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Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council

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Abstract

The Universal Periodic Review (UPR) of the United Nations Human Rights Council promises to be a useful tool for examining human rights situations in states in an objective, non-selective, universal and transparent manner. It is an undertaking imbued with a shift from the former Commission's policies and practice of shaming to a new consensual and cooperative model of human rights evaluation. The experience of African countries, both during the negotiation over its normative and institutional framework and in the two sessions of the Working Group on UPR, lays bare the challenges to the new human rights body and its unique peer review mechanism. The article critically examines the participation of African countries in the UPR and highlights some of the issues that deserve, at this early stage, the attention of all those who mind to see the objectives of the UPR fully realised.

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1 Introduction

The UPR is feted as a signature outcome of the human rights reform that resulted in the creation of the United Nations Human Rights Council (the Council). Though not as radical as was originally intended, being the outcome of the delicate task of keeping a balance between the competing objectives of creating a professional and an authoritative human rights organ on the one hand, and of crafting an inter-governmental cooperative platform for human rights review on the other, this new human rights evaluation mechanism may, even so, 'redress the shortcomings' of the Commission on Human Rights by rectifying the politics of shaming, selectivity and double-standards that were too often cited as weaknesses of the Commission. Whereas numerous Western countries and civil society organisations criticised the former Commission as a discredited organ in which states sought membership mainly to shield themselves from scrutiny, African states often alluded to the fact that the Commission and its institutional architecture, established 60 years ago when most of them were far from being full-fledged participants of the UN multilateral forum, for far too long encouraged and nurtured a culture of politicisation and selectivity.

The negotiation on Resolution 60/251 of the General Assembly (GA Resolution 60/251),¹ which establishes the Council, unmasks the different visions various stakeholders had regarding the new institution and its mechanisms including the UPR. Delegations disagreed on a host of issues including, among others, the status of the Council within the United Nations, the size and composition of its membership, its geographic representation, the Council's mandate and competence, the role of special procedures, and the nature and extent of the participation and involvement of civil society organisations.² States and other stakeholders across the spectrum, however, generally embraced the idea of a peer review mechanism where states' human rights performance will be evaluated by the Council in an objective, universal, genuine and non-selective manner. Soon after the establishment of the Council in 2006, additional negotiations were held to lay down the institutional and procedural framework for this review mechanism.

The narrative on international human rights law and practice is disproportionately informed by the experiences of Western countries and their domestic and regional paradigms. This skewed human rights scholarship and practice risks neglecting the views of others struggling to participate in international human rights institutions and influence their evolution. This article examines the encounters of the African Group, a regional bloc where all Member States

1 15 March 2006, A/RES/60/251; 13 IHRR 1195 (2006).

2 Lauren, 'To Preserve and Build on its Achievements and to Redress its Shortcomings: The Journey from the Commission on Human Rights to the Human Rights Council', (2007) 29 *Human Rights Quarterly* 307 at 332.

of the African Union are represented, with the UN human rights reform process, particularly in the context of the UPR. African states were active participants in the negotiations in New York on GA Resolution 60/251 and in Geneva on what is clumsily referred to as the 'institution-building text' of the Council, Resolution 5/1.³ By looking at African countries' participation in the two sessions of the UPR Working Group and relevant meetings of the Council over the past two years, this article seeks to highlight some of the challenges this unique inter-governmental human rights monitoring system faces. The initial institutional building process has been vastly influenced by political considerations and has accommodated a minimal professional and expert input. The UPR remains a largely unknown process outside of the UN human rights environment. Thus, a brief description of its features and process is provided. Based on an analysis of African countries' participation in the negotiation and the two sessions of the UPR Working Group, the article also discusses some of the issues that may influence the future of the UPR.

It is still far too early to pass judgement on the efficacy of the Council and its mechanisms. Yet, it has also become evident that the Council's new and innovative modalities confront a working culture that is predictably old-signalling an ominous sign for the efficacy of the new mechanism. Group alliance and factionalism remains a veritable force in the conduct of business in any political organ, and the Council has not so far proven an exception to this rule. African states have deftly manipulated this sub-culture to support and prominently participate in initiatives intended to resist the involvement of individual experts in the UPR, to significantly limit the participation of stakeholders, to monitor the conduct of special procedures and to oppose the Council moves to take country-specific condemnatory decisions. They often stressed the importance not only of the conception of the UPR but also the entire edifice of the Council as a political undertaking, bargaining to ensure an institutional environment to their liking. As the review of African countries under the UPR and their participation in the process indicate, there are signs that the new institution and its working methods are offering opportunities for African states to graduate from being 'subjects' of a condemnatory system of oversight mechanism into becoming conscious bargainers and participants in a much more cooperative forum. Whether this will help the Council achieve its lofty goals of creating a genuine, practical and action-oriented peer review mechanism that is relevant to human rights situations on the ground is far from certain.

3 Institution-building of the Council, 18 June 2007, A/HRC/RES/5/1.

2. The Invention of the UPR

Much as in the negotiation in New York that led to the adoption of the resolution establishing the Council, African countries actively participated in negotiations conducted in various working groups set up during the Council's first regular session held between 19 and 30 June 2006, to lay down the Council's institutional and procedural framework. These negotiations took a considerable portion of the Council's time, and often competed with other equally important promotional and protection issues deserving its attention. Though the conceptualisation of the UPR, just like many other dimensions of the new Council, had a political nature, it did also garner some expert insight, albeit, in a minimal fashion. For example, on 28 August 2006, a symposium was held in Lausanne, Switzerland where government representatives, non-governmental organisations (NGOs) and academics held a brainstorming session on the various models for the UPR and other mechanisms of the new Council. But the negotiation over the modalities of the UPR was conducted largely within an open-ended Working Group established by the Council.⁴ During these consultations and negotiations, both African and non-African countries cited the example of the African Peer Review Mechanism (APRM) as one possible model to be considered while determining the nature of the UPR.⁵ The definition of the contours and modalities of the new review mechanism was a protracted matter and the subject of a great deal of debate and discussion. This made it impossible for the Council to kick start the process of the review during its first cycle. Some wanted a detailed and factually rigorous process of UPR review, whereas others called for a less cumbersome and light scrutiny procedure.⁶ Not a few participants suggested the appointment of independent experts who would assist, either directly or indirectly, the review of human rights compliance. Criticisms were made of the idea of soliciting new and additional reports for the UPR, arguing that the review should only limit itself to an investigation of states' submission to existing human rights treaties. The participation of NGOs and other human rights mechanisms also became points of intense discussion and debate. African countries, who relied on the experience of APRM, called for an essentially state-driven process while others wanted to maintain a robust participation of NGOs.

These consultations and negotiations led to the adoption by the Council, during its fifth session on 17 June 2007, of Council Resolution 5\1⁷ which contains as an annex the 'institution-building' text. The text covers, *inter alia*,

4 Council Dec. 1/103, 30 June 2006, A/61/53 at 34.

5 Other models considered include peer-review mechanisms in the International Labour Organisation (ILO), the Organisation for Economic Co-operation and Development (OECD) and the World Trade Organisation (WTO).

6 See Human Rights Peer Review, Draft Concept and Options Paper, Prepared by Canada, 29 April 2005 at para. 9, available at: <http://www.eyeontheun.org> [last accessed 1 December 2008].

7 Supra n. 3.

modalities for the conduct of the UPR, the basis of the review, the principles and objectives of the UPR, the periodicity and general order of countries to be reviewed and the outcome and follow-up of the review mechanism. The Council later took additional decisions in order to further clarify and refine its normative framework and the procedure of the review. In September 2007, it adopted the General Guidelines for the preparation of information for the UPR.⁸

Some have identified striking similarities between the UPR and the little known periodic reporting procedure that had been used at the Commission between 1956 and 1981.⁹ But the UPR is by and large considered as a unique mechanism. The former High Commissioner for Human Rights, Ms Louise Arbour, touted the UPR as a formidable response to most of the criticisms levelled against the former Commission, and argued that it could 'provide a vehicle for scrutiny of the implementation of rights and norms beyond anything ever attempted by the Commission on Human Rights'.¹⁰ The UN Secretary-General Mr Ban Ki-moon called the procedures of the UPR 'strong and meaningful' and capable of sending a 'clear message that all countries will have their human rights record and performance examined at regular intervals'.¹¹ Major human rights NGOs called it 'one of the most significant innovations in this new Human Rights Council'.¹²

The UPR is not a treaty specific regime, so that it is not limited to the application of a treaty set of human rights norms, but covers a broad spectrum of normative standards and issues. As clearly laid down in Council Resolution 5/1, the objectives of the review include: improvement of the human rights situation on the ground; assessment of achievements and challenges in the fulfilment of human rights obligations and commitments; recommendations of technical and capacity building measures; sharing of best practices; and promotion of cooperation with other human rights treaty bodies. By Council Resolution 5/1 the normative framework for the review is not restricted to human rights treaties to which the state under review is a party, but has an expansive focus including also the Charter of the United Nations, the Universal Declaration of Human Rights 1948 and voluntary human rights

8 Council Dec. 6/102, 27 September 2007, A/HRC/DEC/6/102.

9 For a very concise discussion of that reporting mechanism and why it has failed, see Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council', (2006) 7 *Melbourne Journal of International Law* 185 at 207–13.

10 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: <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/92691375A6EOCED5C125745C0042D391?opendocument> [last accessed 1 December 2008].

11 Address to the seventh ordinary session of the Human Rights Council, 3 March 2008, available at: <http://www.un.org/apps/news/infocus/sgspeeches/search.full.asp?statID=196> [last accessed 1 December 2008].

