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South Africa and the United Nations Human Rights Council

*Eduard Jordaan**

ABSTRACT

This article assesses South Africa's foreign policy commitment to human rights by studying the country's role in the United Nations Human Rights Council, which began its work in 2006. South Africa's behavior is evaluated in terms of its participation in four aspects of the Council's work: the institution-building phase that took place during the body's first year, country-specific human rights issues, thematic human rights problems, and the Universal Periodic Review. It is concluded that South Africa has become a defender of unpalatable regimes and an obstacle to the international promotion of human rights.

I. INTRODUCTION

One year before South Africa held its first democratic elections, Nelson Mandela published an article in *Foreign Affairs* promising that the newly democratic South Africa's foreign policy would center on the promotion of

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human rights.¹ South Africa certainly tried to uphold this promise, but before long it retreated from its lofty commitments. There is wide agreement that South Africa scaled back the human rights component in its foreign policy,² but the extent of this retreat is still in dispute.

There are three broad perspectives on the matter. The first perspective sees South Africa as still strongly committed to the human rights cause. In this regard, Alison Brysk groups South Africa with good international citizens like Sweden and Canada. Brysk notes that South Africa has gone “from pariah to promoter” of human rights and is a “role model to other emerging regional powers, demonstrating that underdevelopment, non-Western culture, and historic divisions are not necessarily impediments to an active and principled foreign policy.”³ Chris Landsberg notes that although South Africa has struggled to operationalize the “responsibility to protect,” it is an “avid champion” of this norm.⁴ Importantly, the South African government understands itself as adhering to this perspective, declaring that “South Africa attaches great importance to the promotion of human rights.”⁵ In the pledge South Africa made in support of its own candidacy for a United Nations Human Rights Council (HRC) seat, South African representatives stated that the country “by its very nature . . . takes the international human rights agenda very seriously.”⁶

The second perspective occupies the middle ground and views South Africa’s foreign policy as no more and no less committed to human rights than other democracies. In this view, South Africa’s foreign policy is marked by ambiguity and the “pragmatic” pursuit of a variety of foreign policy goals.⁷

Finally, the third perspective argues that South Africa is worse than other democracies. From this view, South Africa has become a country that actively shields regimes with odious human rights records and that obstructs the international human rights cause. This perspective found its most succinct expression in Michael Gershon’s *Washington Post* article that labeled South Africa as a “rogue democracy,” a country that “remains an example

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1. Nelson Mandela, *South Africa’s Future Foreign Policy*, 75 FOREIGN AFF. 86, 87 (1993).
 2. *Id.* at 87; Tiyanjana Maluwa, *Human Rights and Foreign Policy in Post-Apartheid South Africa*, in HUMAN RIGHTS AND COMPARATIVE FOREIGN POLICY: FOUNDATIONS OF PEACE 1, 2 (David P. Forsythe ed., 2002).
 3. ALISON BRYSK, GLOBAL GOOD SAMARITANS: HUMAN RIGHTS AS FOREIGN POLICY 171 (2009).
 4. Chris Landsberg, *Pax South Africana and the Responsibility to Protect*, 2 GLOBAL RESP. TO PROTECT 436, 457 (2010).
 5. Maite Nkoana-Mashabane, Minister of Int’l Relations and Cooperation of South Africa, Statement to the 16th Session of the U.N. Human Rights Council (28 Feb. 2011).
 6. The Permanent Mission of the Rep. of S. Afr. to the U.N., Aide-Memoire In Support of S. Afr.’s Candidature of the Human Rights Council, Note no. 142/06 (2 May 2006), available at <http://www.un.org/ga/60/elect/hrc/southafrica.pdf>.
 7. JAMES BARBER, MANDELA’S WORLD 85–115 (2004); David Black, *Lever or Cover? South Africa, Multilateral Institutions and the Promotion of Human Rights*, in SOUTH AFRICA’S MULTILATERAL DIPLOMACY AND GLOBAL CHANGE: THE LIMITS OF REFORMISM 76, 77 (Philip Nel et al. eds., 2001).

of freedom—while devaluing and undermining the freedom of others . . . the product of a conscience it does not display.”⁸

There is evidence to support each perspective’s argument. However, none of these perspectives focus on South Africa’s role in the HRC. Once South Africa’s actions at the HRC are examined, the picture that emerges is one that strongly affirms the third perspective: South Africa is a defender of oppressive regimes and an obstacle to the international promotion of human rights. Admittedly, South Africa’s record on the international promotion of human rights has been mixed, but once South Africa’s actions on the HRC are included in the analyses, the weight of the evidence makes it very difficult to defend the first two perspectives mentioned above.

The focus on South Africa’s role in the HRC is of primary importance because of the significance that South Africa itself places on the HRC. South Africa’s most recent foreign policy blueprint stated that the government attaches “great importance” to the HRC,⁹ an institution with “first instance” responsibility for human rights.¹⁰ Furthermore, South Africa has used various international platforms, including the Security Council, the General Assembly, and the summit meetings of the India-Brazil-South Africa Dialogue Forum, to assert that the HRC is the most appropriate forum for addressing international human rights problems.

In addition to the importance South Africa places on the HRC, the country’s actions on this body are illustrative of South Africa’s wider foreign policy. There is a high degree of repetition to the debates and votes that take place in the HRC. Such repetitiveness makes it likely that country votes and statements in the HRC are the result of extensive deliberation and oversight and thus well integrated with the rest of the country’s foreign policy. A country’s vote in the HRC yields a reasonably clear view of its position. Country statements before the HRC, despite being plagued by diversion and double-speak, give us further insight into a country’s motivation. Furthermore the structured and repetitive nature of business in the HRC allows for fairly straightforward comparisons between countries. Admittedly, a focus on South Africa’s role in the HRC does not offer a complete picture of the country’s commitment to human rights—it leaves out what happens in bilateral and other multilateral settings—but there is little evidence to suggest that South Africa’s behavior at the HRC is out of step with its actions elsewhere.

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8. Michael Gerson, *The Despots’ Democracy*, *WASH. POST*, 28 May 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/27/AR2008052702556.html>.
 9. S. Afr. Dep’t. Int’l Relations & Cooperation, Strategic Plan 2011-2014, at 19 (2011), available at <http://www.dfa.gov.za/department/strategicplan%202011-014/strategic%20plan%202011.pdf>.
 10. U.N. GAOR, 65th Sess., 42d Plen. Mtg., Statement by Ambassador Baso Sangqu, Permanent Representative of S. Afr. on the Report of the Human Rights Council (2 Nov. 2010), available at http://www.southafrica-newyork.net/speeches_pmun/view_speech.php?speech=3810844.

The rest of this article consists of four sections and a conclusion. The first section focuses on South Africa's participation in the "institution-building" phase of the HRC. The following three sections are organized around three broad areas of the HRC's work: country-specific issues, thematic issues, and the Universal Periodic Review (UPR). Emphasis falls on matters on which states in the HRC were significantly divided because such disagreements allow for a clearer comparison of South Africa to other countries. Apart from the usual sources, such as UN records and academic and NGO publications, this research also draws from interviews conducted in February and March 2011 with relevant international civil servants, diplomats, representatives of human rights NGOs in Switzerland, analysts at think tanks in South Africa, and academics in both countries.

