

A review of African states in the first cycle of the UN Human Rights Council's Universal Periodic Review

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Summary

Abebe titled his article on the first session of the UN Human Rights Council's Working Group on Universal Periodic Review 'Of shaming and bargaining: African states and the Universal Periodic Review of the United Nations Human Rights Council'. As the title suggests, he argues that African states 'deftly manipulated' the system, evolving from their traditionally-perceived role as "subjects" of a condemnatory system' to 'conscious bargainers and participants in a much more co-operative forum'. With the benefit of hindsight, the first complete cycle of review having been concluded, and aided by qualitative and quantitative data, this article will seek to analyse the extent to which the African regional grouping has demonstrated solidarity inter se and extra se during the review process. It will be demonstrated that African states have proven more engaged with the review process when commenting on other African states than external states. In the spirit of universal application of human rights, it is to be hoped that this will change in the second cycle. African states have also been more positive towards other African states' progress in human rights than states from other regions. Overall, African states adopted a soft, supportive approach in their comments during the interactive dialogues, although this may yet prove to be successful. Whilst some African states have embraced the opportunity to participate in the review process, a more substantive participation in the second cycle would help the process better achieve its objectives.

Key words: *United Nations; Universal Periodic Review; Africa region*

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1 Introduction

Abebe titled his article on the first session of the UN Human Rights Council's Working Group on Universal Periodic Review 'Of shaming and bargaining: African states and the Universal Periodic Review of the United Nations Human Rights Council'.¹ As the title suggests, he argues that African states 'deftly manipulated' the system, evolving from their traditionally perceived role as "'subjects" of a condemnatory system' to 'conscious bargainers and participants in a much more co-operative forum'.² With the benefit of hindsight, the first complete cycle of review having been concluded, and aided by qualitative and quantitative data, this article seeks to analyse the extent to which the African regional grouping have demonstrated solidarity *inter se* and *extra se* during the review process.

First, however, the Universal Periodic Review process will be introduced. Its aims will be considered against the context in which the process was conceived. Universal Periodic Review was intended to be innovative; an inclusive, participatory approach to promoting the necessary respect for human rights. Such respect for human rights norms remains sadly lacking more than six decades after the Universal Declaration of Human Rights (Universal Declaration) was adopted. Whilst African states may sometimes feel a historic exclusion from the United Nations (UN) and human rights discourse, not least because many of them were not independent states at the time of the establishment of the UN and the adoption of the Universal Declaration, African states are represented in the Human Rights Council with cognisance taken of equitable geographical distribution.

African issues and views have certainly been prominent in the Council though, arguably, not excessively so. Perhaps there has been a greater focus on the troubled Middle East and North African region (Libya, Tunisia, Syria, Israel, Egypt). Despite African and Asian states' opposition to singling out states for comment, a number of new special procedures with African country mandates have been approved: Sudan, Mali, Eritrea and Côte d'Ivoire.³

With Universal Periodic Review, there is a unique opportunity to measure objectively the extent to which African states elect to comment on the human rights performance of each other and whether those comments are positive or negative. There is a similar

1 A Abebe 'Of shaming and bargaining: African states and the Universal Periodic Review of the United Nations Human Rights Council' (2009) 9 *Human Rights Law Review* 1.

2 Abebe (n 1 above) 3.

3 Country mandates are established for one year and are subject to annual renewal: Sudan established 2009; Mali 2013; Eritrea 2012; Côte d'Ivoire 2011. discontinued and a new mandate has been approved for 2014. For the present list of country mandates of Special Procedures, see the listing on the Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx> (accessed 31 July 2014).

opportunity to examine the approach of the African regional group to third states: Is there evidence of internal regional solidarity against external states? It should be noted that, for the purpose of this article, the scope of 'African states' is that of the regional grouping designation used in the UN Human Rights Council, which almost coincides with membership of the African Union (AU) (Morocco participates in the Africa group at the Council but is not in the AU). It should further be noted that it is only possible to provide a snapshot of the phenomenon reported on in this article, with representative references to examples of the trends drawn from across the region. This article does not purport to, and cannot, exhaustively address the entire first cycle of Universal Periodic Review of African states.

2 The Human Rights Council and Universal Periodic Review

2.1 Establishing the Human Rights Council

The UN Human Rights Council was established as a subsidiary body of the UN General Assembly by a resolution of the General Assembly itself in March 2006.⁴ Its status is monitored and subject to review by the General Assembly. However, following the first (five-year) review in 2011, the General Assembly decided it should retain this status until the next review of its work is undertaken between 2021 and 2026.⁵ The Council replaced the Commission on Human Rights (a functional Commission of the UN's Economic and Social Council) whose early successes included the drafting of the Universal Declaration. Half a century later, the Commission found itself more often mired in controversy than hailed as a beacon for human rights' protection and promotion. The High Level Panel, charged by the then UN Secretary-General, Kofi Annan, with reviewing the functioning of the UN, noted with concern that '[s]tates have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticise others'.⁶ Kofi Annan concurred, noting in his follow-up report to the UN General Assembly that⁷

[t]he Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism ... As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.

4 UN General Assembly Resolution 60/251, UN Doc A/RES/60/251, 15 March 2006.

5 UN General Assembly Resolution 65/281 Review of the Human Rights Council, UN Doc A/RES/65/281, 17 June 2011 para 3.

6 Report of the High Level Panel on Threats, Challenges and Changes, A More Secure World: Our Shared Responsibility UN Doc A/59/565 (2004) para 283.

7 K Annan In larger freedom: development, security and human rights for all, Report of the UN Secretary-General, UN Doc A/59/2005 (2005) para 182.

It was averred that some states viewed membership of the Commission as a guarantee (at least in part) against international investigation of, and/or condemnation of, their human rights record.⁸ Alston argues that the demise of the Commission was heralded by⁹

a rancorous debate among governments, often reflecting a north-south split. Accusations of politicisation, double standards and unprofessionalism led many commentators to conclude that the Commission had lost its credibility and prompted calls for far-reaching reforms of its operation.