12 The Universal Periodic Review Mechanism: Joint Statement to the First Session of the Human Rights Council, 27 June 2006, available at: <http://hrw.org/en/news/2006/06/27/universal-periodic-review-mechanism> [last accessed 1 December 2008].

pledges and commitments made by the state under review, including those undertaken when applying for membership of the Council. A number of countries, including Switzerland that hosts and funds the International Committee of the Red Cross (ICRC), called for the inclusion of the body of humanitarian law as a basis for state scrutiny. Others, including members of the African Group and some Western countries such as the US, insisted that the normative basis for the review should exclusively be human rights norms.¹³ The institution-building text eventually provided that the UPR should take into account applicable international humanitarian law. Since international humanitarian law relates to sensitive issues such as conflicts, it should be of a considerable interest to see how this part of the UPR will be implemented.¹⁴ The Council, in its special session on Israel's intervention in Lebanon in 2006, considered that issues of human rights violations occurring in the context of conflicts fall squarely within the purview of its mandate. Countries such as the US on the other hand continue to maintain that the application of international humanitarian law during an active conflict should not be the concern of the Council, which 'should not address particular military actions taken during a period of armed conflict that are clearly governed by the law of war'.¹⁵

During its sixth session in September 2007, the Council adopted the calendar of review for the first year cycle, containing a list of 48 countries to be reviewed. Except in the case of Switzerland and Colombia, which volunteered for review during the first session of the UPR Working Group, the order of states were selected by a drawing of lots. The process of selection had to take into account different considerations such as regional representation, reviewing Council's members during their term of membership and accommodating volunteers. A mathematical model was formulated by the Office of the High Commissioner for Human Rights (OHCHR) secretariat which was presented to all missions present in Geneva. The Working Group set out to review 16 African countries in 2008, including both members and observers of the Council. The first and second sessions of the UPR Working Group were held from 7 to 18 April 2008 and from 5 to 19 May 2008, respectively. The report and outcome of the reviews held during these two sessions were considered and adopted by the Council in its sixth Ordinary session in June 2008. The following African states were reviewed in the first session: Morocco, South

13 The facilitator suggested a compromised language which cited the application of humanitarian law when applicable. See Non-paper on the universal periodic review mechanism, 27 April 2007, A/HRC/5/14 at 2.

14 The review of the two batches of African countries does not shed light on this topic since none of them have major conflicts.

15 See Statement of the United States at the third special session of the UN Human Rights Council, 15 November 2006, available at: <http://geneva.usmission.gov/Press2006/1115TichenorGaza.html> [last accessed 1 December 2008]. For a critique of the US policy on this topic, see Alston, Morgan-Foster and Abresch, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"', (2008) 19 *European Journal of International Law* 183.

Africa, Algeria and Tunisia. Only South Africa was a member of the Council during its review. Gabon, Ghana, Mali and Zambia were slotted for a review in the second session. Both Ghana and Zambia were members of the Council during their review.

3. Features and Processes of the Review

The basic elements of the UPR are set out in GA Resolution 60/251, which mandates the Council to:

undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies.¹⁶

The UPR as thus conceived has the following four phases: (i) the gathering and collation of information on the human rights situation in the state under review; (ii) an interactive dialogue in the UPR Working Group, in which a troika of rapporteur states play a leading role, including the drafting of the 'outcome' report; (iii) the final adoption of the 'outcome' report, including recommendations to the reporting state, by the plenary Council; and (iv) the 'follow up' to the review.

Though the UPR is not based on any specific treaty or legal instrument, the obligation by the state to be involved in the process and present information intriguingly was not contested. In other instances in which the technique of peer review by states is used, as, for example, in the African regional human rights system, countries have to first accept voluntarily a Memorandum of Understanding prior to the initiation of the formal scrutiny under APRM.¹⁷ Under the UPR, the legal foundation of the conduct of the exercise is GA Resolution 60/251 and Council Resolution 5/1. Even though both resolutions and the subsequent Guidelines conceptualise participation in the UPR as a cooperative undertaking, there is a general acceptance of states' obligation to engage in the process. Neither the Resolutions nor the Guidelines incorporate provisions dealing with situations of potential state defaults on providing such information.

The UPR seeks to ensure universal coverage by reviewing the implementation of all dimensions of human rights by all Member States based on 'objective

¹⁶ *Supra* n. 1 at para. 11.

¹⁷ See Kanbur, 'The African Peer Review Mechanism: An Assessment of Concept and Design', (2004) 31 *South African Journal of Political Studies* 157.

and reliable' information gathered from a national report, recommendations of human rights treaty bodies and contributions by civil society organisations. It is periodic in that the review of a country takes place every four years. The UPR Working Group, in which all Council members are represented and in which observer states may participate, is established for the purpose of undertaking the review. It will evaluate 48 countries annually, 16 in each session. During its first two sessions, the Working Group reviewed 32 countries.

A wide distinction between the UPR and treaty based human rights monitoring mechanism emerges when one looks at issues such as preparation of the report, the conduct of the review and the normative basis of the review. The UPR is primarily an inter-governmental oversight mechanism, and thus is a profoundly political undertaking. The UPR is also different from the monitoring function of human rights treaty bodies whose members are individual experts with a mandate to scrutinise the implementation of treaty-based commitments. Unlike the procedures followed in these mechanisms, the normative framework for the UPR, that is, GA Resolution 60/251 and the Council Resolution 5/1 on institution-building, deliberately exclude individual human rights experts from directly participating in the review process.¹⁸ In the UPR, states are in the driving seat, being the primary suppliers of information, reviewers and consolidators of the report itself.

The sessions of the UPR Working Group, like all other meetings of the Council and its mechanisms, are serviced by the OHCHR. Though there were numerous initial proposals suggesting multiple functions for the OHCHR in the review (such as the preparation of a dossier on the basis of which the review would be conducted, the appointment of individual experts who would undertake the review and the provision of assistance identified in recommendations resulting from the review), many, including African countries argued that the role of the OHCHR in the process should be limited. It was 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.

When the UPR commenced, the specific modalities of the review that would apply in the Working Group were unclear.¹⁹ There was considerable apprehension that the review would unravel in light of the myriads of procedural issues that remained unsolved. No common position existed on a variety of issues including the modalities for the exercise of the mandate of rapporteurs, the relationship between the Working Group and the Council, the level of government representation in the review, the process of formulating

18 Originally some members of the Western Group and representatives of civil society called for the appointment of individual experts for the purpose.

19 Brett, *Neither Mountain nor Molehill: UN Human Rights Council: One Year On*, Quakers United Nations Office, August 2007, at 8, available at: <http://www.quono.org/geneva/pdf/humanrights/NeitherMountainNorMolehill200707.pdf> [last accessed 1 December 2008].

recommendations put forward during the interactive dialogue, the reflection of these recommendations in the Working Group's report and the procedure for the interactive dialogue. The African Group initially questioned the wisdom of initiating a process the details of which remained unclear. But later it joined those who expressed a desire to see the exercise initiated while conducting consultation and negotiations on outstanding procedural issues simultaneously. Thus, by the end of the first session of the Working Group, it had already made a series of procedural decisions which sought to fill gaps in the institution building text, without the need for the adoption of specific decisions by the Council—a fact that need not be overstated as GA Resolution 60/251 already laid out the general framework for the conduct of the review. Granted the lengthy nature of the negotiation over the institutional architecture of the Council, certain flexibilities were required to kick-start the much anticipated process. Issues such as the responsibilities of the troika members prior to the actual review, the length of speaking time and the preparations of the report of the Working Group required last-minutes deliberations and decisions.

A. Another Report, Again?

The first phase of the UPR involves information gathering where data on the human rights situation in the state under review is collected by means of a state report; a compilation of information from UN sources, including the human rights treaty bodies; and a summary of information provided by other stakeholders, including national human rights institutions and NGOs.²⁰ The state under review is required to present a report not exceeding 20 pages.²¹ A compilation of UN treaty body and special procedures reports, etc, and a summary of the submissions by national stakeholders, which both need to be limited to 10 pages, are prepared by the OHCHR. The structure of these documents is expected to follow and reflect the Council's General Guidelines on the preparation of the national report.

Reliance in the first segment of the review upon a state report blurs the important distinction between the UPR procedure and that which applies under human rights treaty body mechanisms, as the latter also requires states to make reports. The approach favouring a comprehensive report was sidelined, partly in order to avoid 'overlap' with the work of treaty bodies and other mechanisms.²² The General Guidelines use the term 'information' to describe submissions by states. Some states have also routinely used similar

20 Compilation prepared by the Office of the High Commissioner for Human Rights: Algeria, 6 March 2008, A/HRC/WG.6/1/DZA/2.

21 Summary prepared by the Office of the High Commissioner for Human Rights: Algeria, 6 March 2008, A/HRC/WG.6/1/DZA/3.

22 Gaer, 'Voice Not an Echo: Universal Periodic Review and the UN Human Rights Treaty Bodies System', (2007) 7 *Human Rights Law Review* 109 at 114.

terminology during discussions and debates both in the Working Group and the Council.

