] Finland again demonstrated the EU's neutrality, neither supporting nor criticising the Session. Canada and Australia repeated earlier positions, deploring the Council for its lack of objectivity, impartiality, and balance. Both States reminded the Council of its founding principles, saying that

200 *Ibidem,* Finnish delegate.

201 *Ibidem,* Australian delegate.

202 *Ibidem,* American delegate.

203 Human Rights Council Resolution S-2/1, 'The grave situation of human rights in Lebanon caused by Israeli military operations', 11 August 2006, UN Doc. A/HRC/RES/S-2/1.

204 Algeria, Argentina, Azerbaijan, Bahrain, Bangladesh, Brazil, China, Cuba, Ecuador, India, Indonesia, Jordan, Malaysia, Mali, Mauritius, Mexico, Morocco, Pakistan, Peru, Russian Federation, Saudi Arabia, Senegal, South Africa, Sri Lanka, Tunisia, Uruguay, Zambia.

205 Canada, Czech Republic, Finland, France, Germany, Japan, Netherlands, Poland, Romania, Ukraine, United Kingdom of Great Britain and Northern Ireland.

206 Cameroon, Gabon, Ghana, Guatemala, Nigeria, Philippines, Republic of Korea, Switzerland.

207 Algeria, Azerbaijan, Bahrain, Bangladesh, Brazil, China, Cuba, Ghana, India, Indonesia, Jordan, Malaysia, Mauritius, Morocco, Nigeria, Pakistan, Philippines, Russian Federation, Saudi Arabia, Senegal, South Africa, Sri Lanka, Tunisia and Zambia – Human Rights Council Report, 'Report of the Human Rights Council on its Third Special Session', 15 November 2006, UN Doc. A/HRC/S-3/2, Part II, para. 3.

208 Pakistani delegate, 3rd Special Session, 15 November 2006.

209 *Ibidem,* Algerian delegate.

210 *Ibidem,* Swiss delegate.

the body's actions were futile without adherence to these principles. The Third Session's Resolution[211] was adopted by 32 votes[212] to 8,[213] with 6 abstentions.[214] Although Japan and Switzerland pointed to the Resolution's lack of balance, the OIC welcomed its adoption by a two-thirds majority, asking 'We can't all be wrong, can we?'[215]

The Fourth Special Session was convened on the human rights situation in Darfur. More States called for this session than other sessions, and for the first time States calling for the session included countries from all regional groups.[216] At this first session unrelated to Israel, then Secretary-General Kofi Annan called on the Council to address problems outside of the Middle East.[217] Unlike the sessions on Israel, various States, typically Sudan's allies from the OIC or the African Group, expressed support for the country concerned. Again, unlike previous sessions, Western States supported the session. Palestine, Iran and Pakistan all used the session to attack Israel, and to criticise Annan's 'partial' statement about the Middle East.

At the Fourth Special Session consensus was reached on the outcome document, but the final text was in the form of a decision rather than a resolution,[218] thus carrying far less weight than the previous sessions' outcomes. Nineteen Council members spoke after the decision's adoption,[219] all lauding the Council for its cooperative, compromising, and congenial approach. Most were careful to say this was a happy moment for both the Council and the people of Darfur. However, India, Saudi Arabia, China, and Tunisia, amongst others, cared more that the consensus 'proved' the Council's legitimacy than about its impact on violations in Darfur.[220] The UK hoped that the Council would build on this constructive spirit to move away from solely

211 Human Rights Council Resolution S-3/1, 'Human rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory, including the recent one in northern Gaza and the assault on Beit Hanoun', 15 November 2006, UN Doc. A/HRC/RES/S-3/1.

212 Algeria, Argentina, Azerbaijan, Bahrain, Bangladesh, Brazil, China, Cuba, Djibouti, Ecuador, Gabon, Ghana, India, Indonesia, Jordan, Malaysia, Mali, Mauritius, Mexico, Morocco, Nigeria, Pakistan, Peru, Philippines, Russian Federation, Saudi Arabia, Senegal, South Africa, Sri Lanka, Tunisia, Uruguay, Zambia.

213 Canada, Czech Republic, Finland, Germany, Netherlands, Poland, Romania, United Kingdom of Great Britain and Northern Ireland.