However, he notes that¹⁰

[t]he diagnosis that it had lost credibility was motivated by radically divergent perceptions of what it should have been doing and what it had done or failed to do. While many of the critics called for a conciliatory approach that would avoid confrontation with governments, others impugned its credibility precisely because it had failed to condemn governments that they considered to be responsible for egregious cases of human rights violations.

A very uncertain but clearly unsatisfactory state of affairs was resolved by the creation of the new Human Rights Council and the dissolution of the former Commission in 2006. No African states voted against or abstained from the enabling resolution. Indeed, Abebe notes that African states 'were active participants in the negotiations in New York on GA Resolution 60/251',¹¹ and it can thus be surmised that the development had broad support in the region, or at least few decriers. In the main, the Council assumed the responsibilities of the former Commission with a period of review, rationalisation and reform of its activities. However, it also was given clear guidance as to its functions by the General Assembly in the founding resolution and acquired new mechanisms to discharge its primary function of¹²

promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner; address[ing] situations of violations of human rights, including gross and systematic violations, and mak[ing] recommendations thereon ... [and] promot[ing] the effective coordination and the mainstreaming of human rights within the United Nations system.

The involvement with, and impact on, African states of some of these functions are discussed below. First, however, an overview of Universal Periodic Review.

8 As above: 'In particular, states have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticise others.'

9 P Alston 'Reconceiving the UN human rights regime: Challenges confronting the new UN Human Rights Council' (2006) 7 *Melbourne Journal of International Law* 185, <http://corrigan.austlii.edu.au/au/journals/MelbJIL/2006/9.html> (accessed 31 July 2014).

10 As above.

11 Abebe (n 1 above) 3.

12 General Assembly Resolution 60/251 (n 4 above) paras 2-3.

2.2 Universal Periodic Review

A, if not the, major innovation of the new Human Rights Council was its capacity to undertake Universal Periodic Review. General Assembly Resolution 60/251 provided that the Council should¹³

[u]ndertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; 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.

This system is unique in that every UN member state submits itself to review by any interested UN member or observer state.¹⁴

Further information on the review process was forthcoming in the Human Rights Council's Institution-Building Resolution of 2007.¹⁵ This set out the modalities for the review process. Therein the basis of the review was stipulated as the UN Charter, the Universal Declaration, human rights treaties to which the state is a party (in practice this means both those of the UN and regional organisations), and voluntary pledges and commitments made by states.¹⁶ The objectives of the review were and remain¹⁷

- (a) [t]he improvement of the human rights situation on the ground;
- (b) [t]he fulfilment of the state's human rights obligations and commitments and assessment of positive developments and challenges faced by the state;
- (c) [t]he enhancement of the state's capacity and of technical assistance, in consultation with, and with the consent of, the state concerned;
- (d) [t]he sharing of best practice among states and other stakeholders;
- (e) [s]upport for co-operation in the promotion and protection of human rights;
- (f) [t]he encouragement of full co-operation and engagement with the Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights.

In addition to these objectives, the second cycle of review will look at the level of progress towards compliance with the recommendations accepted during the first review cycle.¹⁸

13 General Assembly Resolution 60/251 (n 4 above) para 5(e).

14 Palestine and the Holy See chose to comment on the reviews of several states, including some within the African regional group.

15 Human Rights Council Resolution 5/1 Institution-building of the United Nations Human Rights Council, UN Doc/A/HRC/RES/5/1, 18 June 2007.

16 Human Rights Council Resolution 5/1 (n 15 above) Annex para 1.

17 Human Rights Council Resolution 5/1 (n 15 above) Annex para 4.

18 Human Rights Council Resolution 16/21 Review of the work and functioning of the Human Rights Council, UN Doc A/HRC/RES/16/21, 25 March 2011 Annex para 6, adopted also by the General Assembly in General Assembly Resolution 65/281 (n 5 above).

Three documents form the basis of the review: information submitted or presented by the state itself (this has generally been in the form of a national report); a compilation prepared by the Office of the High Commissioner for Human Rights of the information contained in the reports of treaty bodies, special procedures, and other relevant official United Nations documents (essentially a summary of all existing UN documentation on the state – no mean feat to reduce this to the specified ten pages); and ‘credible and reliable information provided by other relevant stake-holders’ (that is, non-governmental organisation (NGO) reports and reports of other organisations).¹⁹ Whilst the latter is innovative, formally acknowledging the contribution of NGOs and other stakeholders, utilising this source of information and the expertise of the special procedures and UN treaty bodies should mean that the discussions in the working groups and eventual outcomes are informed and based on credible facts. ‘It is the responsibility accorded to expert inputs that will primarily distinguish the Council’s more objective and systematic approach from the haphazard and unscientific country-focused discussions held by the Commission.’²⁰ Whether this aspiration has been realised is open to debate. There is some evidence that states will refer to the UN documentation or the stakeholders’ reports when formulating questions and comments.²¹ However, extensive (identifiably referenced) use was not made of these documents in the working group reports of the first cycle.²²

As for the review itself, each state is allocated three hours for its individual review within a working group, with a strict timetable prepared in advance and adhered to. These working groups are chaired by a troika of Human Rights Council members, but the sessions are open to all UN member and observer states. Abebe criticises the failure of the Council to allow direct NGO participation in the interactive dialogues as a ‘weakness’ of the review process.²³ However, NGOs can make representations to the full Human Rights Council when the outcome of the reviews are being debated and discussed.²⁴ States are able to direct questions to states under review in advance. However, the central activity of each review occurs during an interactive dialogue: Any state²⁵ can make comments or

19 Human Rights Council Resolution 5/1 (n 20 above) Annex para 15.

20 Alston (n 9 above).

21 Eg, Switzerland draws attention to ‘thousands of detainees who cannot exercise their rights, in contravention of the judicial safeguards guaranteed by international law’ in Eritrea; Report of the Working Group on the Universal Periodic Review Eritrea, UN Doc A/HRC/13/2, 4 January 2010 para 54, citing the stakeholders’ summary report.