States are not duty-bound to present a colossal and factually dense report, which many would have found burdensome to do. Moreover, the presentation of a major report would be impractical given the page limit of the document. What the guidelines require is a national report that presents a brief description of the human rights situation within the country, highlights some of the challenges the country faces and indicates the possible assistance it requires. The Council's agreement on a set of Guidelines on the preparation of the report cannot be said to constitute a compulsory format for reports.²³ States are even entitled to present their report orally, although so far only South Africa has done so.²⁴ The Guidelines encourage states to prepare their reports based on a broad national consultation involving all relevant stakeholders. The call to adopt an inclusive method of preparing the report was informed by well-meant considerations, but it has created an impression that states ought to follow an elaborate national process of preparing a human rights report similar to the ones they pursue during the preparation of reports for human rights treaty bodies. Preferring a more simplified and state-driven procedure, the African Group and African member countries opposed a stringent procedure requiring the participation of a broad spectrum of stakeholders. Such a procedure would, it was argued, open an opportunity for others to attack the report on account of procedural failings. The Guidelines also prescribe that states should indicate in their reports, the methodology they adopted for the participation of stakeholders in the preparation of the report. The Guidelines, however, do not themselves seek to provide detailed ideas on how such consultative national process should be undertaken. During the review process so far, most of the states under review have stressed the importance of the inclusive nature of the national report preparation process, and stated during the sessions of the Working Group that they had allowed the active participation of civil society organisations. The reports and oral presentations by states in the Working Group all indicate that an inclusive national reporting procedure was adopted. But far fewer reports and submissions identify the specific nature (time, place and number) of consultations that were held.

The African Group's position on reporting under the UPR was rather ambiguous. Confronted by competing considerations, on the one hand, the pervasive defaulting on reporting obligations by African states and a lack of capacity to prepare national reports and, on the other hand, the threat of

23 See National Report submitted in accordance with the Annex to Human Rights Council Resolution 5/1, 20 March 2008, A/HRC/WG.6/1/DZA/1 at para. 15(a).

24 South Africa's report to the Working Group, which was not presented within the time required under Council Resolution 5/1, was considered as orally presented, although a written report was distributed during the session of the group.

a review mechanism that heavily relied on non-state contributions, the Group, on numerous occasions, expressed its interest in a simplified and non-obligatory procedure of collecting information that could be presented even orally to the Working Group.²⁵ South Africa initially insisted on the use of questionnaires as a means of gathering information from states.²⁶ During the negotiations, however, the Group's coordinator, Algeria,²⁷ and several of its members also made statements often citing 'the national report' as the basis of the review.²⁸ This approach was influenced by the Group's fear that if the Working Group did not take the state report as a central element of its review, the exercise would largely be influenced by information or data regarding which it had far too little say. The privileged status of a 'national report' under the procedure in human rights treaty bodies means that 'third party' information or data is accommodated as 'shadow reports'. In contrast, the UPR breaks from that procedure by avoiding any hierarchy among the various inputs, and allows contributions by UN treaty bodies and submissions by national stakeholders to be introduced as official documents in the review process.

B. Review through an Interactive Dialogue

What in the Council's parlance is referred to as 'interactive dialogue' is conducted as a public hearing where observer states (including Palestine and the Holy See) as well as Council members participate in the Working Group. Both members and observers states may raise questions and present observations or recommendations. The state under review is given an opportunity to respond to questions and observations. It can also respond to written questions transmitted to it through the troika.²⁹

The interactive dialogue embodies two important elements: presentation of information or a report by the state under review, and a 'question and answer' session. A procedure on report presentations by states was adopted. States are given 30 minutes of presentation, followed by a question and answer

25 See Algeria, Oral Statement (on Behalf of the African Group), 21 July 2006, Reproduced in Updated Compilations of Proposals and Relevant Information on the Universal Periodic Review (OHCHR, Secretariat of the Human Rights Council, 5 April 2007) at 7, available at: <http://portal.ohchr.org> [last accessed 1 December 2008].

26 Questionnaires are used for APRM.

27 Egypt replaced Algeria as coordinator of the African Group during the second cycle of the Council.

28 See Algeria's Statement (on Behalf of the African Group), in ISHR, 'Human Rights Council, Institution Building President's Open Meeting, 10 May 2007 final copy, Council Monitor, at 4, available at: <http://www.ishr.ch/hrm/council/wg/wg.reports/highlights/highlights.open.meeting.10.may.2007.final.pdf> [last accessed 1 December 2008].

29 Zambia, for example, used its introductory note largely to reply to questions sent to it in advance by a group of Western countries, see Report on the Working Group on the Universal Periodic Review: Zambia, 2 June 2008, A/HRC/8/43 at para. 5.

session involving Council members and observers and lasting two hours. The state under review can, in its oral presentation, provide the Working Group with additional information. It is also given an additional 30 minutes to be used for responding to questions raised during the review and make final observations. A period of three hours is dedicated for the review of each country.

Most of the states reviewed in the first two UPR sessions were represented by delegations headed by a minister or senior official or diplomat. Believing that a high-level participation of delegations will reaffirm the seriousness with which states take the process, and provide an opportunity for an effective dialogue, the officers of the Council, OHCHR and states often emphasised the importance of such participation.³⁰ South Africa strongly pushed for the idea that participation at the UPR Working Group should be at a ministerial or relatively high position and such requirement be incorporated in the institutional building text. Though the usefulness of high-level participation in the UPR was apparent, there was a general feeling that the matter should best be left to states to determine. During the first session of the UPR, almost all of the states under review, with a few exceptions, were represented by a high-level delegation. Among African countries, Tunisia, Morocco, Algeria, and Ghana were represented at ministerial level.³¹ Gabon and South Africa were represented by their missions in Geneva. Perhaps not to embarrass their colleagues in Geneva, no diplomat raised the issue of level of participation by the state under review during the interactive dialogue.

Three and two minutes were allotted for each member and observer state, respectively, to make statements during the interactive dialogue. However, it soon became evident that these time limits were unrealistic in light of the large number of countries seeking to participate. If there was fear that many states would not find the time and resources to actively participate in a burdensome review process, the interactive dialogue during the two sessions did not see these fears materialise. For example, over 60 states participated during the interactive dialogue on the review of Tunisia.³² The review of Ghana, South Africa, Algeria, Morocco and Mali also drew the participation of more than

30 With the purpose of encouraging professionalism, the High Level Panel had suggested that state delegations should be led by key and prominent individuals with human rights experience. See UN General Assembly, *A More Secure World: Our Shared Responsibility*. Report by the High-Level Panel on Threats, Challenges and Change, 2 December 2004, A/59/565 at para. 286, available at: <http://www.un.org/secureworld/report2.pdf> [last accessed 1 December 2008].

31 The reports of the Working Group usefully provide lists of the composition of delegations as annexures, available at: <http://www.upr-info.org/-Working-Group-Reports-adopted-.html> [last accessed 1 December 2008].

32 A record number of 70 countries made intervention during the review of Pakistan. Data on the first and second sessions of the UPR are available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx> [last accessed 1 December 2008].

40 states each.³³ If each Member State takes three minutes to present its views, it obvious that the three hours time limit will not be sufficient. Hence the Working Group decided to shorten the speaking time for Member States to two minutes. The list of participants resulted in overcrowding whereby in many cases several questions were not adequately addressed by the reporting state.³⁴ In some cases, the state under review took more than 30 minutes to make its initial presentation, which meant that it had far less time at its disposal to respond to the numerous questions raised both during the interactive dialogue and through the troika.³⁵ There were numerous occasions where several states could not participate in the interactive dialogue due to lack of time. If states were to take advantage of the procedure allowing written questions, this problem could have been partly addressed. With very few exceptions, only Western Groups sent written questions to states under review through troika members. But even where states already presented their questions in written form prior to the interactive states, it was observed that the same states took the floor during the interactive dialogue to make statements³⁶ or to repeat the same questions.³⁷ States may wish to prefer direct participation as they wish to be seen participating in the review process.

Questions were raised regarding how transparent the review should be. Webcasting the actual review was problematic for numerous delegations including those of members of the African countries. During the negotiations on the modalities of review which took place in parallel with the meetings of the Working Group, it was agreed that the review process will solely be based on the national report, the compilations and the summary. It was also agreed that the OHCHR office will not post the full text of NGO's submission in the extranet of the Council.

Council Member States and observers often made reference to recommendations and conclusions of treaty bodies. This should be of considerable interest to those who follow how the relationship between the UPR mechanism and that followed by the treaty bodies will evolve. GA Resolution 60/251 establishes that the review process should not duplicate the work of the treaty bodies. A view was expressed that if recommendations of treaty bodies are presented as components of the UPR outcome, the authority of treaty bodies will be

33 The number of participants during the review of other African countries include: Gabon (36), Benin(39) and Zambia (39).

34 See ISHR, 'Universal Periodic Review, 1st Session: Tunisia', UPR Monitor, April 2008, at 4, available at: <http://www.ishr.ch> [last accessed 1 December 2008].

35 See ISHR, 'Universal Periodic Review, 2nd Session: Ghana', UPR Monitor, May 2008, at 2, available at: <http://www.ishr.ch> [last accessed 1 December 2008].

36 See the Reports of the Working Group on the Universal Periodic Review of Gabon, 9 May 2008, A/HRC/WG.6/2/L.1 and of Zambia, 19 May 2008, A/HRC/WG.6/2/L.9.

37 See, for example, the Report of the Working Group on the Universal Periodic Review: South Africa, 18 April 2008, A/HRC/WG.6/1/ZAF/4 and Zambia, *supra* n. 36.

significantly diminished since states under review will be having the opportunity to reject recommendations by which they are otherwise obligated.³⁸ This claim is speculative, although a review of the two sessions of the Working Group reveals that the UPR review provided opportunity for government representatives to give a political profile to some of the recommendations of the various treaty bodies.

C. Outcome of the Review

The findings of the Working Group—which includes a summary of the proceeding, recommendations and the voluntary commitments of the state under review—are prepared in the form of a report by a process fully involving and engaging the state under review. In Council Resolution 5/1 on ‘institution-building’, these findings are referred to as an outcome, to be prepared by the troika rapporteurs who, while undertaking their task, should take into account the state’s report and its observations and response to the questions and comments raised during the interactive dialogue.