An understanding of the HRC's bloc politics is necessary to this analysis. The HRC consists of forty-seven members, with thirteen seats for African states, thirteen to Asia, eight seats for Latin American and Caribbean states, six seats for Eastern European states, and seven seats for Western Europe and Others Group (WEOG) states. Judging by the number of statements before the HRC, the Latin American and Caribbean and the African Groups are most likely to act as a bloc. Two non-geographic organizations, the Non-Aligned Movement (NAM) and especially the Organization of the Islamic Conference (OIC) have considerable influence in the HRC. As HRC action depends on approval by a simple majority, the major source of power in the HRC is numbers. Developing countries far outnumber industrialized countries. Sliced differently, the African and Asian Groups occupy twenty-six of the forty-seven seats, which Bertrand Ramcharan, a former acting UN High Commissioner for Human Rights, considers a "key problem."¹¹ Moreover, during the HRC's first year, twenty-eight states were members of the NAM, while seventeen were members of the OIC. During the same period, only twenty-five of the HRC's forty-seven members were considered "free" according to Freedom House, a US-based non-governmental research institute. Although states do not always vote in line with their regions or the organizations to which they belong, such associations bring a high degree of predictability to votes and debates in the HRC. A report to the Canadian parliament, for instance, noted that during the HRC's first year, many of the votes were split 33-12 or 34-11, as the WEOG and its Eastern European and Asian allies were outvoted by the rest of the world.¹²

South Africa's principal loyalties are to the African Group and other developing countries, often represented by the NAM. These two groups often make statements before the HRC that emphasize respect for national sovereignty, an insistence that often clashes with the promotion of human rights. Among the larger states in the African Group—Algeria, Egypt, Nigeria, and

11. BERTRAND G. RAMCHARAN, *THE UN HUMAN RIGHTS COUNCIL* 13 (2011).

12. A. RAYNELL ANDREYCHUK & JOAN FRASER, *CANADIAN SENATE STANDING COMMITTEE ON HUMAN RIGHTS, CANADA AND THE UNITED NATIONS HUMAN RIGHTS COUNCIL: AT THE CROSSROADS* 30 (2007).

South Africa—Algeria and Egypt are among the most obstructive delegations on the HRC. Although there is pressure on African states to conform to the Group line,¹³ which has often been obstructive of international efforts to promote human rights,¹⁴ there have been deviations from the African Group's conservative line. Mauritius and Zambia are the most frequent defectors, but Burkina Faso and Ghana have also on numerous occasions voted differently from the larger states in the African Group. Such deviations are important because it means that the grip of the African Group is not so strong that its members cannot vote how they want. South Africa, however, has rarely deviated from the more obstructive states in the African Group.¹⁵ According to one interviewee, the African Group will not adopt a position unless South Africa consents; therefore when Algeria or Egypt speaks on behalf of the African Group it is safe to assume South Africa is on board.¹⁶

II. INSTITUTION-BUILDING PHASE

The HRC replaced the UN Commission for Human Rights (CHR) in 2006.¹⁷ General Assembly Resolution 60/251, which established the HRC, settled some of the disagreements over the structure of the HRC, notably over membership, but also left many matters to settle. The HRC's institution-building phase lasted a year, ending 30 June 2007. It was an acrimonious period. During this time, any hope that the HRC would be significantly better than its ignominious predecessor was soon waylaid. The major task became preventing the dismantling of the CHR mechanisms, rather than focusing on strengthening preexisting structures and mechanisms.

The African Group, during discussions about reforming the CHR in June 2005, "stressed the importance of preserving the strengths of the Commission."¹⁸ However, as the HRC began its work, the African Group, with South Africa's support, featured prominently in efforts to undermine those

13. Statement by Nigeria, U.N.H.R.C., 17th Sess., 31st plen. mtg., HRC Video Archive (17 June 2011), <http://www.un.org/webcast/unhrc/archive.asp?go=110617>.

14. RAMCHARAN, *supra* note 11, at 13.

15. South Africa's only clear departure from the conservative members in the African Group in a pro-human rights direction came in 2011 when South Africa took the lead on a resolution on sexual orientation and gender identity. South Africa also abstained on resolutions on North Korea, whereas Egypt and Nigeria voted against. However, South Africa once voted even more conservatively than the rest of the African Group when it was the only state to vote against Council resolution 10/25, an EU-sponsored resolution on religious tolerance.

16. Interview with International Civil Servant, in Geneva (23 Feb. 2012).

17. Report of the Sixty-Second Session of the Commission on Human Rights, G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (15 Mar. 2006).

18. U.N. GAOR, 59th Sess., Summary of the Open-Ended Informal Consultations held by the Commission on Human Rights Pursuant to Economic and Social Council Decision 2005/217, ¶ 53, U.N. Doc. A/59/847-E/2005/73 (25 June 2001), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/summary_En.pdf.

strengths. South Africa allied itself with states that pushed a “negative reform” agenda, a numerically superior camp that included China, Cuba, Russia, Indonesia, Malaysia, and other OIC states.¹⁹ During the institution-building period, Algeria did most of the talking on behalf of the African Group. South Africa, however, fully supported Algeria. In fact, in 2008, the South African ambassador on the HRC paid tribute to Algeria for its contribution to the institution-building phase, gushing that it had been “a source of inspiration” to work closely with the Algerian delegation “for the common cause of promoting and protecting all human rights throughout the world.”²⁰

The HRC’s system of expert advice was one mechanism that South Africa and its allies attempted to weaken. The CHR’s system of expert advice, the Sub-Commission on the Promotion and Protection of Human Rights, played an important role in setting human rights standards, as it provided guidance on the interpretation of human rights norms and identified new areas of human rights concerns and gaps in current human rights protection. Many of these initiatives originated with the Sub-Commission, rather than at the request of the CHR.²¹ However, the restricting of the Sub-Commission began in 2000 and continued during the HRC’s institution-building phase, when it was renamed the Human Rights Council Advisory Committee. During this time, South Africa and the rest of the African Group figured prominently in efforts to limit the flow of information, to protect states from scrutiny, and to keep the whole process as state-dominated as possible. The African Group maintained that the studies of the expert body should not inform UPR reports and should only be for the HRC’s use. Interestingly, Zambia broke with the group, arguing that the expert body should also be available for use by other human rights mechanisms.²² The African Group further argued that the expert body should only undertake tasks assigned to it by the HRC.²³ In its usual aversion to country-specific scrutiny, the African Group stressed that the expert body should not deal with any country-specific issues, only thematic issues.²⁴ Finally, the African Group supported the view that members of the Advisory Committee should be elected by the HRC from a list of candidates nominated by states, rather than from a list drawn up by the Office of the

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19. INT’L SERV. FOR HUMAN RIGHTS (ISHR), HUMAN RIGHTS COUNCIL WORKING GRP. ON REVIEW OF MECHANISMS AND MANDATES, 13–24 NOVEMBER 2006: REPORT ON THE REVIEW OF SPECIAL PROCEDURES, 4 (2007), available at http://olddoc.ishr.ch/hrm/council/wg/wg_reports/wg_review_sps.pdf.
 20. Statement by South Africa, Review of Algeria, U.N.H.R.C., U.P.R., 1st Sess., HRC Video Archive (14 Apr. 2008), <http://www.un.org/webcast/unhrc/archive.asp?go=080414>.
 21. Meghna Abraham, *Building the New Human Rights Council: Outcome and Analysis of the Institution-Building Year*, Dialogue on Globalization No. 33, at 16 (2007).
 22. ISHR, HUMAN RIGHTS COUNCIL WORKING GROUP ON REVIEW OF MECHANISMS AND MANDATES DISCUSSIONS ON THE EXPERT BODY, 5 (2006), available at http://olddoc.ishr.ch/hrm/council/wg/wg_reports/wg_review_expertadvice.pdf.
 23. *Id.*
 24. *Id.*

High Commissioner for Human Rights (OHCHR).²⁵ While not all the African proposals were accepted, in the end the powers of the Advisory Committee were limited to the extent that it has become of “marginal importance.”²⁶

South Africa also participated in the weakening of the HRC’s complaint procedure, principally by making it harder for victims to raise complaints and by giving states stronger defenses against potential scrutiny. The CHR’s main complaint procedure, the 1503 Procedure, became the blueprint for the HRC’s complaint procedure and was intended to enable victims and those acting on their behalf to bring attention to instances that “appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.”²⁷ During the institution-building phase, the African Group held that for violations to be serious enough for consideration, each should be “gross and systematic” rather than merely part of a “consistent pattern” (“systematic” was defined as “willful action that is part of a pattern”).²⁸ As abuse might be large-scale but not systematic, the African Group’s requirement that abuse be “systematic” limits the situational applicability of the procedure and raises the burden of proof for victims.²⁹ Moreover, while no state questioned that the HRC should hear complaints about “gross” violations of human rights, South Africa and others explicitly opposed expanding the range of permissible violations to “gross or serious,”³⁰ arguing that such a broadening would overburden an already strained procedure. Finally, the African Group proposed a further narrowing of the 1503 Procedure—that complaints may only come from victims, not from organizations speaking on their behalf, because such organizations might not be “trustworthy.”³¹

The African Group also made various attempts to assist states in the face of complaints. Under the 1503 Procedure complaints passed through two committees. The first of these, the Working Group on Communications, would do the initial screening of complaints. Complaints that qualified would then pass to the second committee, the Working Group on Situations, which was made up of state representatives. This second committee would then make recommendations to the plenary of the HRC. The African Group wanted

25. *Id.* at 4.