22 All working group reports have been read and analysed for the research on which this article is based.

23 Abebe (n 1 above) 29.

24 This offers much less opportunity for challenging a state because the process is more of political rhetoric than examination at that stage.

25 Numbers can be limited to ensure compliance with the time limit and offer a degree of equality of treatment of states.

recommendations or pose questions to the state under review. That state can respond within the working group, or later in writing (or occasionally orally) to the next full Human Rights Council session. The Council will formally adopt the outcome of the review which comprises the three primary documents, the report of the working group on the interactive dialogue and all or any responses made by the state under review.

The first cycle of review ran from 2008 through 2011; the second cycle began in May-June 2012. This means that a complete initial set of documentation on all states is now available.

Interestingly, Alston notes that the process of periodic review is not new, it being mooted by some states as early as 1950 with an oft-forgotten 'futile and ultimately abandoned periodic review procedure' in operation for almost 25 years.²⁶ More pertinently, peer review has been established for a decade in Africa. The African Peer Review Mechanism,²⁷ however, is significantly different from universal periodic review as it is voluntary, involves country visits, and results in a plan of action drafted by the state under review to address identified governance deficiencies.²⁸

3 The African group and Universal Periodic Review

So then attention must turn to the African states' participation in the Universal Periodic Review. In accordance with the enabling resolution, those states which were serving as members of the Council²⁹ were called upon to act as rapporteurs and serve on the troika appointed to undertake the review of other states. These duties appear, on the evidence of the working group reports and outcome documents, to have been discharged as fully by African regional grouping member states as by any other states. However, this is virtually an administrative and co-ordinating role as well as being partly subject to a lottery of nominations drawn from member states.

²⁶ Alston (n 9 above).

²⁷ For all relevant public documentation, see <http://www.aprm-au>.

²⁸ For an analysis of the first few reviews under this mechanism, see M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41; N Stulz 'African states experiment with peer reviewing: The APRM, 2002-2007' (2006-7) 13 *Brown Journal of World Affairs* 247.

²⁹ Current members are Angola, Benin, Botswana, Burkina Faso, Congo, Côte d'Ivoire, Ethiopia, Gabon, Kenya, Libya, Mauritania, Sierra Leone and Uganda (May 2013). Previous members during the first cycle of review included Algeria, Cameroon, Djibouti, Egypt, Gabon, Ghana, Madagascar, Mali, Mauritius, Morocco, Nigeria, Senegal, South Africa, Tunisia and Zambia. It should be noted that South Sudan, joining the UN in 2011, was excluded from the first cycle of review although it is scheduled to be considered in the final session of cycle two in October/November 2016. Accordingly, South Sudan is not considered as a separate state in the analysis which follows, as it was part of Sudan during the first cycle and was thus considered during the Sudanese review which took place during the penultimate review session of the first cycle (2011).

To further situate this discussion, it is thus useful to identify the extent to which African states participated in the review process other than in those official capacities arising from membership of the Council and, of course, as subjects of their own review. To facilitate this, all African states' participation in Universal Periodic Review working groups has been mapped across those states upon whose review they chose to comment. This is not a perfect system as, on occasion, states (including African states) who wished to comment on particular states were unable to do so due to the pressure of time.³⁰ In such a situation, states were invited to submit comments on the extranet to which the state under review should respond before the final outcome of the review was adopted by the Human Rights Council in that particular instance. Nevertheless, it is the only feasible system to provide a snapshot of the extent of participation of African states in the working groups, the extent to which African states chose to comment on, question, otherwise praise or criticise the human rights performance of any other UN member state. The rigour of this is core to the notion of Universal Periodic Review as a 'peer review' process,³¹ states reviewing states as equals. As an inter-governmental process, there is inevitably a degree of politicisation inherent in the process. However, the scope of the review – all UN member states reviewing all others – statistically minimises the impact of rogue politicised interventions.³²

3.1 Extent of participation of African states in the review process

First it is worth noting that several African states did not actively participate in working group sessions as reviewers, thus electing not to avail themselves of the opportunity to comment on the performance of other states around the world. All African states were, however, subjected to the review process and thus were open to review by all other states. Sierra Leone, Seychelles, São Tomé and Príncipe, Malawi, Liberia, Kenya, Guinea Bissau, The Gambia, Eritrea and Comoros are amongst the states making little or no contribution

30 For African regional examples, see Report of the Working Group on Universal Periodic Review Nigeria, UN Doc A/HRC/11/26, 5 October 2009. Ten African states were time-barred; Report of the Working Group on Universal Periodic Review Djibouti, UN Doc A/HRC/11/16, 5 October 2009 with 12 African regional members time-barred; Report of the Working Group on Universal Periodic Review Angola, UN Doc A/HRC/14/11, 24 March 2010 with 14 African states time-barred; and Report of the Working Group on Universal Periodic Review Egypt UN Doc A/HRC/14/17, 26 March 2010 with 16 African states time-barred.

31 K Annan 'In larger freedom: Towards development, security and human rights for all' Report of the Secretary-General of the United Nations, Addendum Human Rights Council, (2005), UN Doc A.59/2005/Add.1 paras 6 *et seq.*

32 Thus, when some states attracted almost entirely negative comments, Israel and the United States of America being two examples, there are arguments of politicisation with polemical views expressed by allies and the rest; Working Group on the Universal Periodic Review Israel, UN Doc A/HRC/10/76, 8 January 2009; Working Group on the Universal Periodic Review United States of America, UN Doc A/HRC/16/11, 4 January 2011.

to working groups during the first cycle. There are, of course, some obvious reasons which could explain this: Many of these states are small island states and/or very poor; some do not have permanent representation at the UN in Geneva, or other local diplomatic representation (for example, an embassy in Switzerland). For such states, sending representatives to Geneva would prove a costly and possibly not financially justifiable exercise.³³