(i) The role of the troika

The mandate of the troika, though stated in general terms under the institution-building text, invited considerable debate.³⁹ Fearing that these rapporteurs may act as powerful and unwieldy *ad hoc* country-specific mandate holders, African countries felt that there was a need to make the rapporteurs focus on the actual review process, define the time span in which they exercise that role, and ensure that they resist the temptation of playing the role of country specific rapporteurs.⁴⁰ These fears were triggered by the fact that the rapporteurs were given responsibility for filtering the salient issues raised during the review and those views that could be captured as recommendations. The institution-building text allows the state under review to request the Council that one of the members of the troika should be assigned from its own region. All African counties reviewed during the two session of the Working Group except Ghana did this. The rapporteurs may decide among themselves to assign one of their own as a spokesperson of the troika and this individual

38 See International Commission of Jurists, Written Contributions, Reproduced in Updated Compilations of Proposals, *supra* n. 25. This argument was also picked up by diplomats. The Mexican Ambassador to Geneva during the workshop organised jointly by the Swiss Government and Geneva Academy of International Humanitarian and Human Rights Law, 3 July 2008, made a similar point.

39 Council Resolution 5/1, *supra* n. 3 at para. 18(d), states: ‘A group of three rapporteurs, selected by the drawing of lots among the members of the Council and from different Regional Groups (troika) will be formed to facilitate each review, including the preparation of the report of the working group. The Office of the High Commissioner for Human Rights will provide the necessary assistance and expertise to the rapporteurs.’ A state may recuse itself from acting as rapporteur’.

40 See also Joint Letter of the African Group, Arab Group and the OIC, 3 April 2008.

will be responsible for presenting the report to the Working Group and introduce issues that arose during the drafting of the report and particularly the recommendations and conclusions identified from the deliberation.

(ii) Recommendations

States under review are required, during the session of the Working Group, to declare their position on all recommendations that are proposed concerning them. They may accept or reject a recommendation or set of recommendations forwarded. For example, Algeria, Benin, Ghana, Morocco and Zambia rejected one or more recommendations.⁴¹ States may find it difficult for various reasons to express themselves immediately on certain recommendations and observations. In these instances, states may take advantage of the provisions of Resolution 5/1 that grant them an opportunity to express their views on the outcome of the review before the plenary takes action on it. Council Resolution 5/1⁴² states that the final outcome report of the Council should 'note' even those recommendations that do not enjoy the support of the state under review.

The first two sessions of the Working Group, however, showed the difficulty of implementing this provision, as illustrated by the review of Tunisia. During the presentation of the report on Tunisia, Belgium criticised the original draft prepared by the rapporteurs arguing that its recommendations were ignored.⁴³ In an apparent consideration of the institution-building text, which states that 'rejected' recommendations shall be noted in the report, the troika members decided to list the recommendations not accepted by Tunisia as a part of the narrative section of the report. This led Belgium to criticise the report for failing to properly reflect its recommendations given during the review. At the time it was the view of many, including a number of African countries, that a recommendation not accepted by the state should only be 'noted' in the report. Hence, a 'rejected' recommendation should not form part of lists of recommendations of the outcome to be identified in the report. Others states, including members of the Western Group, argued that all recommendations without distinction should be identified in the same section of the report. After a prolonged debate and negotiation, it was agreed that recommendations will not be included in the section listing final conclusions and recommendations of the UPR Working Group. Rather the paragraph containing the recommendation or set of recommendations rejected by the state under review will simply be identified in that section.

41 See the Report of the Working Group on the Universal Periodic Review for each state, available at: <http://www.upr-info.org/-Working-Group-Reports-adopted-.html> [last accessed 1 December 2008].

42 *Supra* n. 3 at para. 32.

43 See Draft Report of the Human Rights Council on its eighth session, 5 August 2008, A/HRC/8/L.10/Rev.1 at para. 236.

Another challenge for the process of formulating recommendations related to what diplomats at the Council termed 'attribution', not as much a well-considered doctrine as a convenient 'fix' within the Working Group by which recommendations will be recognized as inputs by states who have proposed them, not as recommendations of the Working Group. Some states had argued that recommendations should be ascribed to the state which proposed them. The rationale was straightforward: the UPR is undertaken not by an independent human rights body as such, but by Member States and observers of the Working Group involved in the review procedure in their 'individual sovereign capacity'.⁴⁴ Egypt, on behalf of the African Group, argued that it is a violation of the sovereign rights of states to create the impression that all members of the Working Group agree to a recommendation proposed by one state. Western countries routinely proposed recommendations in their statements. This risked the submissions of numerous recommendations, some of which were cumbersome. Thus, the idea that a recommendation should be attributed to a state proposing it was widely accepted, not least because it appeared to be a 'brilliant' solution to handling some quite sensitive recommendations on which delegations do not see each other eye to eye, such as the question of sexual orientation. The Working Group, by adopting the report, in no way endorses the recommendations are by individual states, but 'acknowledges that the report factually describe the proceedings in the working group'. Though the practical consideration for such proposal was understandable, the decision will have far-reaching implications. Technically it means that the recommendations are not adopted by the Working Group. States may also not like the idea of their names being attached to certain recommendations.

Compared with the great number of general statements made by African states during the interactive dialogue, the number of recommendations that were put forward by African delegations was minimal. In a few cases where pointed recommendations were presented, they were either presented during a review process involving Western countries,⁴⁵ or were 'friendly recommendations' in reviews of third world states touching upon such issues as technical assistance and capacity building. It was also considered that some of the recommendations were too general and as such enormously difficult to be actionable.⁴⁶

44 Ibid.

45 See recommendations made by delegations such as Egypt and Algeria during the review of countries such as The Netherlands, Great Britain and Switzerland.

46 See NGO joint statement, eighth session, Human Rights Council, 13 June 2008, available at: <http://www.ishr.ch/lca/statements.council/otherngos/upr.statement.final.13june.2008.pdf> [last accessed 1 December 2008].

(iii) Relationship between the Working Group and the Council

The link between the report of the Working Group and the plenary Council in the UPR process was far from clear. Is the Working Group really the only forum for the review? This question was intensely debated both during the negotiation of the institution-building text and the conduct of the review. States significantly disagreed over the 'division of labour' that should exist between the two. Developing countries feared that unless clear procedures were formulated, the consideration of the review both in the Working Group and the plenary of the Council might result in a 'double review'—a situation envisaged neither in GA Resolution 60/251 nor Council Resolution 5/1. The African Group argued that there should not be additional consideration of the state report and other documents prepared by the OHCHR at the Council's plenary and that the discussion at the plenary should focus only on the process that followed at the Working Group. It also considered that interventions by civil society representatives in the plenary should not touch upon new elements but should be restricted to the review process and the outcome document. The Western Group favoured a working method that allowed the Council to look at issues not sufficiently addressed at the Working Group and defended greater participation by NGOs, who are to attend but not participate in the UPR Working Group.⁴⁷ Frantic negotiation and back-room discussions led to an enormously ambiguous presidential statement which underscored that the review will solely be undertaken in the Working Group.⁴⁸ This statement hid the fact that there was not a clear delineation between the nature of UPR-related activities in the Working Group and in the Council for many participants of the process.

The procedure that was adopted was that the Council will dedicate one hour to discuss the report of the Working Group. During this period, the state under review will be given 20 minutes to present its views and recommendations, make voluntary pledges and commitments, and reply to questions not adequately answered during the review.⁴⁹ Questions can still be raised by members and observers of the Council under Item 6 of the Council's agenda dedicated to the consideration of the UPR. States whose recommendations were not accepted during the conduct of the review process can reiterate their proposals.⁵⁰ For example, during the eighth regular session of the Council,

47 ISHR, Daily Updates, Human Rights Council, 8th session, 10 June 2008, at 7, available at: <http://www.ishr.ch/hrm/council/dailyupdates> [last accessed 1 December 2008].

48 President Statement on Modalities and Practices for the Universal Periodic Review Process, 9 April 2008, A/HRC/8/L.1.

49 Technical Modalities relating to the conduct of the UPR Process in the plenary of the Council, 5 June 2008.

50 Report of the Human Rights Council on its eighth session, 26 June 2008, A/HRC/8/L.10/Add.1 at para. 183.

Belgium expressed its concern about freedom of expression in Tunisia and even criticised the recommendations as incorporated in the report of the Working Group for being 'too vague'.⁵¹ The Netherlands used the opportunity to seek clarification on Morocco's position regarding the recommendation presented to it to examine Morocco's position on the ratification of the Rome Statute, and the extending by it of a standing invitation to special mechanisms.⁵² Canada reiterated its concern over the conditions of human rights of migrants in South Africa, and also emphasised the relevance of its recommendation for the government to respect the rights of migrants.⁵³ Luxemburg called for Ghana to pursue consultation and dialogue regarding the recommendation the latter rejected on the death penalty, decriminalisation of sexual orientation, and abolition of polygamy.⁵⁴ Ireland expressed its confidence that Zambia will continue to positively consider eleven recommendations which the latter promised to look into, whereas Switzerland drew particular attention to the precarious status of the girl child and asked the government of Zambia to prioritise allocation of resources to programmes designed to address the problem and further called upon the government to work with civil society organisations in meeting these challenges.⁵⁵

It is also during the plenary of the Council that 'stakeholders' such as national human rights institutions and NGOs may participate in the discussions by making their 'general observations'. More than anything else, the level and nature of NGO participation in the review as well as the question of what constitutes a 'general observation', remains, as will be discussed later, one of the most controversial and divisive aspects of the review. Despite the fact that the consideration of the Working Group's report by the Council offers a rare opportunity for NGOs to participate in the review, very few NGOs participated during this stage of the process.⁵⁶ Only one stakeholder spoke during the consideration of the outcome on Benin and Zambia.⁵⁷ In the review of Gabon and Mali, there was no participation on the part of stakeholders at all.⁵⁸

Given the fact that a substantial discussion was held during the adoption of the outcome, one would have expected officials and other members of

51 Ibid. at para. 33.

52 Ibid. at para. 53.

53 Ibid. at para. 212.

54 Ibid. at para 260.

55 Ibid. at para. 354.

56 Ghana and South Africa had three; Tunisia, with the participation of 10 NGOs during the consideration of its review, had an unusually high level of stakeholders: see Draft Report of the Human Rights Council on its eighth session, 5 August 2008, A/HRC/8/L.10/Rev.1 at paras 242–51.