214 France, Guatemala, Japan, Republic of Korea, Switzerland, Ukraine.

215 Pakistani delegate, 3rd Special Session, 15 November 2006.

216 Algeria, Brazil, Canada, the Czech Republic, Cuba, Ecuador, Finland, France, Gabon, Germany, Ghana, Guatemala, Japan, Mauritius, Mexico, Morocco, the Netherlands, Nigeria, Peru, Poland, the Republic of Korea, Romania, the Russian Federation, South Africa, Switzerland, Tunisia, Ukraine, the United Kingdom of Great Britain and Northern Ireland, Uruguay and Zambia – Human Rights Council Report, 'Report of the Human Rights Council on its Fourth Special Session', 12–13 December 2006, UN Doc. A/HRC/S-4/5, Part II, para. 3.

217 Secretary-General Kofi Anan, Address to the Human Rights Council, 4th Special Session, 12 December 2006.

218 Human Rights Council Decision, 'Situation of human rights in Darfur', 13 December 2006, UN Doc. A/HRC/S-4/101.

219 Including seven OIC countries, five EU countries, including Cuba, India, Russia, China, and Zambia.

220 All statements made at the 4th Special Session, 13 December 2006.

focusing on the Middle East, and the President invited Council members to 'maintain this spirit when we deal with other situations'.[221]

The Fifth Special Session adopted a Resolution on the situation in Myanmar by consensus.[222] The Session took place after Myanmar's military junta violently repressed monks' peaceful demonstrations. The Resolution resulted in the Special Rapporteur on Myanmar's first invitation to visit the country since 2003.[223] The Sixth Special Session again focused on Israeli violations, this time in Gaza and Nablus. The Resolution[224] was adopted by 30 votes[225] to 1,[226] with 15 abstentions.[227] Canada was the sole dissenting voice, once again rejecting country-specific resolutions and emphasising the Council's founding principles. The Seventh Special Session was the first to deal with a thematic issue. It examined 'The negative impact on the realization of the right to food […] caused inter alia by the soaring food prices' and its Resolution was adopted by consensus.[228] The Eighth Special Session also adopted its Resolution by consensus, this time on the situation in the Democratic Republic of Congo.[229] However, the Ninth Special Session, once again focused on Israeli violations. Its Resolution[230] was adopted by 33 votes[231] to 1,[232] with 13 abstentions.[233] Canada again cast the sole dissenting vote. The Tenth Special Session dealt with the second thematic

221 *Ibidem,* President Luis Alfonso de Alba (Mexico).

222 Human Rights Council Resolution S-5/1. 'Situation of human rights in Myanmar', 2 October 2007, UN Doc. A/HRC/RES/S-5/1.

223 Callejon, *loc.cit.* note 15, pp. 340–341.

224 Human Rights Council Resolution S-6/1.'Human rights violations emanating from Israeli military attacks and incursions in the Occupied Palestinian Territory, particularly in the occupied Gaza Strip', 24 January 2008, UN Doc. A/HRC/RES/S-6/1.

225 Angola, Azerbaijan, Bangladesh, Bolivia, Brazil, China, Cuba, Djibouti, Egypt, India, Indonesia, Jordan, Madagascar, Malaysia, Mali, Mauritius, Mexico, Nicaragua, Nigeria, Pakistan, Peru, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Sri Lanka, Uruguay, Zambia.

226 Canada.

227 Bosnia and Herzegovina, Cameroon, France, Germany, Ghana, Guatemala, Italy, Japan, Netherlands, Republic of Korea, Romania, Slovenia, Switzerland, Ukraine, United Kingdom of Great Britain and Northern Ireland.

228 Human Rights Council Resolution S-7/1, 'The negative impact of the worsening of the world food crisis on the realization of the right to food for all', 22 May 2008, UN Doc. A/HRC/RES/S-7/1.

229 Human Rights Council Resolution S-8/1, 'Situation of human rights in the east of the Democratic Republic of the Congo', 1 December 2008, UN Doc. A/HRC/RES/S-8/1.

230 Human Rights Council Resolution S-9/1, 'The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip', 12 January 2009, UN Doc. A/HRC/RES/S-9/1.