Second, several African states chose to intervene only, or primarily, in reviews of other African states. Burundi, Cape Verde, Central African Republic, Chad, Gabon, Guinea, Niger, Rwanda, Swaziland, Uganda and Tanzania are examples. This can indicate local interest – neighbouring states and those in the same region may be more aware of and interested in the human rights issues in those states. They can also share similar problems and/or be impacted on by infringements of human rights in adjacent states. Human trafficking is one obvious example, or refugees influxing from extreme poverty and civil conflict. However, it can also indicate that regional alliances are ‘a major force influencing the review process’,³⁴ opening the possibility that such allegiances may usurp neutral evaluation of human rights performance as a basis for review. Inevitably, most states trade with neighbouring states. Thus, this is not purely an issue pertinent to Africa. Indeed, this phenomenon is evident to a greater or lesser extent across the globe.³⁵

Of all the African states, Algeria, itself reviewed in the first session of the first cycle of review, has proven to be one of the most active states. It has participated in virtually every working group and, in general, has been either neutral or positive and encouraging of the human rights performance of every state. South Africa,³⁶ Nigeria and Ghana³⁷ have also made broad contributions throughout the first cycle. These states have representatives in Geneva and thus can physically participate in the review process without additional expense. However, a number of other African states also have permanent representation in Geneva; thus, this cannot be the sole

33 On the ‘burden of participation’, see Abebe (n 1 above) 22-25. For a discussion of some problems with small island states and universal periodic review, see R Smith ‘The Pacific island states: Themes emerging from the UN Human Rights Council’s inaugural Universal Periodic Review?’ (2011) 13 *Melbourne Journal of International Law* 569. Videoconferencing and similar technologies are now being considered to facilitate the involvement of small states distant from Geneva. See General Assembly Resolution 65/281 (n 4 above) Annex para 59.

34 Abebe (n 1 above) 19; see also R Freedman ‘New mechanisms of the UN Human Rights Council’ (2011) 29 *Netherlands Quarterly of Human Rights* 289 309, noting that ‘[r]egionalism was utilised by African and OIC members to protect allied states’.

35 Regional organisations which have objectives of single markets of free trade include the European Economic Area, the Association of South East Asian Nations, the African Free Trade Zone (SADC-COMESA-EAC) and MERCOSUR’s Common Market of the South in the Americas.

36 Also considered during the first session.

37 Considered during the second session of the first cycle of review.

explanation. Algeria, Ghana, Nigeria and South Africa are, however, large and/or fairly powerful states within the region.

3.2 Evaluating state contributions to the working group reports: African states as reviewers

To evaluate the comments of each state, the contributions recorded in the report of each working group have been analysed with each comment graded according to whether it was overall positive, negative or neutral. Some common factors, such as ratification of additional treaties, were deemed neutral. Thus, for example, Guinea, noting South Africa's 'efforts in promoting human rights since the end of apartheid, its achievement in establishing the rule of law and its success in promoting socio-economic and cultural changes', was graded as positive.³⁸ Angola, appreciating 'the considerably increased school attendance rate and the rapid development of higher education' whilst noting 'a number of remaining difficulties and in the country such as the harmful traditional practices such as female genital mutilation, early marriages and abductions linked to forced marriages' in Ethiopia, was graded overall negative due to the number of problem issues identified.³⁹ In some instances, positive and negative comments balance each other out. Thus, commenting on Mozambique, Zambia 'commended the invitation extended to nine Special Rapporteurs in 2010 ... commended the Plan of Action for Orphans and Vulnerable Children'. However, Zambia called on Mozambique to make operational all laws regarding to children's rights. It urged Mozambique to revisit the Five-Year Plan to reduce illiteracy. It noted that violence against women and girls should be addressed, *inter alia*, by criminalising it.⁴⁰ The positives and negatives, in effect, balanced each other out. Similarly, neutral was accorded to mere political statements with little focus on rights. Swaziland

referred to the difficult economic times in Zimbabwe and challenges faced in providing essential services. [It] encouraged the GNU to continue rebuilding the economy and its institutions, including the Organ for National Healing, Reconciliation and Integration. [It] appealed to the international community to provide Zimbabwe with much needed assistance'

and recommended that Zimbabwe '[s]eek international assistance to fund programmes and capacity-building initiatives'.⁴¹ As this

38 Guinea para 14, Report of the Working Group on the Universal Periodic Review South Africa, UN Doc A/HRC/8/32, 23 May 2008.

39 Angola para 77, Report of the Working Group on the Universal Periodic Review Ethiopia, UN Doc A/HRC/13/17, 4 January 2010.

40 Zambia para 60, recommendations in 89.12 and 89.90, Report of the Working Group in the Universal Periodic Review Mozambique, UN Doc A/HRC/17/16, 28 March 2011.

41 Swaziland para 35 and recommendation at para 93.74, Report of the Working Group on the Universal Periodic Review Zimbabwe, UN Doc A/HRC/19/14, 19 December 2011.

intervention is more neutral with comments and observations as well as neutral recommendations, it was recorded as overall neutral. Of course, the classifications are subjective but, as far as possible, they are based on the same quasi-objective criteria for each working group report; thus the same comments are regarded as positive, negative or neutral throughout. It should be borne in mind that some comments graded negative are in fact constructive, offering advice to a state deemed by the commenting state to be struggling with complying with its human rights obligations. No distinction is made between overt criticism and constructive criticism as, arguably, that would require a subjective view.⁴²

Using the above outlined criteria, it is fair to say that there is evidence of differing approaches to Universal Periodic Review. So-called 'Western' states, taken as being from the Western European and Others regional group in particular, though also some members of the Eastern European group, particularly those who hold membership of the Council of Europe, are, overall, more likely to express criticism and make serial recommendations concerning perceived human rights infringements and problems within the state under review. This is true across the globe, rather than simply with respect to comments made on African states. Of all the African states, only Ghana, Algeria and South Africa made comments across the full range of negative to positive. The other African states tended to favour more positive and neutral comments, irrespective of which states they were commenting on. Zimbabwe made positive comments on all states whose review it participated in, as did Tanzania, Tunisia, Swaziland, Somalia, Rwanda, Mauritius, Mauritania, Mali, Madagascar, Lesotho, Côte d'Ivoire, Burundi and Botswana. There are a myriad of reasons for this, not least a general lack of engagement with the process as a mechanism for critiquing human rights performance, an emphasis on positive encouragement rather than criticism of other states and, of course, the 'glass house' argument, namely, that states with many human rights problems should not be unduly critical of others in a similar position. In the latter case, the whole system of peer review is predicated on all states commenting on all others. Accordingly, it should be feasible for any state to make an objective evaluation of the performance of any other state, on the basis of the prepared documentation rather than reciprocity. Moreover, it is always open to the state under review to respond to any comments, correcting errors and supplying additional information and clarification. Thus, for example, Mauritius clarified that its legislation already provided for equal rights of women and men and for the criminal offence of rape,