26. Karen E. Smith, *The European Union and the Review of the Human Rights Council 27 EXPO/B/DROI/2010/06* (2011).

27. E.S.C. Res. 1503, ¶ 5. U.N. Doc. E/4832/Add.1 (27 May 1970).

28. ISHR, HUMAN RIGHTS COUNCIL 3RD SESSION DAILY UPDATE 3 (2006), available at <http://www.ishr.ch/council-monitor/institution-building/complaint-procedure>.

29. ISHR, WORKING GROUP ON REVIEW OF MECHANISMS AND MANDATES: REVIEW OF THE COMPLAINT PROCEDURE, 14 (2006), available at http://olddoc.ishr.ch/hrm/council/wg/wg_reports/wg_review_complaint.pdf.

30. ISHR, WORKING GROUP REPORT: REVIEW OF COMPLAINT PROCEDURE, 2ND SESSION 4 (2007), available at http://olddoc.ishr.ch/hrm/council/wg/wg_reports/wg_review_complaint_02.pdf.

31. *Id.* at 5.

the five regional groups to directly select experts to the Working Group on Communications from the HRC's new expert advice body rather than have the OHCHR make the appointment or, as was the practice in the CHR, have the expert body designate the membership from its own ranks.³² The African Group also worked to contain the spread of information that pertained to abuse in a specific country. The African Group strongly objected to the proposal that the Working Group on Situations should have the power to move cases from the confidential 1503 Procedure to the public 1235 Procedure when states failed to cooperate, whereas the CHR had given the Working Group this power.³³ The African Group further wanted to ease what counted as non-cooperative action, objecting that a three-month deadline for states to respond to complaints was too short.³⁴ The African Group also sought to limit the flow of information about human rights abuses by rejecting the linking of the complaint procedure to the UPR because it would contravene the confidentiality of the complaint procedure.³⁵

Most serious of all was the attack on the special procedures system of the HRC, which Kofi Annan has praised as the "crown jewel" of the UN human rights machinery.³⁶ The CHR developed a number of special procedures to examine and monitor human rights violations in a specific country or under a specific theme. Special procedures mandate holders would undertake fact-finding missions to specific countries or to study specific themes, communicate with governments, and issue "urgent appeals" and "letters of allegation." Although in 2005 the African Group had explicitly identified special procedures as worth maintaining,³⁷ it now attempted to weaken this system. Three issues related to special procedures were particularly contentious: mandate renewal, appointment of mandate holders, and a code of conduct for mandate holders.

The HRC inherited the country and thematic mandates that were in force when the CHR was closed down. Although the thematic mandates were not without controversy, country mandates elicited the most resistance. South Africa supported the African Group's position that country mandates established without the consent of the state concerned should be terminated.

32. *Id.* at 8.

33. ISHR, WORKING GROUP ON REVIEW ON MECHANISMS AND MANDATES: DISCUSSIONS ON COMPLAINT PROCEDURE, 3RD SESSION 7 (2007), available at http://olddoc.ishr.ch/hrm/council/wg/wg_reports/wg_complaints_03.pdf.

34. *Id.* at 8.

35. ISHR, WORKING GROUP REPORT: REVIEW OF COMPLAINT PROCEDURE, 2ND SESSION, *supra* note 30, at 9.

36. Press Release, United Nations, Annan Calls on Human Rights Council to Strive for Unity, Avoid Familiar Fault Lines (29 Nov. 2006), available at <http://www.un.org/apps/news/story.asp?NewsID=20770>.

37. U.N. GAOR, 59th Sess., Summary of the Open-Ended Informal Consultations, *supra* note 18, ¶ 53.

When South Africa realized that country mandates were likely to continue, it tried to increase the threshold standard for human rights abuse that would warrant a country mandate. Thus, when Egypt objected to the words “serious violations” as the minimum to implement a country mandate and suggested “grave and systematic” instead, South Africa proposed that the level of abuse should be “grave and massive.”³⁸

South Africa also joined in efforts to limit the independence of the experts who were entrusted with special procedures mandates by trying to assert greater state control over expert appointment. Under the CHR, the Chair of the CHR appointed the human rights experts after consultation with the five regional groups. Such an appointment process lacked transparency, but provided for the appointment of experts not beholden to any particular regional group. During the institution-building phase, South Africa and the rest of the African Group maintained that potential mandate holders should be nominated by states rather than, for example, drawn from a list compiled by the OHCHR.³⁹ The Council would then elect nominees directly, which would ostensibly “increase the credibility” of mandate holders.⁴⁰ The obvious problem with the African Group’s proposal is that because the work of the mandate holders often involved criticism of states, their election and re-election would be directly dependent on the approval of the very entities they criticize.

States frequently objected to special procedures reports by questioning the integrity of the mandate holder or alleging that he or she had gone beyond his or her mandate. The obvious solution, for many states, was to subject mandate holders to a code of conduct. The idea of such a code of conduct is not new, but it was the African Group that drove the issue in the HRC. Although Algeria led the African Group on this matter, South Africa was in full agreement. In an “especially strong” response to the work of the Special Rapporteur on the right to adequate housing and the Independent Expert on the promotion and protection of human rights while countering terrorism, South Africa charged that the mandate holders had behaved “disgracefully” and in a “perfidious” manner when they visited the country. To South Africa, such alleged behavior made obvious the need for a code of conduct.⁴¹

In March 2007 the African Group first presented their proposed code of conduct. The African Group maintained that such a code was necessary to

38. ISHR, WORKING GROUP ON REVIEW ON MECHANISMS AND MANDATES: REPORT ON THE REVIEW OF SPECIAL PROCEDURES 14 (2006), available at http://olddoc.ishr.ch/hrm/council/wg/wg_reports/wg_review_sps.pdf.

39. ISHR, HUMAN RIGHTS COUNCIL 3RD SESSION DAILY UPDATE, *supra* note 28, at 5.

40. Abraham, *supra* note 21, at 25.

41. ISHR, WORKING GROUP ON REVIEW OF MANDATES: SPECIAL PROCEDURES, HIGHLIGHTS 2 (2007), available at http://olddoc.ishr.ch/hrm/council/wg/wg_reports/highlights/wgsps_highlights_26_april_07.pdf.

“enhance the moral authority and accountability of mandate holders.”⁴² Its purpose was to “spell out the consequences” of the independence of mandate holders.⁴³ The African Group stressed that the independence of mandate holders was “absolute in nature,”⁴⁴ yet repeatedly insisted that mandate holders were accountable to the HRC. Indeed, the African Group’s entire effort was directed at constraining mandate holders and strengthening states’ position vis-à-vis special procedure investigators, or, as the African Group put it, to increase “mutual trust” between states and mandate holders.⁴⁵

There are many examples of the African Group’s attempts to keep mandate holders on a tight leash. The African Group wanted mandate holders to prepare their visit “in close collaboration” with the state’s permanent mission in Geneva; “finalise the official programme of their visits directly with the host country representatives;” and, while in the host country, remain for security reasons “in the care of the host authorities at all times.”⁴⁶ As was pointed out, such close “collaboration” between the state and the mandate holder might compromise the anonymity of sources of information and might lead to the moving of witnesses before the mandate holder’s arrival.⁴⁷ The African Group also rejected the idea that mandate holders should only comply with national legislation in the host country if it was in accordance with international human rights principles.⁴⁸ The African Group dismissed such a requirement as “too restrictive.”⁴⁹ The African Group further sought to constrain and channel communications from the mandate holders in order to benefit states at the likely expense of victims of human rights abuses. For example, mandate holders were not to make public allegations of human rights violations without first informing the state concerned and giving the state “adequate time for investigation, reply and, when appropriate, action.”⁵⁰ Furthermore, mandate holders were to address communications, including “urgent appeals,” not directly to the government, but to the country’s diplomatic mission in Geneva.⁵¹ Finally, the African Group sought to limit

42. ISHR, HUMAN RIGHTS COUNCIL OPEN-ENDED MEETING CONVENED BY THE AFRICAN GROUP ON THE CODE OF CONDUCT FOR SPECIAL PROCEDURES 1 (2007), available at http://olddoc.ishr.ch/hrm/council/wg/specialprocedures/11_june_coc.pdf.