57 See summary of statement by Franciscan International, *ibid.* at paras 728 and 835, respectively.

58 Ibid. at paras 654 and 1014, respectively.

delegations who participated during the review at the Working Group to be also present during the consideration of the outcome at the plenary. Instead, during the adoption of the report at the plenary, the composition of delegations of the states under review became thinner, less representative and largely composed of diplomats based in Geneva. This is unfortunate given the fact that the interactive dialogue at the Council has been notably substantial, often with additional questions raised requiring responses from the state under review. For many African states, such a high-level participation both during the session of the Working Group and the Council's plenary will be quite burdensome. The funds that were established for the purpose of helping states to participate in the UPR process should come in handy. Currently, these do not cover participation in the plenary for the adoption of the outcome. Given the substantial nature of the adoption phase of the UPR, it does not make sense to make an artificial distinction between the two separate yet related stages. During the adoption of the outcome of the UPR, states under review are expected to react not only to observations that will be made on the report, but also to questions that were not sufficiently addressed during the last session of the Working Group. This gives an indication that there is some-how a link between the two stages.

4. Group Dynamics and the Politics of Bargaining

The Council might well be a maiden and innovative institution. But so far its culture and working methods, as reflected in the conduct of states during its various sessions and during the meetings of its mechanisms, has been visibly predictable. Though a number of procedural reforms were introduced, the Council remains an inter-governmental organ. Thus, it operates on the premise that states are the primary actors. Much as in the former Commission, states in the Council often organise themselves and undertake their activities in groups and networks. There are ominous signs that the problem of regional block voting, which had seriously afflicted the former Commission, remains a formidable challenge to the Council's decision making process. One of the challenges presented by the UPR as an inter-governmental process is that it is being implemented in a context where regional groups such as the European Union (EU), the African Group, the Organisation of Islamic States and the Non-Aligned Movement wield enormous influence and power.

Regional alliance is a major force influencing the review process. Groups never issue statements that are critical of one of their own. In fact, states belonging to similar regional groupings often make statements praising the human rights situation in the state under review, a problem which, also shared by western countries, is too often manifested among non-western countries. For example, out of 65 statements during the review of Tunisia,

50 'favourable' statements were made, mainly by African and Muslim countries.⁵⁹ More than half of the 50 statements that were recorded during the review of Morocco were favourable to that country.⁶⁰ Non-Western countries presented rather critical observations of the human rights situations in the UK, a development that even attracted some rare publicity.⁶¹ But similar reaction towards reports by developing countries were absent; a practice that was severely criticized.⁶² In a rather scathing criticism of the process, a group of NGOs stated:⁶³

On the UPR Working Group, we note the value of a cooperative approach but express serious concern at the practice of some States which have been lining up only to praise their allies. This approach runs contrary to the agreed principle that the UPR should be conducted in an 'objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner'. In this sense, the UPR has not lived up to the expectations of a move away from the 'politicisation' of the past. Indeed, in many cases, this 'politicisation' has seemed more pronounced than ever. In several instances information provided by states under review, or by those praising them, has been misleading at best.

African countries may easily be tempted to equate the cooperative nature of the new mechanism with the absence of any genuine criticisms. Western governments, not used to criticisms from other groups, may equally interpret any such criticism as deliberate attacks against them. The sharpest criticism and question during the review of African countries came from countries of the Western Group. African countries often invoked the level of development of states under review and urged members of the Working Group to be measured in their evaluation of human rights conditions in African countries.⁶⁴

This, however, does not mean that there were no serious questions put by African states to other African countries under review. Numerous substantively significant questions were raised during the review of African countries. For example, Angola and Zambia raised questions about the restrictions on freedom of expression in Tunisia. The Democratic Republic of Congo criticised the report of Gabon for lack of information on people living with HIV/AIDS

59 See ISHR, *supra* n. 34 at 4.

60 See ISHR, 'Universal Periodic Review, 1st Session: Morocco', UPR Monitor, April 2008, at 4, available at: <http://www.ishr.ch> [last accessed 1 December 2008].

61 See Nebehay, 'UN forum faults Britain over terror suspect rules', (2008), available at: <http://uk.reuters.com/article/newsOne/idUKL108500220080410> [last accessed 1 December 2008].

62 Joint NGO Statement on Item 6, eighth session, Human Rights Council, 13 June 2008, available at: <http://www.ishr.ch> [last accessed 1 December 2008].

63 *Ibid.*

64 See statement made by Ghana, Sudan and Côte d'Ivoire during the review of Morocco.

and requested additional information on the situation of minorities such as pygmies in the country.⁶⁵

The general context in which the negotiations over the institution-building text were undertaken and the conduct of the review reinforced regional sentiments. Post-9/11 developments further sharpened and deepened the North–South divide. The uproar over the Mohammad cartoons, the ever worsening situation in the Middle East conflict and the problem of anti-terrorism initiatives has created deep schisms. The impact of this on how African countries participated in the Council cannot be overstated. The African Group, numerous members of which also belong to the Arab League and the Organisation of Islamic Conference (OIC), found a natural alliance in these powerful groups. On several issues, such as human rights conditions in the Palestine occupied territories, racism and freedom of expression, the Group wisely shared positions held by the Arab League and the OIC.

This relationship has triggered criticisms that the Group itself is a contributor to the old form of political selectivity and art of shaming and naming. Israel, some western states and NGOs routinely argue that the Council's 'disproportionate attack' on Israel, in which the African Group continued to play a part, is a strong indication that the new human rights body is afflicted with the ills of the former Commission. In response, first, one needs to look at the historical relationship between African countries on the one hand, and Arab and Asian countries on the other. Second, it should be noted that the EU has carefully used its regional alliance and group game plan. With the purpose of limiting the influence of other groups within the Council, EU countries are working hard to cultivate cross-regional working relationship. For some, this is a sign of weakness, a reaction by western countries to a weakening position of their position in the Council. It is really not clear to what extent, for example, geographical representation was responsible for a decline in the number of controversial, country-specific initiatives by the EU. The answer should be sought not within the Council, but outside of it. In addition, African countries see the current international system, exemplified by the reconfiguration of power as a result of the rise of China, as a reason for the absence of EU's controversial initiatives. Some argue that such a trend was even to be observed during the time of the former Commission where the EU failed to bring country-specific resolutions against countries such as China or Russia for fear that these initiative might not secure the necessary vote.⁶⁶

65 See Report of the Working Group on the Universal Periodic Review, 28 May 2008, A/HRC/8/35 at para. 15.

66 Lempinen and Scheinin, 'The New Human Rights Council: The First Two Years,' Report of the workshop organised by the European University Institute, Istituto Affari Internazionali, and the Institute for Human Rights at Åbo Akademi University, 7 and 8 November 2007, at 4, available at: <http://www.iue.it/AEL/Projects/PDFs/HRC.Report.pdf> [last accessed 1 December 2008].

5. The Burden of Participation

How the working methods and the calendar of the Council will evolve was not evident at the beginning. Nonetheless, it was clear that the workload associated with the establishment of the new human rights body presents a formidable challenge to states and their diplomatic missions in Geneva; particularly so to those from Africa. The Council holds three annual regular sessions taking not less than 10 weeks. It can also hold a number of special sessions. During its first year, the Council held four special sessions. Other mechanisms of the Council also have their own meetings spread out during the year. The UPR Working Group meets thrice a year. It may well be argued that the increased time allocation for the work of the Council provides greater opportunity to consider the numerous human rights issues deserving its attention. But many African countries—particularly those which do not have diplomatic representation in Geneva—find it considerably onerous to effectively participate in the Council and its various forums. During the negotiation on GA Resolution 60/251, the Caribbean Community (CARICOM) countries, fearful of this, had proposed that the locations of the meetings of the new Council should alternate between New York where almost all the UN Member States have mission and Geneva.⁶⁷ Though this proposal has its own limitations, it is indicative of the pre-occupation of small countries and those with resource constraints regarding the burden of participating in the work of the new body, including the UPR. The workload stemming from such a crowded calendar was very clear, and even developed countries will be required to increase their human and other resources if they wish to fully engage in the work of the Council actively.⁶⁸

Members of the Council particularly carry additional burdens, not least for working as rapporteurs in the troika. Though the country selected to be a member of the troika will determine how it shall be represented in discharge of its responsibility, the first two sessions of the Working Group show that countries, both developed and developing, largely relied on their Geneva based diplomats. The implication of this practice cannot be overstated since the effectiveness of participation and level of expertise these rapporteurs bring to the review will have a bearing on its efficacy and professionalism. The small community of diplomats in Geneva may find the process of open criticism unpalatable and may well fall pray to praise-bargaining. Moreover, delegations implementing this mandate may not be constituted of individuals with the required level of technical competence. Already visible discrepancies in the

67 Updates on Human Rights Council Negotiation, 25 January 2006, available at: <http://www.reformtheun.org/index.php/eupdate/1906> [last accessed 1 December 2008].