42 On additional issues pertinent to progressively realisable rights, see J Duggan-Larkin 'Can an intergovernmental mechanism increase the protection of human rights? The potential of universal review in relation to the realisation of economic, social and cultural rights' (2010) 28 *Netherlands Quarterly of Human Rights* 548.

when faced with recommendations to enact such by Germany and New Zealand.⁴³

Sudan participated in over 55 reviews but was only negative, bordering on condemnatory, in respect of Israel, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Such an approach, while valid within the terms of the process, inevitably adds weight to claims of politicisation. However, arguably it also adds balance, as Sudan is a country regularly receiving criticism, not least through the indictments issued by the International Criminal Court. During Sudan's review, few African states sought to participate, but those that did were positive and encouraging.⁴⁴ In some instances, the results are perhaps more random. Morocco participated widely in the review but was only critical of Israel,⁴⁵ Tajikistan⁴⁶ and the Solomon Islands.⁴⁷

By way of comparison, a number of non-African states were generally critical during the review process, listing multiple recommendations for the state under review to consider. The USA, Sweden, Slovenia, Norway, Netherlands, Germany, France and Canada are among the more consistently critical states. Indeed, they were amongst the most critical of states when commenting across all regions, including states from the Western European and Others Group and Eastern European grouping. These states also generally made recommendations requiring positive action, for example in the form of new laws.⁴⁸ Fears that 'Western' states are more likely to use the process to criticise less developed states thus gain credence.

South Africa and Ghana are most critical of fellow African group states, identifying problems in seven⁴⁹ and six⁵⁰ countries, respectively. In many instances, the critique was mild and balanced with positives. A handful of other African states expressed slightly negative views of the human rights situations in other African states. In many instances, such comments were directed at neighbouring

43 Report of the Working Group on the Universal Periodic Review Mauritius, UN Doc A/HRC/11/28, 3 March 2009 paras 82(3) & (5).

44 Several African states were denied participation in the interactive due to the time limits and thus were restricted to comments on the extranet: Chad, Morocco, Senegal, Nigeria, Swaziland, Tanzania, Kenya and the Central African Republic; footnote 1 in para 16, Report of the Working Group on the Universal Periodic Review Sudan, UN Doc A/HRC/18/16, 11 July 2011.

45 Report of the Working Group on Universal Periodic Review Israel (n 30 above) para 46.

46 Report of the Working Group on Universal Periodic Review Tajikistan, UN Doc A/HRC/19/3, 12 December 2011 para 78.

47 Report of the Working Group on Universal Periodic Review Solomon Islands, UN Doc A/HRC/18/8, 11 July 2011 para 57.

48 For an analysis of this, see E McMahon *The Universal Periodic Review: A work in progress. An evaluation of the first cycle of the new UPR mechanism of the United Nations Human Rights Council* (2012).

49 Zimbabwe, Swaziland, Togo, Seychelles, Guinea-Bissau, Eritrea and Chad.

50 Swaziland, Liberia, Equatorial Guinea, Eritrea, Democratic Republic of Congo and Botswana.

states. Thus, Benin commented adversely on Nigeria,⁵¹ Senegal on Guinea,⁵² Central African Republic and Democratic Republic of the Congo on Congo,⁵³ and Burkina Faso on Benin.⁵⁴ In contrast, Algeria, Djibouti, Mauritius, Nigeria, Sudan, Egypt, Morocco, Tunisia and Burkina Faso were generally positive when reviewing other African states.

The working group reports also record examples of expressed solidarity. For example, Senegal 'reaffirmed its solidarity with the sister nation of Guinea-Bissau' and noted its pride in its participation in universal periodic review.⁵⁵ Similarly, Burkina Faso expressed a view that the 'constraints and difficulties faced by Benin in the implementation of its international human rights obligations were common to many developing countries'.⁵⁶ Successful, if incremental, emergence from conflict and colonisation was commented upon favourably in respect of several states, including Liberia (particularly importance being placed on the election of its female president),⁵⁷ Burundi⁵⁸ and Namibia.⁵⁹ African states often took the opportunity to highlight examples of good practice in the states under review. This of course is one of the objectives of the review process.⁶⁰ However, African and, indeed, Asian states proved more likely than other regional groupings of states to identify positives. Thus, support within

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- 51 Report of the Working Group on Universal Periodic Review Nigeria, UN Doc A/HRC/11/26, 5 October 2009 para 72, highlighting the issue of extra-judicial killings and the need for a national torture preventive mechanism whilst expressing gratitude for the progress made in protecting and promoting human rights.
- 52 Report of the Working Group on Universal Periodic Review Guinea, UN Doc A/HRC/15/4, 14 June 2010 para 65, recognising the 'fragile situation' of the country, whilst recommending increased human rights sensitisation, education and training (para 71.18) and a greater challenge to impunity of perpetrators of sexual violence (para 71.46), recommendations which Guinea accepted.
- 53 Report of the Working Group on Universal Periodic Review Congo, UN Doc A/HRC/12/6, 5 June 2009 paras 70 & 32 respectively, Central African Republic commenting on a range of minority and indigenous issues, sharing as they do many of the same indigenous peoples; Democratic Republic of the Congo commenting on judicial system weaknesses and problems with internally-displaced persons.
- 54 Report of the Working Group on Universal Periodic Review Benin, UN Doc A/HRC/8/39, 28 May 2008 para 44, noting sociological difficulties impeding the realisation of certain rights and freedoms.
- 55 Report of the Working Group on Universal Periodic Review Guinea-Bissau, UN Doc A/HRC/15/10, 16 June 2012 para 55.
- 56 Report of the Working Group on Universal Periodic Review Benin, UN Doc A/HRC/8/39, 28 May 2008 para 44.
- 57 Report of the Working Group on Universal Periodic Review Liberia, UN Doc A/HRC/16/3, 4 January 2011; Algeria para 24; Morocco para 26; Egypt para 64; Angola para 65; and the Congo para 72.
- 58 Report of the Working Group on Universal Periodic Review Burundi, UN Doc A/HRC/10/71, 8 January 2009; Algeria para 18; Cameroon para 36; and Benin para 66.
- 59 Report of the Working Group on Universal Periodic Review Namibia, UN Doc A/HRC/17/14, 24 March 2011. See comments of Angola para 70; Swaziland para 41; Algeria para 45; and Botswana para 37.
- 60 Human Rights Council Resolution 5/1 (n 13 above) para 4(d).