43. *Id.* at 2.

44. HRC, *Code of Conduct for Mandate Holders of the Special Procedures of the Human Rights Council 2*, U.N. Doc. A/HRC/5/L.3 (15 Jun. 2007).

45. ISHR, WORKING GROUP ON REVIEW OF MECHANISMS AND MANDATES, 2ND SESSION (2007), available at http://olddoc.ishr.ch/hrm/council/wg/wg_reports/wg_review_sps_february_2007.pdf.

46. HRC, *Code of Conduct for Mandate Holders of the Special Procedures of the Human Rights Council*, *supra* note 44, art. 3.

47. ISHR, HUMAN RIGHTS COUNCIL OPEN-ENDED MEETING CONVENED BY THE AFRICAN GROUP ON THE CODE OF CONDUCT FOR SPECIAL PROCEDURES, *supra* note 42, at 4.

48. *Id.* at 2.

49. *Id.*

50. HRC, *Code of Conduct for Mandate Holders of the Special Procedures of the Human Rights Council*, *supra* note 44, art. 12a, 13c.

51. ISHR, WORKING GROUP ON REVIEW ON MECHANISMS AND MANDATES: REPORT ON THE REVIEW OF SPECIAL PROCEDURES, *supra* note 38, at 22.

direct interaction between special procedures and other mechanisms of the HRC, such as the UPR.⁵²

Some suggested that states should also be held to a code of conduct in their dealings with special procedures mandate holders. Non-compliance of states was a serious problem; states would refuse entry to mandate holders or often simply not reply to a request for a country visit. For instance, in a 2009 report the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions noted that of the forty-seven countries where invitations were requested, thirty-four failed to respond in a meaningful way, if at all.⁵³ South Africa explicitly opposed the idea that states should also be subject to a code of conduct.⁵⁴ The African Group held that it would be “simplistic” to compare the accountability of states with that of mandate holders. Apparently, states could not be asked to meet the same level of accountability as mandate holders.⁵⁵ The issuing of standing invitations to special procedures was one measure of state cooperativeness, and some states felt that it was incumbent upon HRC members to issue such invitations. However, South Africa maintained that such a measure of compliance should not be linked to HRC membership. The issuance of standing invitations remains, in South Africa’s view, a decision that should be made by sovereign states.⁵⁶

III. COUNTRY-SPECIFIC RESOLUTIONS

At the HRC, South Africa opposes the singling out of specific countries for their human rights records through country mandates.⁵⁷ South Africa adheres to the belief that international pressure and “naming and shaming” are counterproductive, believing that quiet diplomacy is the better option. The most charitable interpretation of South Africa’s quiet diplomacy is that, at best, it is naïve. At worst, the practice is a shield for despotic regimes. Even so, South Africa has not been consistent in its opposition to international pressure. South Africa has explicitly called for greater international pressure on Israel⁵⁸ and voted for all twenty-three of the typically harsh and one-

52. *Id.* at 30.

53. HRC, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 10, U.N. Doc. A/HRC/11/2 (27 May 2009) (by Philip Alston).

54. ISHR, WORKING GROUP ON REVIEW ON MECHANISMS AND MANDATES: DISCUSSIONS ON COMPLAINT PROCEDURE, 3RD SESSION, *supra* note 33.

55. ISHR, WORKING GROUP ON REVIEW OF MECHANISMS AND MANDATES, 2ND SESSION, *supra* note 45, at 17.

56. *Id.* at 18.

57. Statement by South Africa, U.N.H.R.C., 5th Sess., 4th plen. mtg., HRC Video Archive (12 June 2007), available at <http://www.un.org/webcast/unhrc/archive.asp?go=070612>.

58. Statement by South Africa, The Situation of Human Rights in the Occupied Palestinian Territories, U.N.H.R.C., 6th Spec. Sess., 1st plen. mtg., HRC Video Archive (23 Jan. 2008), available at <http://www.un.org/webcast/unhrc/archive.asp?go=016>.

sided resolutions related to Israel that were presented during South Africa's membership of the HRC.⁵⁹ Ironically, democratic change in South Africa is itself partly the result of international pressure on the apartheid regime, as even the country's top foreign officials recognize.⁶⁰ It is noteworthy that while opposition to country-specific scrutiny is the official view of the African Group, African states have frequently deviated from this stance. One is left with little option but to conclude that South Africa's opposition to country-specific scrutiny is intended to protect unsavory regimes. The rest of this section runs through examples of such protection.

A. Myanmar

In January 2007, South Africa controversially voted against a Security Council resolution condemning human rights abuses in Myanmar. One of South Africa's arguments was that the HRC, not the Security Council, was the appropriate place for addressing the human rights problems in Myanmar. However, at the HRC South Africa did little to address the situation in Myanmar. South Africa was not among the states that signed on to the EU's request for the special session on Myanmar held on 2 October 2007. The resultant resolution "strongly deplore[d] the continued violent repression of peaceful demonstrations in Myanmar" and was adopted without a vote.⁶¹ The African Group nevertheless used the occasion to object to the selective use of special sessions to criticize weak countries. Some African countries expressed strong views about the human rights situation in Myanmar—Mauritius called for the "most stringent sanctions" and Zambia called for Myanmar to democratize⁶²—but South Africa's response was timid. South Africa stated that it "deeply regrets the recent violence and excessive use of force" and called for political dialogue and the immediate release of Aung

59. For example, the resolution adopted at a HRC special session on Israel's invasion of Lebanon in 2006, uses words such as "appalled," "strongly condemning," and "outraged," which one seldom sees in resolutions on other countries. As an indication of one-sidedness, the resolution further calls for an investigation into Israel's actions in Lebanon, but says nothing about Hezbollah's role in the conflict. The Grave Situation of Human Rights in Lebanon Caused by Israeli Military Operations, HRC Res. S-2/1, U.N. Doc. A/HRC/RES/S-2/1 (11 Aug. 2006).

60. Nkosazana Dlamini Zuma, *Minister of Foreign Affairs of South Africa, Address on the WCAR Debate* (7 Nov. 2001), available at <http://www.dfa.gov.za/docs/speeches/2001/dzum1107.htm>.

61. Situation of Human Rights in Myanmar, HRC Res. S-5/1, U.N. Doc. A/HRC/RES/S-5/1 (2 Oct. 2007).

62. ISHR, HUMAN RIGHTS COUNCIL, 5TH SPECIAL SESSION, SITUATION IN MYANMAR, 12 (2007), available at http://olddoc.ishr.ch/hrm/council/other/cmreports/specialsessions/ss_myanmar_2_october_2007.pdf.