231 Angola, Argentina, Azerbaijan, Bahrain, Bangladesh, Bolivia, Brazil, Burkina Faso, Chile, China, Cuba, Djibouti, Egypt, Gabon, Ghana, India, Indonesia, Jordan, Madagascar, Malaysia, Mauritius, Mexico, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Uruguay, Zambia.

232 Canada.

233 Bosnia and Herzegovina, Cameroon, France, Germany, Italy, Japan, Netherlands, Republic of Korea, Slovakia, Slovenia, Switzerland, Ukraine, United Kingdom of Great Britain and Northern Ireland.

issue, the impact of the global economic and financial crises on human rights. Its Resolution[234] was adopted 31 votes[235] to 0, with 14 abstentions.[236] The Eleventh Special Session was convened on Sri Lanka. It took until the 2009 massacre of Tamils for the Council to call the session, despite Scannella and Splinter writing in 2007 of the 'growing deterioration' that required the Council's attention.[237] The Resolution[238] was adopted by 29 votes[239] to 12,[240] with 6 abstentions.[241] Those were the first dissenting votes cast on an issue other than Israeli violations. The Twelfth Special Session was again convened on Israel, and its Resolution[242] was adopted by 25 votes[243] to 6,[244] with 11 abstentions.[245]

3.3. POLITICISATION OF SPECIAL SESSIONS

The first 12 Special Sessions took place between 2006 and 2009. During this time, many gross and systemic human rights violations occurred that were not dealt with by this mechanism, or indeed at all by the Council. The violent repression of protests following Iran's 2009 Presidential elections was ignored by the Council despite well-

234 Human Rights Council Resolution S-10/1, 'The impact of the global economic and financial crises on the universal realization and effective enjoyment of human rights', 23 February 2009, UN Doc. A/HRC/RES/S-10/1.

235 Angola, Argentina, Azerbaijan, Bahrain, Bangladesh, Bolivia, Brazil, Burkina Faso, Cameroon, Chile, China, Cuba, Djibouti, Egypt, Ghana, India, Indonesia, Jordan, Madagascar, Malaysia, Mauritius, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Uruguay.

236 Bosnia and Herzegovina, Canada, France, Germany, Italy, Japan, Mexico, Netherlands, Republic of Korea, Slovakia, Slovenia, Switzerland, Ukraine, United Kingdom of Great Britain and Northern Ireland.

237 Arguably, political mistrust between States 'prevented Council members from cooperating effectively' to deal with the Sri Lankan human rights situation. Scannella and Splinter use that example to demonstrate 'the dangerous double standards' at the Council.

238 Human Rights Council Resolution S-11/1, 'Assistance to Sri Lanka in the promotion and protection of human rights', 27 May 2009, UN Doc. A/HRC/RES/S-11/1.

239 Angola, Azerbaijan, Bahrain, Bangladesh, Bolivia (Plurinational State of), Brazil, Burkina Faso, Cameroon, China, Cuba, Djibouti, Egypt, Ghana, India, Indonesia, Jordan, Madagascar, Malaysia, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Uruguay, Zambia.

240 Bosnia and Herzegovina, Canada, Chile, France, Germany, Italy, Mexico, Netherlands, Slovakia, Slovenia, Switzerland, United Kingdom of Great Britain and Northern Ireland.

241 Argentina, Gabon, Japan, Mauritius, Republic of Korea, Ukraine.

242 Human Rights Council Resolution S-12/1, 'The human rights situation in the Occupied Palestinian Territory, including East Jerusalem', 16 October 2009, UN Doc. A/HRC/RES/S-12/1.

243 Argentina, Bahrain, Bangladesh, Bolivia, Brazil, Chile, China, Cuba, Djibouti, Egypt, Ghana, India, Indonesia, Jordan, Mauritius, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Zambia.

244 Hungary, Italy, Netherlands, Slovakia, Ukraine, United States of America.

245 Belgium, Bosnia and Herzegovina, Burkina Faso, Cameroon, Gabon, Japan, Mexico, Norway, Republic of Korea, Slovenia, Uruguay.

documented human rights violations.[246] Similarly, grave violations occurring in China, particularly surrounding the Beijing Olympics in 2008, did not merit the convening of a Special Session despite widespread coverage of the human rights abuses.[247] Situations in these, and other, countries were not dealt with by the Council for political reasons. OIC members, including known grave abusers such as Iran, Libya, and Syria, were protected by their political and regional allies. Powerful States from the global South, including China and Zimbabwe, as well as the South's allies, such as Russia and Venezuela, were also protected from scrutiny of their gross and systemic human rights violations.