68 Citing the workload, the Canadian Standing Committee on Human Rights had recommended that the Government assign a dedicated ambassador for human rights, see Standing Committee on Human Rights, Canada and the United Nations Human Rights Council: At the Crossroads – Interim Report, May 2007, at 52 and 53, available at: <http://www.senate-senat.ca/rights-droits.asp> [last accessed 1 December 2008].

exercise of the role of the rapporteur have emerged which could be attributable to the personality and technical competence of the individuals involved in the process.⁶⁹

Developing countries may find it costly to bring individual experts from their capital for the purpose of participating as rapporteurs. It is not expected that many states will volunteer to call upon individual human rights experts as troika members. Governments may wish to restrict this role to their Geneva-based diplomats, quite a burdensome task for diplomat experts and ambassadors from African countries, who cover so many activities in other international organisations in Geneva. As was stated:

If States are to participate fully in all aspects of the Council's work, most need to increase the number of persons in their Geneva delegations, and preferably with persons having human rights expertise. The frequency of meetings now means that it is no longer possible to rely on bringing in people from capitals to cover and/or provide expertise. Even with the Commission, some States were never members, or only served one term, throughout the decades of its existence. If the Council is to be credible, it will be important that States are neither precluded from membership because of the demands, nor that some members do not participate fully in all aspects of the Council's work, including in all UPR considerations. If the need for consultations and action at the Ambassadorial level continues as it has been during the first year, consideration should also be given to having an Ambassador for Human Rights in the same way that some already do for Trade or Disarmament.⁷⁰

For the African Group, the demanding role of being a rapporteur only revolves around the 13 African members of the Council. In the first two sessions of the Working Group on UPR, the following African countries served as rapporteurs: Angola (for Poland and Romania); Cameroon (for Argentina and Sri Lanka); Djibouti (for Indonesia and Japan); Egypt (for the Republic of Korea and UK); Gabon (for Brazil and Guatemala); Ghana (for India and Pakistan); Madagascar (for Benin and Morocco); Mauritius (for Mali and Tunisia); Mali (for Peru and Philippines); Nigeria (for Gabon, The Netherlands and Togo); Senegal (for Algeria and Zambia); South Africa (for the Czech Republic and Switzerland); and Zambia (for France and South Africa). All of them served as members of a troika at least twice. Nigeria served thrice. South Africa, Ghana, Gabon and Mali participated as rapporteurs at least once during a session of the Working Group in which they were slated to be reviewed.

69 OHCHR workshop organised jointly by the Swiss Government and Geneva Academy of International Humanitarian and Human Rights Law, 3 July 2008.

70 Brett, *supra* n. 19 at 16.

One of the overarching principles of the UPR, as clearly captured in the institution-building text, has been that the process shall be cost-effective, non-burdensome and not absorb a disproportionate amount of the time and resources (human and financial) of the Council and of the state under review. One important element in ensuring that the review does not become burdensome relates to the obligation of reporting. As noted, the report phase does not follow the procedures and guidelines of existing human rights treaty bodies. Specific Guidelines were adopted which identified some of the elements that need to be incorporated when a state presents its report. Opportunity is also open for states even to present their report orally, though it is not expected that many would follow such route. The Guidelines provide for a report preparation phase which is broad and inclusive in its approach. But this provision is not introduced in the text as an authoritative and binding provision. Rather states are simply 'encouraged' to involve all stakeholders in the preparation of the report.

Numerous African countries considered it important that technical and financial assistance is provided enabling them to effectively participate in the UPR. It remains a question whether African countries, particularly least developed countries (LDCs), can muster the capacity and resources to actively participate in the UPR. Thanks to the insistence of the African Group, the institution-building text included a provision for the establishment of a UPR Trust Fund which will provide assistance for the effective participation of developing countries, particularly LDCs. The Council, during its fifth session, held between 11 and 18 June 2007, upon the behest of the African Group, adopted a resolution establishing this Trust Fund. A few had reservations about its establishment, citing problems associated with similar voluntary trust funds established without any guarantee that such decisions will be actively supported by donor governments. Though the Fund is now established, its practical assistance to states is uncertain. Numerous countries, particularly developed ones, often citing the proliferation of funds and the technical difficulty of getting decisions to establish them through the Fifth Committee of the GA, were originally opposed to its establishment. African countries on the other hand insisted that a provision to that effect should be incorporated in the text. Perhaps owing to the stark difference displayed among delegations at the time of the negotiation of the text, the commitment to establish the fund is only indicated in a footnote to Council Resolution 5/1.⁷¹ This goes down as a unique provision in which an enormously serious, action oriented provision is inserted in a footnote of a document. The second financial mechanism, which is even more equivocal, refers to financial and technical assistance that will assist states to implement the outcome. Unlike the UPR Trust Fund, the text, in yet another footnote, provides for the taking of a decision in

71 *Supra* n. 3 at para. 18(a).

the future on whether to resort to existing financial mechanisms or create new mechanisms.

The OHCHR has long been engaged in providing a range of advisory services, technical assistance and field operations. Providing assistance to resource constrained countries to participate effectively in the UPR adds a new dimension to the already existing technical assistance mandate. The Office has sent out a note to member countries stating that they can request funding to cover the cost of individuals travelling to Geneva to participate as rapporteurs.⁷² However, the impact of such funding mechanism is enormously limited. Though the Voluntary Trust Fund is already established, the Office is struggling to secure sufficient financial commitments from donors, forcing it to prioritise requests and considerably limit their coverage. Priority will be given to those who are asking for financial assistance to present their national report over those who are requesting similar assistance to take part in the Working Group sessions as rapporteurs. Moreover, the funding is limited to just one individual from a Member State of the Council which do not have permanent mission in Geneva. Very few countries will likely vie for membership of the Council without having some form of representation in Geneva, and currently all African member countries have permanent mission in Geneva. Thus, the mechanism does not help those who have missions and yet do not have the necessary human resource to play an active role in the Council.

6. Detractors, not Peers: The Role of NGOs and other Stakeholders

The majority of states perceived the conceptualisation of the UPR as a consensual and cooperative inter-governmental process and thus initiated or supported proposals that amplified the role of governments in the review process, sometimes to the detriment of the role of other stakeholders. GA Resolution 60/251 stipulates that the Council retains, as is the case regarding many other institutional and procedural issues, existing arrangements for an effective participation of stakeholders in the former Commission and the Economic and Social Council as prescribed in Resolution 31/1996.⁷³ Paragraph 11 of the Resolution states that the Council

shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and also decides that the participation of and consultation with observers, including States that are not members

72 Voluntary Fund for Participation in the Universal Periodic Review, 2 April 2008, available at: <http://www.upr-info.org/IMG/pdf/TRUST.20FundE.pdf> [last accessed 1 December 2008].

73 See the Rules of Procedure, A/520/Rev.15.

of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities.

The institution-building text provides for a compromise that noticeably narrowed the potential application of this overarching provision. Whilst the participation of NGOs and other stakeholders in the activities of the Council was generally embraced⁷⁴ and their involvement during the first two years of the Council's existence may well be considered positive, the extent of their involvement in the UPR has not proven to be an easy subject for states to agree upon. During the negotiations, the African Group argued that the role of NGOs should be limited to participation in the preparation of the national report.⁷⁵ However, it was provided that national human rights institutions, NGOs and other stakeholders may attend the proceedings of the Working Group.⁷⁶ But the institution-building text contains no provision authorising them to make statements and raise questions during the interactive dialogue in the Working Group. Neither GA Resolution 60/251⁷⁷ nor Council Resolution 5/1 defines the term 'stakeholders'. Thus, the debate and negotiation relied on a vague and an almost exclusive association of 'stakeholders' with NGOs—an ambiguity which postponed what could be a potentially meaningful discussion on the role of mechanisms such as regional human rights institutions in the UPR.

This of course is in no way to suggest that national human rights institutions and NGOs cannot bring influence to bear on the review. On the contrary, the involvement of these stakeholders has been an important feature of the review process. First, as discussed in previous sections of this article, states are encouraged to involve NGOs in the preparation of their report at the national level. Second, NGOs may forward their submissions to the OHCHR which will then incorporate these contributions in its summary. Many representatives of stakeholders feared that the 10-page-limit to the OHCHR summary set by the institution-building text risked excluding a large body of information that may be introduced to the Working Group by civil society

74 GA Resolution 60/251, supra n. 1 at para. 5(h), states that the Council shall 'work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions, and civil society'.

75 See Algeria's Statement (on behalf of the African Group), Human Rights Council, Open-ended Working Group on the Universal Periodic Review, 11 April 2007, available at: <http://portal.ohchr.org> [last accessed 1 December 2008].