San Suu Kyi.⁶³ South Africa also pandered to the other side by thanking the representative from Myanmar for his statement even though he had claimed that his government had “exercised the utmost restraint” in dealing with the September 2007 protests and failed to respond to the Special Rapporteur’s questions on the human rights situation in Myanmar.⁶⁴

B. North Korea

Despite the fact that the government of North Korea is to blame for the misery and lack of freedom of its people,⁶⁵ at the HRC, South Africa refused to acknowledge that greater international scrutiny might be an appropriate response to the dire human rights situation in the country. During its four years on the HRC, South Africa had the opportunity to vote on three resolutions that expressed deep concerns about the human rights problems in North Korea. The resolutions each expressed regret at the country’s failure to cooperate with the HRC and sought to extend the mandate of the Special Rapporteur on human rights in the country. South Africa, however, abstained all three times.⁶⁶ By contrast, Burkina Faso, Cameroon, Djibouti, Ghana, Madagascar, Mauritius, and Zambia all voted in favor of the North Korea resolutions at least once.⁶⁷

C. SRI LANKA

South Africa similarly worked to protect Sri Lanka from accountability for its human rights abuses. In the wake of the Sri Lankan government’s defeat of the Liberal Tigers of Tamil Eelam (LTTE) that effectively ended the country’s twenty-six-year civil war, the HRC in May 2009 called a special session on the human rights situation in Sri Lanka. The UN High Commissioner of Human Rights highlighted three areas of concern: the plight of the more than 200,000 internally displaced persons who were being confined to

63. Statement by South Africa, The Situation of Human Rights in Myanmar, U.N.H.R.C., 5th Spec. Sess., 1st plen. mtg., HRC Video Archive (2 Oct. 2007), available at <http://www.un.org/webcast/unhrc/archive.asp?go=015>.

64. ISHR, HUMAN RIGHTS COUNCIL, 5TH SPECIAL SESSION, SITUATION IN MYANMAR, *supra* note 62, at 3–4.

65. STEPHAN HAGGARD & MARCUS NOLAND, WITNESS TO TRANSFORMATION: REFUGEE INSIGHTS INTO NORTH KOREA 12–15 (2011).

66. HRC, Situation of Human Rights in the Democratic People’s Republic of North Korea, U.N. Doc. A/HRC/7/15 (2008); HRC, Situation of Human Rights in the Democratic People’s Republic of North Korea, U.N. Doc. A/HRC/10/16 (2009); HRC, Situation of Human Rights in the Democratic People’s Republic of North Korea, U.N. Doc. A/HRC/13/14 (2010).

67. *Id.*

camps partly because the government was trying to identify the LTTE fighters among the civilians, the need for humanitarian assistance, and gross disregard for the inviolability of civilians during the conflict.⁶⁸ However, Sri Lanka introduced its own self-congratulatory draft resolution, which became the basis for discussion.⁶⁹ In response, Germany, on behalf of the EU and other states, including Mauritius, proposed a package of amendments that sought to remove Sri Lanka's draft resolution's emphasis on sovereignty, called for unimpeded access for humanitarian organizations, and stressed the importance of investigating all allegations of human rights violations to hold accountable those found guilty of such violations.⁷⁰ However, before these amendments could be discussed, Cuba proposed that discussion end through a so-called "no-action motion." Cuba's proposal was put to a vote and won 22-17.⁷¹ South Africa was among those who voted to close the debate.⁷² Mauritius was the only African country to oppose the motion, while Gabon, Nigeria, Senegal, and Zambia abstained.⁷³ With the amendments defeated, South Africa voted for a weak resolution that was ultimately adopted.⁷⁴ Most of the states that proposed the special session ended up voting against the final resolution.⁷⁵ Human Rights Watch found it "deeply disappointing that a majority of the Human Rights Council decided to focus on praising a government whose forces have been responsible for the repeated shelling of civilians."⁷⁶

D. Darfur/Sudan

South Africa also played a key role in obstructing HRC efforts in addressing the crisis in Darfur. After Kofi Annan reprimanded the HRC for its exagger-

68. Navi Pillay, U.N. High Commissioner for Human Rights, Message at the Human Rights Council Special Session on the Human Rights Situation in Sri Lanka (26 May 2009), available at <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/1BBA5307164D4708C12575C20054FB10?opendocument>.

69. Assistance to Sri Lanka in the Promotion and Protection of Human Rights, HRC Draft Res. S-11, Rev. 2, U.N. Doc. A/HRC/RES/S-11/L.1/Rev.2 (26 May 2009).

70. Statement by Germany, The Human Rights Situation in Sri Lanka, U.N.H.R.C., 11th Spec. Sess., 3rd plen. mtg., HRC Video Archive (27 May 2009), <http://www.un.org/webcast/unhrc/archive.asp?go=0111>.

71. Assistance to Sri Lanka in the Promotion and Protection of Human Rights, HRC Res. S-11/1, 11th Spec. Sess., U.N. Doc. A/HRC/RES/S-11/1 (27 May 2009). See also Report of the Human Rights Council on its Eleventh Special Session, at 5, 9, U.N. Doc. A/HRC/S-11/2, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/144/09/PDF/G0914409.pdf?OpenElement>.

72. *Id.*

73. *Id.*

74. *Id.*

75. The resolution was adopted 29-12 (six abstentions).

76. Human Rights Watch, *Sri Lanka: Human Rights Council Fails Victims* (27 May 2009), available at <http://www.hrw.org/news/2009/05/27/sri-lanka-un-rights-council-fails-victims>.

ated focus on the Middle East—the HRC’s first three special sessions were all related to Israel—the HRC called its fourth special session, this time on “the human rights situation in Darfur,” held on 12 and 13 December 2006. However, from the beginning, the topic of Darfur elicited “politicisation reminiscent of the Commission at its worst.”⁷⁷ The African Group was at the forefront of obstructing strong HRC action on Darfur. That said, the Darfur question resulted in bitter disputes among the African members themselves. Ghana, Mauritius, and, most resolutely, Zambia, stood up against the African Group.⁷⁸ South Africa, however, sided with Algeria, Egypt, and the bulk of the African Group.⁷⁹ In the years that followed the special session on Darfur, South Africa continued to oppose strong HRC action on Darfur and Sudan.

The primary aim of the special session on Darfur evolved into sending a fact-finding mission to the region. Many states felt that the facts were sufficiently established; yet the African Group insisted that the understanding of the Darfur conflict had been distorted by “far-reaching propagandist campaigns” and “media-driven interpretations.”⁸⁰ The EU, forced to accept that a fact-finding mission was inevitable, proposed that the Special Rapporteur on Sudan, assisted by a group of independent experts, lead the mission.⁸¹ The African Group, however, wanted the mission to consist of representatives of states.⁸² After a month of wrangling, a compromise saw the creation of a team with three independent experts and two state representatives, including the Ambassador of Indonesia, who was a vocal defender and supporter of the Sudanese government.⁸³ Nobel laureate Jody Williams was appointed leader of the mission. Sudan, however, refused to grant visas to the fact-finding team. Significantly, the Indonesian representative resigned from the mission on 14 February 2007 after work had already begun.⁸⁴ Unable

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77. Patrizia Scannella & Peter Splinter, *The United Nations Human Rights Council: A Promise to be Fulfilled*, 7 HUM. RTS. L. REV. 41, 62 (2007).
78. Statements by Ghana and Zambia, U.N.H.R.C., 4th Sess., 10th plen. mtg., HRC Video Archive (16 Mar. 2007), available at <http://www.un.org/webcast/unhrc/archive.asp?go=070316>; Statement by Mauritius, U.N.H.R.C., 4th Sess., 11th plen. mtg., HRC Video Archive (16 Mar. 2007), available at <http://www.un.org/webcast/unhrc/archive.asp?go=070316>; Darfur, HRC Dec. 2/115, U.N. Doc. A/HRC/DEC/2/115 (28 Nov. 2006).
79. Darfur, *supra* note 78; Situation of Human Rights in the Sudan, HRC Res. 11/10, U.N. Doc. A/HRC/RES/11/10 (18 June 2009), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_11_10.pdf.
80. Statement by Algeria on behalf of the African Group, Human Rights Situation in Darfur, U.N.H.R.C., 4th Spec. Sess., 1st plen. mtg., HRC Video Archive (12 Dec. 2006), available at <http://www.un.org/webcast/unhrc/archive.asp?go=014>.
81. ISHR, HUMAN RIGHTS COUNCIL, 4TH SPECIAL SESSION 7 (2006), available at http://olddoc.ishr.ch/hrm/council/other/cmreports/specialsessions/Fourth_Special_Session.pdf.
82. *Id.*
83. Letter from Hillel C. Neuer, Executive Director of UN Watch, to Ambassador Luis Alfonso De Alba, President of the Human Rights Council (1 Feb. 2007), available at <http://www.unwatch.org/site/apps/nlnet/content3.aspx?c=bdKKISNqEmG&b=2607541&ct=3687691>.
84. HRC, Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101, ¶ 2, U.N. Doc. A/HRC/4/80 (9 Mar. 2007).