The overwhelming focus on Israel compared with other grave situations demonstrates that the Council is not overcoming its predecessor's flaws. While the Commission's bias was manifested in excessive resolutions against Israel,[248] the Council went further by using Special Sessions for selective and politicised aims. Half of the Special Sessions were convened on Israeli violations, while countries such as the DPRK, Zimbabwe, Russia and China, avoided scrutiny for similar crises situations. An article on Zimbabwe in *The Economist* noted a main flaw of the Special Sessions mechanism:

> True to form, the UN's recently revamped human rights council […] which might have been expected to be taking keen interest in what is going on in Zimbabwe, has not even raised the issue. Unlike its discredited predecessor, the Commission on Human Rights, it has the power to call for an emergency session to address particularly egregious violations of human rights, for example in Zimbabwe […]. In theory, calling an emergency session on Zimbabwe should not be so difficult […] but with its 16 members, the organisation of the Islamic Conference, supported by the 13 African members, has a stranglehold over the Council. Together, they repeatedly fend off moves to look into the human rights records of Muslim or African countries.[249]

OIC members, alongside some of its allies, were integral in convening Special Sessions on Israeli violations, using collective weight to further the group's political agenda.

Special Sessions were designed to protect human rights during crisis situations. The Council has increasingly used this mechanism to respond to crises in 2010 and 2011 with sessions on Haiti, Ivory Coast, Libya, and Syria. Those situations, as with the one in Sri Lanka, reached absolute crisis point before being addressed by the Council. Israel's human rights violations, on the other hand, were repeatedly raised regardless of whether they were part of an ongoing or crisis situation. If the Special Session mechanism was able to devote sufficient time and resources to all grave and crisis

246 See, for example, 'Iran: Arrests and deaths continue as authorities tighten grip', *Amnesty International Public Statement*, 14 July 2009, AI Index: MDE 13/072/2009.

247 See, for example, 'People's Republic of China The Olympics countdown – broken promises', *Amnesty International*, July 2008, AI Index: ASA 17/089/2008.

248 One quarter of all Commission resolutions concerned Israel.

249 'The United Nations and Zimbabwe: Crimes Against Humanity', *The Economist,* 26 June 2008.

situations then, undoubtedly, the six sessions on Israel would be justified. However, with limited Council time and resources, the body's selectivity and partiality against Israel demonstrates gross misuse of the Special Sessions mechanism. Ultimately, that misuse resulted in the Council failing to adequately address a number of other grave situations which required human rights protection.

The African Group associated country-specific action with the Commission's selectivity and politicisation. African group members sought abolition of country-specific mandates during the Council's creation. Indeed, Abebe comments that the African Group sought less emphasis on Special Sessions in light of the UPR's ability to deal with country-specific situations.[250] However, the Group supported country-specific action on Israel through the Council's Special Sessions. Moreover, whereas the African Group supported a weak and non-condemnatory text on Darfur, it supported strong and one-sided resolutions on Israel.

The EU's position at Special Sessions reflects its tendency for neutrality during politically sensitive Council proceedings. EU members did not call for Special Sessions to be convened on Israel, although they did call for sessions on other issues. Despite voting against or abstaining on resolutions about Israel, EU countries often remained silent or made passive and neutral statements during sessions. Other Western States did speak about politicisation, bias and selectivity, with Canada, Australia and the US taking strong positions on those issues. Indeed, Canada twice cast the sole dissenting vote against resolutions on Israel, for which it suffered repercussions during other Council proceedings.[251]

States from other groups did not adopt group positions on Special Sessions. Cuba, for example, pursued political agendas against Israel, allying itself with the OIC. However, other Latin American States expressed various positions on Israel, even changing their positions at different sessions. While India cited its own national security as motivation for supporting Special Sessions on Israel, other Asian States at times abstained or voted against such resolutions. States arguably pursued their own national agendas, often not tied to the issue at hand, during these sessions. Japan, for example, voted with the West despite making statements supporting the opposite position. Certain African States pursued national agendas on Darfur rather than adopting the African Group's position, particularly Sudan's neighbours affected by the situation. That form of politicisation is unsurprising given the Council's nature as an inter-governmental body. However, the use of collective weight to achieve political objectives, even where such agendas do not affect a member's national agenda, is more worrisome, and reflects the criticised aspects of the Commission.