76 Council Resolution 5/1, supra n. 3 at para. 18(c).

77 GA Resolution 60/251, supra n. 1 at para. 11, enumerates the following as observers of the Council: NGOs, observer states, UN specialised agencies and intergovernmental organisations.

organisations, a concern that enticed the OHCHR to adopt a procedure allowing entire texts of stakeholders' contributions to be posted on its dedicated website for the UPR. Accordingly, those interested will not only have access to the summary document but also to the entire texts of their original contributions as received by the OHCHR. The African Group criticised this decision arguing that only the summary of contributions may be considered during the review, so that the OHCHR is not authorised to communicate the entire texts of contributions by civil society organisations.⁷⁸ Third, NGOs continue to hold parallel sessions during the review process, using these forums to highlight human rights situations in the state under review and distributing their questions to government representatives and diplomats participating in the review process. Fourth, whilst the procedure adopted in the institution-building text precludes the participation of NGOs during the interactive dialogue, it, nonetheless, empowers them to participate during the Council's plenary session on the consideration of the outcome of the process.⁷⁹ Finally, the institution-building text also states that though the outcome of the UPR is expected to be implemented primarily by the state, stakeholders have a role to play in following up the implementation of the outcome.⁸⁰

Ethiopia argued, during the negotiations of the institution-building text that the UPR should provide the necessary space for an 'interaction between the international and regional human rights systems'. This, it was argued, could best be facilitated by giving an opportunity to regional human rights mechanisms, like their counterparts at the international level, to participate in the UPR. During its review at the Working Group on UPR, Ghana cited the outcome of its scrutiny at APRM.⁸¹ The UPR outcome for Ghana includes a recommendation that it takes measures to share its experience under APRM with other states. The negotiations did not result in any agreement to make any specific reference regarding the role of these institutions in the institution-building text. The OHCHR, however, accepts contributions by regional institutions such as the African Commission on Human and Peoples' Rights (ACHPR)—if not for its compilations, for its summary of stakeholders' contributions. Perhaps due to factors such as lack of awareness and adequate resources, the ACHPR has not yet presented a contribution during the review of the African countries. It is imperative for the OHCHR to consider conducting outreach programmes on UPR to regional human rights mechanisms and provide assistances with the view to helping them make contributions.

78 Joint Letter of the African Group, Arab Group and the OIC, 3 April 2008.

79 Council Resolution 5/1, *supra* n. 3 at para. 31.

80 *Ibid.* at 33.

81 See ISHR, 'Universal Periodic Review, 2nd Session: Ghana', UPR Monitor, May 2008, at 4, available at: <http://www.ishr.ch/docs/upr.002.ghana.final.pdf> [last accessed 1 December 2008].

The discussion and conceptualisation of the preparation of the national report has significantly strayed from what was originally intended. The negotiation of the institution-building text and the practice during the two sessions of the Working Group presupposed that states should present a national report whose modalities of preparation is akin to what is followed for report preparation under the procedure of human rights treaty bodies. It will surely be difficult to judge the participation of stakeholders based on such expectations. Be that as it may, there is little information in the way of indicating the level of participation of stakeholders in the preparation of national reports of those African countries which participated in the first two sessions of the Working Group. Though most of the reports and oral presentations of these states claim that there was a significant level of participation of NGOs in the preparation of the report, such declarations do not involve detailed and verifiable data regarding the list of NGOs consulted, the number of consultations undertaken, the place and venue of such consultations and other relevant aspects of stakeholders' involvement in the process. During the interactive dialogue, states under review were rarely questioned regarding their methodology for the preparation of the report, and surprisingly enough few statements by NGOs during the adoption of the outcome at the Council's plenary sought to provide a critique on the process followed at the domestic level.

Perhaps the most visible participation of NGOs in the UPR stems from OHCHR's summary of contributions of stakeholders.⁸² The preparation of this summary is required to comply with the General Guidelines. Though the institution-building package does not provide for page limits for the contribution by stakeholders, the OHCHR requires that the submission should not exceed five pages. The experience of African countries in the UPR reveals that the extent of stakeholders' contributions varies from country to country, and that the average number of contribution to the review of some of the African states is by far the smallest compared with countries from other regions. There were only two stakeholders that contributed to the compilation relating to the review of Gabon and Mali.⁸³ This number slightly improved to seven and eight for the review of Benin and Zambia respectively.⁸⁴ Nine NGOs contributed to the review of Ghana, and 10 sent their contributions concerning Algeria. Eighteen and 17 stakeholders, respectively, made contributions to the compilation that was presented regarding the review of South Africa

82 Information note for relevant stakeholders regarding the Universal Periodic Review mechanism, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Documents/InfoNoteEN.pdf> [last accessed 1 December 2008].

83 See Human Rights Council, Working Group on the Universal Periodic Review, second session, Summary prepared by the Office of the High Commissioner for Human Rights, 2 April 2008, A/HRC/WG.6/2/GAB/3 and 3 April 2008, A/HRC/WG.6/2/MLI/3.

84 Human Rights Council, Working Group on the Universal Periodic Review, second session, Summary prepared by the Office of the High Commissioner for Human Rights, 9 April 2008, A/HRC/WG.6/2/BEN/3 and A/HRC/WG.6/2/ZAM/3, respectively.

and Morocco.⁸⁵ Identifying reasons for the relatively low level of participation requires further investigation. It is also not clear to what extent there is a correlation between the nature of NGOs participation during the preparation of the national report and their contributions through the OHCHR's summary.

The attendance of NGOs and other stakeholders at the session of the UPR Working Group provides them with the opportunity to monitor closely the dialogue within the Working Group. NGOs self-evaluation of their engagement in this regard suggests that some governments were willing to take up concerns expressed by NGOs.⁸⁶ Yet NGOs lack of direct participation in the interactive dialogue is a notable weakness of the review. Perhaps frustrated by the absence of any meaningful role during the interactive dialogue, some NGOs tried to seize the opportunity and speak on substantive human rights situations at the plenary of the Council. However, on numerous occasions, the participation of NGOs in the plenary was strikingly far less than their involvement in the Working Group. Few NGOs participated during the consideration of reports concerning African Countries,⁸⁷ although Gabon and Mali were the only countries the consideration of whose outcome did not involve any participation from NGOs at all. In contrast, during consideration of the outcome of the reviews involving Argentina, Peru, the Czech Republic and Finland, where no state took the floor to speak during the adoption of the outcome at the Council's plenary, NGOs invariably took the opportunity to air their views.

Considerable confusion and misunderstanding erupted within the Council regarding the nature of NGO involvement at the plenary stage, as indicated by the series of objections and 'points of order', introduced mainly by the African Group, during the interventions of NGOs at the plenary of the Council in its eighth session in June 2008. The African Group contended that if substantive comments were allowed to be aired, the process would amount to a 'double review'. Egypt, on behalf of the African Group, raised several procedural objections arguing that the statements delivered by NGOs were too general and thus did not relate to the outcome of report of the UPR Working Group and its recommendations. This position of course was not shared by all members and observers of the Council. Slovenia (on behalf of the EU), Germany and Canada criticised what they considered to be a restrictive interpretation of the institution building text and stated that stakeholders should be allowed the leeway

85 Human Rights Council, Working Group on the Universal Periodic Review, second session, summary prepared by the Office of the High Commissioner for Human Rights, 11 March 2008, A/HRC/WG.6/1/MAR/3.

86 'Lessons learned on civil society involvement in the Universal Periodic Review process', NGO side event organised by Friedrich Ebert Stiftung and CONGO, Palais des Nations, Geneva, 13 June 2008, available at: <http://www.ngocongo.org/index.php?what=pag&id=10490> [last accessed 1 December 2008].

87 The number in brackets representing the number of NGOs which made comments during the adoption of the outcome in the plenary of the Council: Benin(1), Zambia(1), South Africa(3) and Ghana(3).

to make statements of a general nature if they wish to do so. They also argued that most of the elements raised by the NGOs were indeed included in the recommendations incorporated in the outcome. Mexico, quoting paragraph 30 of the institution-building text, reminded the Council that the nature of NGOs remarks can legitimately be general in nature.⁸⁸ Some Member States of the Western Group felt that few NGOs went overboard⁸⁹ and still maintained that NGOs should be encouraged for the sake of the integrity and objectivity of the process. The Council attempted to address this deadlock by simply affirming the mandate of the Council's president to invoke the rules of procedure with the view to ensuring that statements made by these stakeholders comply with these rules. This understanding has helped the Council to make headway in its considerations of reports. But the incident exposed the shaky ground on which NGOs participation in the UPR stood.

The participation of NGOs during the consideration of the outcome of the report also raised questions about the extent to which NGO representatives have understood the process properly. Rather than providing an evaluation of the review at the meetings of the Working Group, most NGOs engaged in a presentation of the usual general statements on human rights conditions in the state under review, or repeated what they have stated in their contributions to the OHCHR's summary.⁹⁰ Few African NGOs participated during the consideration of Working Group's reports at eighth session of the Council.

7. Beyond UPR

Follow-up of the implementation of recommendations stemming from the UPR review is by far the most important component of the review. The state is primarily responsible for implementing the recommendations incorporated in the outcome of the review. Undertaking human rights promotion and protection activities through technical assistance and support was incorporated as components of UPR recommendations to numerous African countries that were reviewed.⁹¹ Numerous states wished to underscore the availability of technical assistance and capacity building as a vital component of the

88 Council Resolution 5/1, *supra* n. 3 at Annex, para. 31(c) states 'Other relevant stakeholders will have the opportunity to make general comments before the adoption of the outcome by the plenary.'

89 Interview with representative of EU members, 5 June 2008.

90 See Franciscan International Presentation on Benin, *supra* n. 57.

91 See Report of the Working Group on the Universal Periodic Review: Gabon, 7 May 2008, A/HRC/8/35 at para. 60(2); Report of the Working Group on the Universal Periodic Review: Benin, 9 May 2008, A/HRC/8/39 at para. 33; Report of the Working Group on the Universal Periodic Review: Ghana, 7 May 2008, A/HRC/WG.6/2/L2 at para. 56(2); Report of the Working Group on the Universal Periodic Review: Mali, 19 May 2008, A/HRC/8/50, at paras 56(1) and 56(3); and Report of the Working Group on the Universal Periodic Review: South Africa, April 2008, A/HRC/8/32 at para. 67(18).

follow-up phase. The follow-up mechanism is one of the least clarified aspects of the review. Numerous questions still remain unanswered. Some of these are technical in nature whereas others involve broader institutional queries. Would there be a follow-up with regard to recommendations that are not accepted by the state under review? What will be the role of special procedures in monitoring the implementation of UPR-related recommendations? Should the Council await another cycle of review opportunity to follow-up issues relevant to monitoring the implementation of its recommendations? How will the Council deal with issues of persistent non-compliance and lack of cooperation with the recommendations? How do international organisations and specialised agencies of the United Nations get involved in the implementations of these recommendations? What ought to be the role of the OHCHR in coordinating such international effort?