to enter Darfur, the team conducted interviews in Addis Ababa, Geneva, N'Djamena, and refugee camps in Eastern Chad.⁸⁵ The mission concluded that “[w]ar crimes and crimes against humanity continue across the region” and that while rebel forces were “guilty of serious abuses of human rights . . . the principal pattern is one of a violent counterinsurgency campaign waged by the Government of Sudan in concert with Janjaweed/militia and targeting mostly civilians.”⁸⁶

The HRC was split on whether to accept the report or not. Algeria argued that because the Mission had not visited Sudan and because not all members had visited Chad, the report had no legal standing.⁸⁷ However, six of the thirteen African Group members argued that the report was legitimate; South Africa was not among the six.⁸⁸ Zambia pinpointed the underlying problem: bickering over procedural matters was a “way of diverting the attention of the Council from doing what [they] are expected to do.”⁸⁹

After the presentation of the Williams report, the EU and the African Group circulated two competing resolutions on the situation in Darfur. A compromise resolution adopted by consensus “took note” of the Williams report and declined to mention the Sudanese government or other purveyors of violence in Darfur.⁹⁰ The resolution created a new expert group to work closely with the Sudanese government to “foster the implementation” of various UN resolutions and recommendations on Darfur, and to monitor the human rights situation in the region.⁹¹ Although the expert group reported “few recommendations have been fully implemented or reportedly had a tangible impact on the ground,” they also noted some areas of improvement.⁹² Despite the promise provided by this report, the HRC “squandered” the work of the expert group and quietly ended its mandate in late 2007.⁹³ Darfur was placed under the mandate of the less influential and less well-resourced Special Rapporteur for Sudan.⁹⁴

85. *Id.* at 6.

86. *Id.* at 76.

87. Statement by Algeria, U.N.H.R.C., 4th Sess., 10th plen. mtg., HRC Video Archive (16 Mar. 2007), available at <http://www.un.org/webcast/unhrc/archive.asp?go=070316>.

88. Statements by Ghana, Senegal and Zambia, U.N.H.R.C., 4th Sess., 10th plen. mtg., HRC Video Archive (16 Mar. 2007), available at <http://www.un.org/webcast/unhrc/archive.asp?go=070316>; Statements by Cameroon, Mauritius and Nigeria, U.N.H.R.C., 4th Sess., 11th plen. mtg., Hrc Video Archive (16 Mar. 2007), available at <http://www.un.org/webcast/unhrc/archive.asp?go=070316>.

89. Statement by Zambia, U.N.H.R.C., 4th Sess., 10th plen. mtg, HRC Video Archive (16 Mar. 2007), available at <http://www.un.org/webcast/unhrc/archive.asp?go=070316>.

90. Situation of Human Rights in Darfur, HRC Res. 4/8, U.N. Doc. A/HRC/RES/4/8 (30 Mar. 2007).

91. *Id.*

92. Human Rights Council, *Human Rights Situations That Require the Council's Attention, Final Report on the Situation of Human Rights in Darfur*, ¶2, U.N. Doc. A/HRC/6/19 (28 Nov. 2007).

93. Human Rights Watch, *UN: Unacceptable Compromise by Rights Council on Darfur* (15 Dec. 2007), available at <http://www.hrw.org/news/2007/12/13/un-unacceptable-compromise-rights-council-darfur>.

94. *Id.*

In September 2008, the Special Rapporteur on human rights in the Sudan reported that she was denied access to certain officials and that one of her staff was denied a visa to Sudan.⁹⁵ She also reported that “the human rights situation on the ground remains grim” and cited concerns about an overall deterioration in the country.⁹⁶ The African Group, however, spoke of the “commendable interaction” that had always taken place between the HRC and the Sudanese government, claiming that there had been an “improvement in the situation on the ground,” and that it was thus “seriously considering” ending the mandate on Sudan.⁹⁷ However, Ghana broke from this narrative and noted that “grave violations” continue to occur in Sudan.⁹⁸ In concert with Burkina Faso and Zambia, Ghana urged the Sudanese government to adopt the HRC recommendations.⁹⁹ South Africa remained silent. In the end, the HRC passed a consensual resolution that extended the mandate for Sudan by only nine months, rather than the usual twelve months.¹⁰⁰ At the end of the nine months, during the HRC’s eleventh session, Egypt, on behalf of the African Group, introduced a resolution to discontinue the mandate on Sudan.¹⁰¹ In reply, the EU proposed amendments to the African Group’s draft resolution to extend the mandate for one year. The EU’s proposed amendments were adopted 20-19 (eight abstentions).¹⁰² The amended draft resolution was then adopted 20-18 (nine abstentions). South Africa was one of seven African countries to vote against the amendments,¹⁰³ and one of five to vote against the final resolution.¹⁰⁴

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95. CHR, *Human Rights Situations that Require the Council’s Attention: Report of the Special Rapporteur on the Situation of Human Rights in the Sudan*, ¶ 6, U.N. Doc. A/HRC/9/13 (2008) (by Simar Samar).
96. *Id.* ¶ 76.
97. Statement by Egypt (on behalf of the African Group), U.N.H.R.C., 9th Sess., 11th plen. mtg., HRC Video Archive (16 Sept. 2008), available at <http://www.un.org/webcast/unhrc/archive.asp?go=080916>. A summary of the meeting can be found at: Press Release, UNHRC, Human Rights Council Adopts Five Texts, Extends Mandates Of Special Procedures On Sudan And Burundi (24 Sept. 2008), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/B64084F92EA8ADB9C12574CE00596D3F?opendocument>.
98. *Id.*
99. ISHR, HUMAN RIGHTS COUNCIL, DAILY UPDATE, 9TH SESSION 4-5 (2008) (on file with author).
100. Situation of Human Rights in the Sudan, HRC Res. 9/17, U.N. Doc. A/HRC/RES/9/17 (18 Sept. 2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_17.pdf.
101. Situation of Human Rights in the Sudan, HRC Draft Res. 11/L.17, U.N. Doc. A/HRC/11/L.17 (16 June 2009), available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G09/142/34/PDF/G0914234.pdf?OpenElement>.
102. Statement by Germany (on behalf of the EU, Canada, Switzerland, Norway, Japan and the United States), U.N.H.R.C., 11th Sess., 29th plen. mtg., HRC Video Archive (18 June 2009), available at <http://www.un.org/webcast/unhrc/archive.asp?go=090618>.
103. The others were Angola, Cameroon, Djibouti, Egypt, Gabon, and Madagascar.
104. The others were Cameroon, Djibouti, Egypt, and Nigeria. Situation of Human Rights in the Sudan, *supra* note 79.