Swaziland for children in the form of feeding, schooling and even housing was highlighted,⁶¹ as was its policies on the elderly,⁶² and Ethiopia's temporary special provisions to address inequality of women.⁶³ Interestingly, there is no evidence of reciprocity of comments, whether graded negative or positive. Thus, African states appear no less or more likely to comment on a state which has commented on its performance in an earlier review. Neither are the reviews of African states statistically more critical or positive as the cycle progressed. Instead, the reviews are fairly consistent in that the few states in the latter sessions with more negative comments (Zimbabwe,⁶⁴ Sudan⁶⁵) also attracted criticism from across the globe.

Critics⁶⁶ suggest that some states 'abused' the system, lining up their allies to comment favourably and be fulsome in their praise. Consequently, the number of review comments balances out and even surpasses the negative, more critical ones. However, within each geographical region, states have been more positive in their 'self-review' than their reviews of states in other regions, even if, in the case of Europe, those 'more positive' reviews were still negative (that is, self-critical). There is undoubtedly evidence to substantiate these claims. A number of states with well-publicised human rights problems received positive reviews, not least within the African regional group: Zimbabwe⁶⁷ and Sudan⁶⁸ are two examples. Other instances of perhaps excessively positive comments can be more easily deemed encouragement and constructive praise and comment when the recipient state has many development needs and lacks the capacity to guarantee many basic economic and social rights to those within its jurisdiction. As reviewers, African states have been proven to be generally positive and supportive of states under review. This is particularly evident when they are reviewing less developed countries. African states rate themselves most favourably, followed by their rating of Asian states. However, African states also rated every other region positively. In this regard, it is perhaps worth remembering that the African Peer Review Mechanism (APRM), the main peer review mechanism African states may have participated in, is itself non-

61 Report of the Working Group on Universal Periodic Review Swaziland, UN Doc A/HRC/19/6, 12 December 2011; Mauritius para 67; Tanzania para 72; and Mozambique para 32.

62 Report of the Working Group on Swaziland (n 61 above); Burkina Faso para 62; Democratic Republic of the Congo para 54; and Uganda para 60.

63 Report of the Working Group on the Universal Periodic Review Ethiopia, UN Doc A/HRC/13/17, 4 January 2010; Côte d'Ivoire para 88.

64 Report of the Working Group on Universal Periodic Review Zimbabwe, UN Doc A/HRC/19/14, 19 December 2011.

65 Report of the Working Group on Universal Periodic Review Sudan, UN Doc A/HRC/18/16, 11 July 2011.

66 Eg Abebe (n 1 above).

67 Report of the Working Group on Universal Periodic Review Zimbabwe, UN Doc A/HRC/19/14, 19 December 2011.

68 Report of the Working Group on Universal Periodic Review Sudan, UN Doc A/HRC/18/16, 11 July 2011.

adversarial, accompanied by neither sanctions nor mandatory recommendations.⁶⁹ Thus, for African states a more encouraging, nurturing process is perhaps more familiar and acceptable. This new Universal Periodic Review has been sculpted to fit that particular mould.

3.3 Performance of African states under review: African states as reviewees

As noted above, all African states underwent review during the first cycle of the process and all, with the addition of South Sudan, are being reviewed again during the second cycle (Tunisia, Morocco, Algeria and South Africa were considered in the first session of the second cycle, held late May to early June 2012). Looking across the cycle, it is possible to discern statistically the extent to which states' human rights performances were viewed as positive or negative across the entire working group report. Lesotho,⁷⁰ Tunisia,⁷¹ South Africa⁷² and Djibouti⁷³ received the greatest preponderance of positive comments of the African group. Tunisia had one of the highest number of states participating in the interactive dialogue – 65 – partly due to this being in the first session of the review. At the other end of the spectrum, Somalia⁷⁴ attracted most negative comments with a plethora of problem areas identified.

States such as Mali⁷⁵ and The Gambia⁷⁶ achieved virtually a neutral review, the negative and positive state interventions balancing each other out when the report of the working group on the interactive dialogue is considered in its entirety. Mali accepted most of the recommendations made, many of which related to accepting technical assistance to ensure the timely submission of UN treaty body reports,⁷⁷ strengthening the position of women and children in national law and society,⁷⁸ reinforcing measures against trafficking in

69 See Stulz (n 28 above).

70 Report of the Working Group on the Universal Periodic Review Lesotho, UN Doc A/HRC/15/7, 16 June 2010.

71 Report of the Working Group on the Universal Periodic Review Tunisia, UN Doc A/HRC/8/21, 22 May 2008.

72 Report of the Working Group on the Universal Periodic Review South Africa, UN Doc A/HRC/8/32, 23 May 2008.

73 Report of the Working Group on the Universal Periodic Review Djibouti, UN Doc A/HRC/11/16, 5 October 2009.

74 Report of the Working Group on the Universal Periodic Review Somalia, UN Doc A/HRC/18/6, 11 July 2011.

75 Report of the Working Group on the Universal Periodic Review Mali, UN Doc A/HRC/8/50, 13 June 2008.

76 Report of the Working Group on the Universal Periodic Review Gambia, UN Doc A/HRC/14/6, 24 March 2010.

77 Working Group Mali (n 75 above) Recommendation 2 by Algeria and Portugal.

78 Recommendation 7 by Netherlands; 8 by Czech Republic; 9 by Canada; 10 by Ireland, Working Group Report Mali (n 75 above).