African states, like many others from the developing world, did not wish to empower the Council with the authority to take specific measures to address the issue of non-compliance. They have consistently rejected proposals for the involvement of third parties such as special procedures or the designation of a special UPR rapporteur in implementing the UPR outcome.⁹² They wish to see in the new review system an oversight mechanism which is far less condemnatory, and serves more as a platform to encourage states to take steps in implementing the outcome of the review. In their view, the Council is expected to use its subsequent review of the same country as an instrument, among others,⁹³ for reviewing the implementation of recommendations given during previous sessions.⁹⁴ The institution-building text states that such follow-up can be undertaken by using a regular agenda item on the UPR. Given that this same agenda item also covers numerous other issues, it is uncertain whether there will be sufficient time.

The UPR should not hinder or stand in the way of the Council considering and looking at human rights emergencies, whether they occur in Africa or anywhere else.⁹⁵ This means that states cannot use the review process and its outcome as a ground to resist additional and specific scrutiny by other mechanism. But almost all developing countries, including those from Africa, have expressed their disdain for country-specific human rights procedures and mandates. In addition to African countries such as Burundi, DRC, Somalia and Rwanda, the Commission had established country-specific mandates in the following countries: Cambodia, Cuba, Iran, Palestine occupied

92 Summary of the Discussion on Universal Periodic Review Prepared by the Secretariat, 13 March 2007, A/HRC/4/CRP3 at para. 68.

93 Some had suggested that subsequent review should focus on reviewing the implementation of recommendations provided for by the previous outcome, *ibid.*

94 The proposal to incorporate intermediate reporting between the two reporting cycles was rejected. Summary of the Discussion on Universal Periodic Review, *ibid.* at para. 71.

95 UN Department of Information, 'Although different in name, Human Rights Commission, the Council are the same, Third Committee Told', 6 November 2007, GA/SHC/3901.

territories and Myanmar. During the negotiations in the Council on the retention of special procedure mandates, these mandates were retained, but mandates on Cuba and Belarus were discarded.

Though it is not unimaginable to have a special session as a follow-up to recommendations of the review process, such an outcome is unlikely to happen. Many tend to create a natural association between country-specific sessions with the politics of selectivity and politicisation in the past. There are various mechanisms where by urgent human rights situations may be considered by the Council. For example, the Working Group on Human Rights Situations has the authority to consider persistent and systematic violations of human rights in any country.

The Council can also decide to hold a special session to consider human rights situations in a specific country. The support of one-third of the membership is required for the Council to hold a special session. So far, the Council has held six country-related special sessions and one on a thematic issue related to the right to food.⁹⁶ Notably some of these special sessions were held during the first cycle of the Council when its members and other stakeholders were negotiating the modalities of the UPR. The African Group and several of its members are very suspicious of special sessions. On numerous occasions, both during the negotiation and other meetings of the Council, they have expressed their view that, in light of the presence of the UPR, states should rely less on special sessions to address human rights concerns. Though so far African countries, or others for that matter, have not opposed official requests for holding a special session, the fear that the Group may resist such sessions, together with members of the OIC, was poignantly captured by *The Economist* in connection with the case in Zimbabwe:⁹⁷

True to form, the UN's recently revamped human rights council, based in Geneva, which might have been expected to be taking keen interest in what is going on 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.

96 Rule 6, Rules of Procedure of the Human Rights Council, Council Resolution 5/1.

97 'The United Nations and Zimbabwe: Crimes Against Humanity', *The Economist*, 28 June and 28–4 July 2008, at 50 and 51.

Some point to the contradiction in the African Group's readiness to support, in its brief history, three special sessions and thirteen resolutions against Israel. The Council's first country-specific resolution relates to the human rights situations in Palestine and the occupied territories. The same issue was taken up in subsequent regular sessions. Though the Group never had a chance to elaborate its policies on the topic, some members of the Group had, on numerous occasions, expressed the view that they do not consider the issue of Palestine occupied territories as a country-specific mandate, but a thematic issue on occupation. Beyond such semantics however, the African Group still promotes quite a contradictory policy on Israel. The response of the Group to such criticism has been the citing of its cooperative role in the Council's consideration of the human rights situation in Darfur. Critics of the African Group argue that its resolution on the Sudan, unlike the ones it has supported on Israel, is non-condemnatory and weak. In fact, when the draft resolution was presented for voting, Canada, eight EU countries and Switzerland rejected the resolution. Interestingly Ghana joined those who called for the amendment of the African proposed resolution.

African countries made a case that the entire edifice of the Council, not just the UPR, should be based on principles of cooperation and dialogue. This meant, they argued, that a new set of rules should be put in place that guarantees that a code of conduct for the conduct of all special mechanisms and mandate holders. This proposal, which led to incredibly numerous criticisms against the African Group, some of which were clearly unfair, was finally agreed upon by consensus. The African Group was also one of the sponsors of the amendment to the resolution on freedom of expression, a resolution which requires the mandate-holder on freedom of expression to report on 'abuse' of religion as one potential limitation on freedom of expression. The World Association of Newspapers and World Editors Forum criticised this decision of the Council as limiting freedom of expression.

8. Conclusion

In its two years existence, the Council has shown a mixed performance. So have African members and observer states whose role in the Council has become crucial. Several African countries were reviewed during the two sessions of the UPR Working Group. Despite severe resource and technical limitations, and against the fact that participating in the activities of the Council has become a burdensome task, all of them participated in these reviews, accepting an outcome that to a limited extent involves some serious human rights recommendations. The UPR should result in a practical evaluation with the objective of improving human rights conditions on the ground. Anxiety abounds that the UPR may end up being an occasional event in the

calendar of what some have referred as ‘a mutual admiration society’⁹⁸ where serious and genuine human rights dialogue will be replaced by back patting and mutual congratulation. Such fear is partly justified as so much is unclear as to what effective tools the Council may avail itself of to follow-up on recommendations that are adopted. Numerous recommendations are formulated in a vague and general manner, making any follow-up process extremely difficult. African countries, like their counterparts in the rest of the developing world, have showed such aversion to country-specific resolutions that the Council is unlikely to adopt them as a follow-up mechanism for the outcome of the UPR. The Council and the OHCHR need to create a tool in which impact assessment of the UPR on countries that have been reviewed can be made. This obviously requires gathering a sufficient amount of data and information, which will be particularly difficult from countries which do not have adequately resource national institutions and mechanisms.

Whereas African countries and members of other regional or other groups such as the OIC, the Arab League and the Group of Latin American and Caribbean countries (GRULAC) have become active in trying to shape and influence the new body, there is a growing unease that such development may not necessarily result in the strengthening of the capacity of the Council to response to human rights situations. It is yet to be seen what positive role the Code of Conduct for Special Procedures for Mandate-holders of the Human Rights Council⁹⁹ may have for the work of the Council. Certainly the position expressed by developing countries, including African states, in restricting the role of NGOs and other stakeholders in the UPR is a set back to its inclusiveness, transparency and efficacy.

Major challenges facing the Council, as this article has tried to identify, are related to issues not necessarily amenable to quick fixes and negotiations. The disengagement of powerful countries such as the US from the Council and its activities is an ominous sign for its future.¹⁰⁰ The dominance of group blocs in the Council also remains an enormous challenge. There had been recommendations on the establishment of *ad hoc* cross-regional structures that promote collaboration among states across regions.¹⁰¹ So far there have been very few occasions, necessarily involving a meeting of minds, where states have transcended their regional alliance. States will continue to formulate their alliances in ways they consider fit to advance their interest. It has to be noted that the African regional bloc is not a homogenous entity. During the Council’s voting on initiatives put forth by the OIC, Ghana and Zambia

98 Andrew Clapham, Workshop organised jointly by the Swiss Government and Geneva Academy of International Humanitarian and Human Rights Law, 3 July 2008.

99 Council Resolution 5/2, 18 June 2007, available at: <http://www2.ohchr.org/english/bodies/chr/special/index.htm> [last accessed 1 December 2008].

100 ‘UN Human Rights Council “pathetic”’, *Herald Sun*, 7 June 2008.

101 See Terlingen, ‘The Human Rights Council: A New Era in the UN Human Rights Work’, (2007) 21 *Ethics and International Affairs* 167.

voted against the proposal. Thus, a much more improved inter-regional dialogue and collaboration should be encouraged.

Even diplomats and government representatives have already observed that some of modalities of the UPR can be improved, though many do not consider it timely to reform or review the rules of procedures yet.¹⁰² In the current context, there is no guarantee that reform initiatives would not be used to further weaken existing procedures. Thus major reform effort should best be left for the review by the Council of its work and functioning that GA Resolution 60/251 requires five years after its establishment. This review should be broad with a view to affording states the opportunity to reflect and consider options to tackle certain issues identified as challenges.

102 In a workshop organised jointly by the Swiss Government and Geneva Academy of International Humanitarian and Human Rights law, 3 July 2008, several participants cited the modalities of the troika and the 48 hour rule for the reply to questions and recommendations as deserving certain improvement. But the general consensus was that more time was needed before venturing into changing these rules.