E. Democratic Republic of the Congo

Although the human rights situation in the Democratic Republic of the Congo (DRC) remains dire—it has no special procedures mandate—this was not always the case. The African Group and South Africa should bear much of the blame. Despite reports to contrary, in March 2008 the African Group argued that the 2006 presidential election in the DRC “had provided the country with a democratic environment conducive to the promotion and protection of human rights.”¹⁰⁵ The African Group also argued that the “mandate has not been to the benefit of the DRC” and because the government of the DRC did not welcome the mandate its renewal would be “counterproductive.”¹⁰⁶ The African Group proposed replacing the mandate on the DRC with a group of seven thematic mandate holders to report and make recommendations within their respective mandates on the problems in DRC.¹⁰⁷ The African Group’s proposal was adopted without a vote.¹⁰⁸

In November 2008, as fighting flared up in the province of North Kivu, France led a call for a special session on the DRC.¹⁰⁹ South Africa, despite “deploring” the violence that had affected “long-suffering people” of the DRC, was not among the signatories.¹¹⁰ Rather, South Africa associated itself with the African Group, which had initially tried to defer the special session. Once the special session was called, the African Group predictably tried (and succeeded) to weaken the HRC’s action on the DRC.¹¹¹ France proposed sending nine different special procedures to investigate the problems in Eastern DRC and to report at the HRC’s March 2009 session.¹¹² However, the African Group and its allies proposed their own resolution, which was adopted without a vote.¹¹³ In the words of UN Watch, the “toothless text” failed to “investigate the mass murder, rape and other war crimes that are making the Eastern Congo a living hell.”¹¹⁴

105. Statement by Egypt (on behalf of the African Group), U.N.H.R.C., 7th Sess., 34th plen. mtg., HRC Video Archive (20 Mar. 2008), available at <http://www.un.org/webcast/unhrc/archive.asp?go=080320>.

106. *Id.*

107. Technical Cooperation and Advisory Services in the Democratic Republic of the Congo, HRC Res. 7/20, ¶ 2, U.N. Doc. A/HRC/RES/7/20 (2008).

108. *Id.*

109. HRC, *Report of the Human Rights Council on its 8th Special Session*, at 6, ¶ 2, U.N. Doc. A/HRC/S-8/2 (16 Jan. 2009).

110. Statement by South Africa, U.N.H.R.C., 8th Spec. Sess., 1st plen. mtg., HRC Video Archive (18 June 2009), available at <http://www.un.org/webcast/unhrc/archive.asp?go=090618>.

111. ISHR, COUNCIL ALERT: HUMAN RIGHTS COUNCIL, 10TH SESSION 3-4 (2009).

112. HRC, *Report of the Human Rights Council on its 8th Special Session*, *supra* note 109, at 4-5 ¶ 10-12.

113. *Id.* at 8-9 ¶ 21-25.

114. *UN Watch Slams “Toothless” Resolution on Congo, in Speech to UN Rights Council Special Session*, UN WATCH (1 Dec. 2008), available at <http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1316871&ct=6421521>.

In March 2009, a year after the country mandate on the DRC was terminated, the EU made one more effort to reinstall the mandate on the DRC.¹¹⁵ The seven thematic mandate holders appointed by the HRC reported that the human rights situation had “further deteriorated” over the past year.¹¹⁶ The DRC government, by contrast, expressed “surprise” at such “statements which are diametrically opposed to the reality in the field.”¹¹⁷ The African Group, for its part, noted the DRC government’s “unwavering” commitment to improve the human rights situation in the country.¹¹⁸ Based on the remaining problems rather than the claimed achievements, the EU sought to appoint an independent expert to advise the DRC government on measures to end impunity, to strengthen victims’ access to justice, to end sexual violence, to protect and assist internally displaced persons, and to assess the progress made.¹¹⁹ However, the African Group then introduced its own draft resolution and forced a discussion of its text, rather than that of the EU.¹²⁰ The African Group’s resolution was upbeat about the progress made in the DRC. It did not criticize the DRC government, nor note its particular responsibilities, and it made no call for the establishment of a country mandate on the DRC.¹²¹ The draft did, however, ask the seven thematic special procedures, whose previous report it “noted,” to report to the HRC in one year.¹²² The EU then proposed amendments to the African text, including the condemnation of the various human rights violations and forming a group to assist the government.¹²³ However, the amendments were rejected in a close vote (18-21, eight abstentions), which again saw the African Group split, with South Africa among those who voted against the amendments,

115. ISHR, COUNCIL UPDATE – ITEM 4, D.R.C. HUMAN RIGHTS COUNCIL, 10TH SESSION (2009).

116. HRC, Combined Report on special procedures on technical assistance to the Government of the Democratic Republic of Congo and urgent examination of the situation in the east of the country, ¶ 22, U.N. Doc. A/HRC/10/59 (5 Mar. 2009).

117. Statement by Democratic Republic of the Congo, U.N.H.R.C., 10th Sess., 25th plen. mtg., HRC Video Archive (17 Mar. 2009), available at <http://www.un.org/webcast/unhrc/archive.asp?go=010>.

118. Statement by Egypt (on behalf of the African Group), U.N.H.R.C., 10th Sess., 25th plen. mtg., HRC Video Archive (17 Mar. 2009), available at <http://www.un.org/webcast/unhrc/archive.asp?go=090317>.

119. HRC, Technical Cooperation and Advisory Assistance in the Democratic Republic of Congo, ¶ 19, U.N. Doc. A/HRC/10/L.1 (12 Mar. 2009).

120. The African Group called for a vote on whether to vote on its resolution rather than that of the EU. The vote went the way of the African Group’s text, 30–15 (two abstentions). HRC, *Report of the Human Rights Council on its Tenth Session*, ¶ 796, U.N. Doc. A/HRC/10/29 (9 Nov. 2009).

121. HRC, Technical Assistance and Capacity-Building, Situation of Human Rights in the Democratic Republic of the Congo and the Strengthening of Technical Cooperation and Consultative Services, U.N. Doc. A/HRC/10/L.3 (17 Mar. 2009).

122. *Id.* ¶ 5.

123. HRC, Technical Cooperation and Advisory Assistance in the Democratic Republic of Congo, *supra* note 119, ¶ 19.

and Burkina Faso, Ghana, Mauritius, Senegal, and Zambia abstaining.¹²⁴ South Africa was then among the thirty-three countries (14 abstentions) to vote for the weak African Group resolution.¹²⁵

In both March 2010 and March 2011, the group of seven mandate holders reported that the human rights situation in the DRC had not improved.¹²⁶ In their March 2011 report the group also concluded that they had achieved all they could and stated that the DRC would be best served by a single mandate focused on the country.¹²⁷ This was never going to happen. The African Group's ensuing draft resolution "noted" the report as well the group's recommendation that their mandate be ended.¹²⁸ Nothing was put in its place.

IV. THEMATIC HUMAN RIGHTS ISSUES

South Africa has been much more willing to speak for victims of past and present abuses when the matter is organized under a theme. However, South Africa's interventions are tainted by three prominent characteristics: namely they constantly interpret matters as a conflict between North and South, work to curtail freedom of expression, and fail to honor the universality of human rights. The remainder of this section discusses South Africa's actions around the themes of race, religion and freedom of expression, sexual orientation, and socioeconomic rights.

A. Race-Related Human Rights Abuses

At the HRC, South Africa drew attention to the racially discriminatory aspects of migration, asylum, the fight against terrorism, and criminal imprisonment and sentencing. South Africa has been adamant that race-related issues should be discussed in the context of the Durban process, named after the city where the 2001 World Conference against Racism (WCAR) was held.¹²⁹

124. HRC, *Report of the Human Rights Council on its Tenth Session*, *supra* note 120, ¶ 802.

125. *Id.* ¶ 804.

126. Press Release, ISHR, Joint Report on DRC Calls for Establishment of Country Mandate (14 Apr. 2011), available at <http://www.ishr.ch/archive-council/1050-joint-report-on-drc-calls-for-establishment-of-country-mandate>.

127. *Id.*

128. HRC, The Human Rights Situation in the Democratic Republic of the Congo and the Strengthening of Technical Cooperation and Consultative Services, U.N. Doc. A/HRC/16/L.35 (2011).

129. Interview with International Civil Servant, in Geneva (23 Feb. 2012). See also Statement of South Africa, on behalf of African Group, U.N. Durbin Review Conference, U.N.

The 2001 conference was a controversial affair largely because of efforts to cast Israel's occupation of the Palestinian territories as racist, demands for an apology to and compensation for victims of past slavery, and widespread anti-Semitism on display at the parallel NGO conference.¹³⁰ In 2006, the General Assembly charged the HRC with preparing a review conference on the Durban Declaration and Programme of Action (DDPA).¹³¹ Although many considered WCAR to have been a disaster and the resultant Durban process a "huge banana peel,"¹³² South Africa outspokenly defended the Durban process.