children⁷⁹ and combating violence against children.⁸⁰ The Gambia, likewise, accepted a substantial number of the recommendations made by participating states. Obviously, it will only be during the second review process that the extent to which these recommendations have been realised should become apparent. It appears clear that African group states are also more likely to accept recommendations made by fellow African group members. McMahon and Ascherio corroborate this, noting that Africa (and indeed Asia) 'self-supplied over 40 per cent of the total recommendations to their region'.⁸¹ Moreover, they classified all recommendations made in the first six sessions of Universal Periodic Review by action category and observed that African states were most inclined to accept recommendations coming from their own regions, a 'soft approach' to Universal Periodic Review, given the lesser action required to comply with recommendations by African states than by, for example, Western European and Others Group recommendations.⁸²

It is also possible to go beyond the statistics and examine the substance of the interactive dialogue component of the review process. A number of common themes emerged from the review documentation of the African group states. Amongst these, access to technical assistance and resources to enhance capacity was almost ubiquitous. One of the declared objectives of review is '[t]he enhancement of the state's capacity and of technical assistance in consultation with, and with the consent of, the state concerned'.⁸³ Capacity issues were noted with respect to a host of issues, not least preparation for participation in the review process. Cape Verde⁸⁴ and Comoros,⁸⁵ for example, did not submit national reports, although they did send delegations to participate in the working group interactive dialogue. A range of other technical issues were identified concerning resources and capacity to fulfil UN treaty body reporting obligations and meeting the Millennium Development Goals. African states concurred with their need for technical assistance and capacity-building resources and welcomed support.⁸⁶ The real difficulties encountered by the governments of many African states were

79 Recommendation 11 by Democratic Republic of the Congo and Brazil, Working Group Report Mali (n 75 above).

80 Working Group Report Mali (n 75 above) Recommendations 12 by Italy and 18 by Switzerland.

81 E McMahon & M Ascherio 'A step ahead in promoting human rights? The Universal Periodic Review of the UN Human Rights Council' (2012) *Global Governance* 231 237.

82 McMahon & Ascherio (n 81 above) 242.

83 Human Rights Council Resolution 5/1 (n 14 above) para 4(c).

84 See Report of the Working Group on the Universal Periodic Review Cape Verde, UN Doc A/HRC/10/81, 12 January 2009.

85 See Report of the Working Group on the Universal Periodic Review Comoros, UN Doc A/HRC/12/16, 3 June 2009.

86 Egypt, eg, even called for support for other African states, eg Botswana. See also Report of the Working Group on the Universal Periodic Review Botswana, UN Doc A/HRC/10/69, 13 January 2009 para 79.

acknowledged within and beyond the region. It will be interesting to identify during the second review cycle whether additional technical assistance has been offered and accepted. In many cases, this will be directly from states through bilateral arrangements. Inevitably, the UN does not have the funding to support all initiatives it may wish. Nevertheless, some additional funding has been made available for implementing recommendations made during the review.⁸⁷

As for specific topics of concern, stabilisation and security in post-conflict situations, the prevalence of HIV and AIDS, poverty, food insecurity, children's rights and violence against women and children as well as institutional protection of the rule of law were frequently noted as areas of concern, obviously not in every state but across the region as a whole. These are probably fairly non-contentious and even predictable, given the state of development of many African states and the instances of natural disasters and the pervasive impact of the HIV pandemic. More controversially, many European states repeatedly raised issues concerning the de-criminalisation and non-persecution of homosexuality,⁸⁸ Lesbian, gay, bisexual, transgender and intersex (LGBTI) rights and equality in law that are not accepted by all states as a requirement of human rights.⁸⁹ Maintenance of the death penalty also attracted widespread concern.⁹⁰ In particular, the number of moratoriums in place in Africa were noted with requests to transform the moratorium into a permanent abolition.

87 Human Rights Council Resolution 6/17, Voluntary trust fund for financial and technical assistance, UN Doc A/HRC/RES/6/17, 28 September 2007 para 19; annex of General Assembly Resolution 65/281 (n 4 above) calls on the fund to be 'strengthened and operationalised in order to provide a source of financial and technical assistance to help countries, in particular least developed countries and small island developing states, to implement the recommendations emanating from their review'.

88 See, eg, Report of the Working Group on the Universal Periodic Review Uganda, UN Doc A/HRC/19/16, 22 December 2011; Denmark para 54; Switzerland para 56; UK para 80; Sweden para 85, though Uganda argued in para 72 that any LGBTI persons feeling their rights are infringed are 'free to go to court for redress or initiate a process for the amendment of specific provisions of the law'. See also Report of the Working Group on the Universal Periodic Review Botswana, UN Doc A/HRC/10/69, 13 January 2009; Czech Republic para 50; France para 36; and the Netherlands para 37.

89 In response to comments made, *inter alia*, by the following states, see Report of the Working Group on the Universal Periodic Review Malawi, UN Doc A/HRC/16/4, 4 January 2011; Italy para 66; Austria para 67; Spain para 71; Switzerland para 71; Germany para 50; France para 45; Malawi noted that 'the wishes of the people of Malawi in this regard should be respected ... there was no international consensus on gay rights or on the right of gay persons to marry. Malawi should not be singled out and unnecessarily pressured to legalise homosexuality' (para 39), citing the defeat in 2008 of the UN resolution on gay rights in support of this contention. Of course, the UN Human Rights Council subsequently adopted Resolution 17/19 (2011) on sexual orientation and gender identity.

90 See, eg, General Assembly Resolution 62/149, UN Doc A/RES/62/149, 18 December 2007 Moratorium on the use of the death penalty. See also the Second Optional Protocol to the International Covenant on Civil and Political Rights.