250 Abebe, *loc.cit.* note 89, pp. 32–33.

251 See, Freedman, *loc.cit.* note 13, pp. 127–128, discussing the OIC blocking non-contentious, and unrelated, Canadian proposals immediately following that State casting the sole dissenting vote on OIC-sponsored resolutions against Israel.

4. CONCLUSION

The proposals for Universal Periodic Review and Special Sessions were first introduced as means to assist the Human Rights Council with fulfilling its mandate. The UPR was created to ensure universal scrutiny of all States, with a particular emphasis on examining the human rights record of Council members during their term of membership. That emphasis was designed to combat criticism that human rights abusers sought membership of the Commission in order to avoid scrutiny of their domestic human rights. Many observers have been keen to herald the UPR's success. That view is unsurprising, as the mechanism is central to the Council's ability to regain the Commission's lost credibility. Indeed the UPR's failure would severely affect the Council.[252]

UPR represents a compromise between the radical and idealist proposals, and the need to encourage cooperation in order to ensure a universal and State-led mechanism. Louise Arbour argues that, despite the compromises required during its creation, the UPR deals with most of the Commission's failings.[253] UN Secretary-General Ban Ki-moon said the UPR procedures were 'strong and meaningful' and could send a 'clear message that all countries will have their human rights record and performance examined at regular intervals'.[254] Assessment cannot fully occur until after the first full cycle, and even then judgments will be reserved until States begin to implement or ignore recommendations. The only true measure of success, according to Sweeney and Saito, is whether States implement the review's recommendations and report back on follow-up. That will determine whether the mechanism meets its primary objective of improving national human rights situations whilst adhering to the Council's founding principles of universality, non-selectivity and lack of bias.

Special Sessions were designed to deal with grave crisis situations, which was also hoped would overcome the Commission's failure to address crises as they arose. The Council's use of Special Sessions during its formative years has demonstrated the body's bias, selectivity and lack of even-handedness. Repeated focus on Israel to the exclusion of other gross and systemic human rights violations has undermined this new mechanism's credibility and ability to deal with grave or crisis situations. Discussions at the Special Sessions demonstrate politicisation and use of group tactics which occur throughout Council proceedings.

Despite hopes that the Council would overcome the failings of its predecessor, the new body has been dominated by similar problems of politicisation, selectivity and

252 Sweeney & Saito, *loc.cit.* note 16, p. 219.

253 UN Press Release, Address by Ms Louise Arbour, UN High Commissioner for Human Rights on the occasion of the eighth session of the Human Rights Council, Geneva, 2 June 2008, *available at*: www.unhchr.ch/huricane/huricane.nsf/view01/92691375A6EOCED5C125745C0042D391?opendocument.

254 Address to the seventh ordinary session of the Human Rights Council, 3 March 2008, *available at*: www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=196.

bias. Indeed, the two new mechanisms have been used by regional groups, political blocs, and States to achieve political aims, undermining their ability to assist the body in promoting and protecting human rights. Dominant regional groups and political alliances, in particular the OIC and African Group, have used these mechanisms to divert attention from scrutiny of the members or allies' human rights records. Moreover, the mechanisms have been utilised to focus disproportionate attention on human rights situations in order to further these groups' political agendas.

Although the two mechanisms have the potential to assist the Council in fulfilling its mandate, the body's membership problems, particularly regarding regionalism at the body, has undermined both UPR and Special Sessions. In order to strengthen these mechanisms, and indeed the Council as a whole, the body's problems regarding membership must be tackled. The Council's internal assessment, due to take place in 2011, must focus on membership as this is the key to many of the Council's problems. Reform proposals that were not taken up at the Council's creation should be revisited in order to ascertain how membership criteria can be altered in order to enable the body to fulfil its mandate more effectively.