As is clear, a range of issues are covered by the reviews of African states. These are drawn from across all rights and freedoms. African states generally accepted comments and recommendations made by others within their region. However, such recommendations were normally easier to comply with than those made by other regional groupings (for example Western European and Others Group).⁹¹ The fact that all states participated in their own reviews remains perhaps the biggest achievement of the first cycle. On the limited evidence to date, African states appear to be making efforts to meet obligations accepted during the review.

4 Conclusion

Having reviewed the completed first cycle of the Universal Periodic Review documentation, it is true to say that the African states have demonstrated considerable solidarity *intra se*, that is to say that African states comment repeatedly (and usually positively) on other African group states. Concerning solidarity *extra se*, excluding Nigeria, South Africa, Ghana and Algeria, there is little evidence of African states intervening extensively in respect of states beyond the region. Perhaps the issue may be that identified by commentators, including Abebe and Freedman, namely, that a north-south divide is emerging in international institutions, with the developing world, including most of Africa, proving reluctant to criticise states, preferring instead a more positive, supportive approach to human rights.⁹² This non-confrontational approach is apparent from the working group reports on the interactive dialogues discussed above. Serious condemnations by African states were restricted to a few external states; otherwise comments were generally positive. Further support for this contention can be deduced from the comparative lack of involvement in the interactive dialogues of many African states, a phenomenon which finds echoes with the plight of small island states,⁹³ for example, those in the South Pacific. Based on the documentation alone, it is not possible to determine the reasoning behind any given state's participation or lack thereof in the process. However, there is established literature indicating that 'naming and shaming' were unpopular among developing states.⁹⁴ There is further support for this in the experience of and literature on the APRM.

91 For an analysis based on the level of action required to implement recommendations, see McMahon (n 48 above).

92 See Abebe (n 1 above) 31; Freedman (n 34 above) 311: 'Developing nations seek to avoid condemnation, instead focusing on practical advice and assistance in implementing recommendations whilst Western countries focus on tailored, specific recommendations.'

93 Smith (n 33 above).

94 Abebe (n 1 above). See also E Dominguez Redondo 'The Universal Periodic Review of the UN Human Rights Council: An assessment of the first session' (2008) 7 *Chinese Journal of International Law* 722-724.

The idea of Universal Periodic Review as a 'voice' distinct from the pre-existing conventional (treaty-based) mechanism was advanced by Gaer.⁹⁵ With African states no different from other states in demonstrating reticence and laxity in complying with treaty body reporting requirements, the fact that (with one exception)⁹⁶ every state submitted to Universal Periodic Review as scheduled is a remarkable achievement in itself. To an extent, equality of treatment emerged⁹⁷ with every UN member state treated alike, irrespective of its stage of development, economic or political power. African states thus clearly participated as and were accepted by all other regional groups as equals.

Although there was evidence of politicisation of the process, despite the exhortations of the General Assembly and the Council itself, it is feasible that this will be more muted in subsequent cycles if, and only if, states consider the process fair and equitable and thus continue to fully participate therein. This will in part depend on the membership of the Council and the direction taken with follow-up to the first cycle of reviews. After all, the Council stipulated at the outset that the review was to be 'conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicised manner'.⁹⁸ This is something African states have emphasised when politicisation was perceived to be an issue,⁹⁹ albeit that there were few (if any) claims of politicisation of the review process with respect to the reviews of the African states. Overall, the approach seemingly favoured across the African regional group, namely, co-operative, non-confrontational and non-politicised discussion of progress towards compliance with human rights, is in fact exactly what the process was intended to be.

In many respects, the positions adopted by African group states resonate with those of other regional groups. There is evidence of solidarity amongst many Asian states, but there is also some disparity, for example differences in actions of the Pacific island states, China and the Central Asian Republics. The degree of convergence of opinion in Africa is perhaps attributable to African states' broadly homogenous approach to the wider international community and to inter-state relations. Is this a problem? Arguably, no. However, an understanding of the politicisation of the process of Universal Periodic

95 F Gaer 'A voice not an echo: Universal periodic review and the UN treaty body system' (2007) 7 *Human Rights Law Review* 109.

96 Note that the Haitian review was moved, at the request of Haiti, to the last session given the aftermath of its earthquake. All other reviews occurred as originally scheduled.

97 See also R Smith 'Equality of "nations large and small": Testing the theory of the Universal Periodic Review in the Asia-Pacific' (2011) 11 *Asia-Pacific Journal on Human Rights and the Law* 36, comparing the experiences of China and Nauru.

98 Human Rights Council Resolution 5/1 (n 14 above) Annex para 3(g).

99 Eg, Algeria 'regretted the politicisation of the human rights situation in China during the review'; Working Group on Universal Periodic Review China UN Doc A/HRC/11/25, 5 October 2009 para 33.

Review supports a truer understanding of the outcome documentation. Asian and African states are particularly supportive during working group interactive dialogues; they are also notably less likely to make recommendations requiring substantial changes of law and policy in the states being commented upon. As the second review cycle is ongoing, it is too early to comment on the effectiveness of the African (and Asian) approaches. However, the level of engagement seen during the first cycle appears to be continuing.

A 'softly-softly' approach can reap dividends because supportive comments will be more acceptable to receiving states.¹⁰⁰ Moreover, any criticisms amidst the positive comments are possibly more likely to be accepted in the spirit of collegiality in which it is apparently given. As the AU grows in stature and increasingly exerts its influence across the region, so too African states gain confidence with their approach to international relations.

Overall, African states have engaged with the Universal Periodic Review process. It is to be hoped, moving forward, that African states will become more active throughout the African region. African states have rich experiences which hitherto are not extensively shared. There are many examples of good practice in human rights and, especially, development. Of course, there are also many instances of poor practice. Universal Periodic Review offers an opportunity to share the burden of building a stronger system which adequately discharges state responsibility to protect, promote and respect the human rights of those within their jurisdiction. Whilst many criticisms of the current system are undoubtedly fair, its achievements should not be underestimated. All states, not least African states, can and should have their voice heard in the international arena.

100 See McMahon (n 48 above).