Ahead of the review conference, many made a concerted effort to avoid the unpleasantness of the WCAR. The African Group's preliminary report presented by South Africa made no mention of Israel or the conflict in the Middle East. In another more ambiguous incident during the drafting of the report, South Africa suggested shortening the reference to the Holocaust.¹³³ Syria and Iran seized upon the mention of the Holocaust, with the former claiming "it is unclear what percentage of Jews were killed in the Holocaust, some say three million, some say one, some say even less."¹³⁴ Argentina and various European states objected, with Denmark stating it was "appalled" by the discussion.¹³⁵ South Africa quickly closed off the nasty direction of the discussion by accepting the EU's proposed text.¹³⁶ Still, by February 2009—the conference was to be held in April—the draft outcome document still contained numerous paragraphs on Israel. Canada, Germany, Poland, the Netherlands, and the US decided to boycott the conference, decisions South Africa described as "regrettable."¹³⁷

Durbin Review Conference Video Archive (24 Apr. 2006), available at <http://www.un.org/webcast/durbanreview/archive.asp?go=090424#>; Statement of South Africa (on behalf of the Africa Group), U.N. Durbin Review Conference Prep. Comm., 2d Substantive Sess., HRC Video Archive (6 Oct. 2008), available at <http://www.un.org/webcast/unhrc/archive.asp?go=081006>. For more information on the Durbin Conference, see World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa 31 Aug.-7 Sept. 2001, available at <http://www.un.org/WCAR/>.

130. Press Release, Dep't of Pub. Info., Discrimination Against Minorities, Middle East, Reparations for Slavery Among Issues Raised at World Conference Against Racism (1 Sept. 2001), available at <http://www.un.org/WCAR/pressreleases/rd-d21.html>.
131. HRC, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council," U.N. Doc. A/HRC/2/L.27/Rev.2 (22 Nov. 2006).
132. HON. RAYNELL ANDREYCHUK & HON. MOBINA S.B. JAFFER, CANADIAN SENATE STANDING COMMITTEE ON HUMAN RIGHTS, CANADA AND THE UNITED NATIONS HUMAN RIGHTS COUNCIL: A TIME FOR SERIOUS RE-EVALUATION 34 (2008).
133. *Intersessional Working Group for the Durban Review Conference*, INTERNET CENTRE ANTI-RACISM EUROPE (22 Jan. 2009), available at http://www.icare.to/livereport/index.php?option=com_content&view=article&id=160%3Ageneve-januari-2009&catid=4%3Aarchive-reports&lang=en.
134. *Id.*
135. *Id.*
136. *Id.*
137. Nkosazana Dlamini Zuma, *Statement on behalf of the African Group, Durban Review Conference* (20 Apr. 2009), available at <http://www.dfa.gov.za/docs/speeches/2009/dzum0421.html>.

The fear that the review conference would become a platform for anti-Semites was soon realized. The Iranian president and Holocaust denier, Mahmoud Ahmadinejad, delivered a poisonous speech in which he complained that Western support for Israel—which he referred to as being made up of “genocidal racists”—was established under the “pretext” of compensating for racism in Europe.¹³⁸ The ambassadors of France, Spain, and the United Kingdom walked out in response. South Africa, a country that has repeatedly spoken about the need to curb freedom of expression to prevent hateful speech, said nothing about the Iranian leader’s views, but instead expressed its “concern at the manner in which some parties chose to articulate their opposition to the statement of a sovereign head of state.”¹³⁹

At the WCAR, African states demanded an apology and reparations for slavery. Most European states were willing to apologize, but not to recognize slavery as a crime against humanity or to pay reparations. According to Patrick Bond, former South African president Thabo Mbeki “colluded with the EU” to defeat the demand of NGOs and African leaders for slavery reparations.¹⁴⁰ After the WCAR, however, South Africa came out more strongly in favor of reparations.¹⁴¹ The issue of slavery continues to crop up in the HRC, but demands for reparations have significantly decreased. South Africa, however, has continued to raise the matter, including recently during a special session on the Syrian government’s crackdown on an uprising that began in March 2011.¹⁴² In response to a joint statement by special procedures mandate holders that recommended Syrian victims’ families should be compensated, South Africa expressed the hope that the mandate holders, for the sake of “consistency and impartiality,” would also demand compensation for the victims of transatlantic slavery and colonization.¹⁴³ While the moral case for reparations for slavery is very strong, South Africa’s invocation of reparations for slavery here is highly selective. Horrific as the transatlantic slave trade was, during the drafting of the outcome document of for the 2009 Durban Review Conference, the African Group sought the deletion of reference to both the Arab slave trade and the involvement of Africans themselves in the

138. Mahmoud Ahmadinejad, *Ahmadinejad Speech: Full Text*, BBC NEWS (21 Apr. 2009), available at http://news.bbc.co.uk/2/hi/middle_east/8010747.stm.

139. Statement by South Africa, U.N. Durban Review Conference, 12th mtg., Statement by South Africa, U.N. Durbin Review Conference Video Archive (24 Apr. 2009), available at <http://www.un.org/webcast/durbanreview/archive.asp?go=090424>.

140. PATRICK BOND, AFRICAN DEVELOPMENT/GOVERNANCE, SOUTH AFRICAN SUBIMPERIALISM AND NEPAD 25–26 (2004), available at http://www.networkideas.org/feathm/dec2004/Conference_Papers/South_African_Subimperialism_NEPAD_PB.pdf.

141. Zuma, *supra* note 60.

142. Statement by South Africa, U.N.H.R.C., 16th Spec. Sess., 2nd plen. mtg., HRC Video Archive (29 Apr. 2011), available at <http://www.un.org/webcast/unhrc/archive.asp?go=0116>.

143. *Id.*

slave trade.¹⁴⁴ Yet former Senegal president Abdoulaye Wade has said that if reparations were due, then he would also be liable, as his ancestors had thousands of slaves.¹⁴⁵ South Africa's selective morality detracts from the justness of the cause and suggests that slavery is not just about the victims, but also a stick with which to beat the West.

B. Freedom of Expression and the Defamation of Religion

HRC debates about the right to free expression have been dominated by unhappiness over the portrayal of Islam in the West, which is alleged to be offensive, demeaning, and even hateful. In the HRC, as well as in the General Assembly plenary and the General Assembly Third Committee, the OIC and its allies have sought to reshape the international normative and legal landscape to address their concerns.¹⁴⁶ However, the OIC's proposals threaten various freedoms—of religion and belief, of speech, of the press—and potentially legitimize the oppression of religious minorities and political critics. The battle between free expression and more reverence for religion continues to surface in various aspects of the HRC's work.

Central to the OIC's efforts have been a series of "combating defamation of religions" resolutions. The first such resolution was presented in the General Assembly in 1999 and was presented in the HRC every year from 2007 until 2010.¹⁴⁷ The defamation resolutions purported to be about all religions, but were mostly about Islam.¹⁴⁸ Claims that the "defamation of religions is a serious affront to human dignity leading to a restriction on the freedom of religion" were characteristic.¹⁴⁹ The resolutions further expressed concern over a global rise in the number of statements attacking Islam; about states profiling and monitoring Muslims; about the equation of "any religion" with terrorism;¹⁵⁰ and about "the deliberate stereotyping of religions, their adherents and sacred persons in the media, as well as programs and agendas pursued by extremist organizations and groups aimed at creating

144. Press Release, UN Watch, Highlights from Durban II Drafting Committee Meeting (23 Jan. 2009), available at <http://www.unwatch.org/site/apps/nlnet/content2.aspx?c=bdKKISNqEmG&b=1316871&ct=6645721>.

145. Rhoda Howard-Hassmann, *Reparations to Africa and the Group of Eminent Persons*, in *CAHIERS D'ÉTUDES AFRICAINES* 173–74, ¶ 7 (2004).

146. About OIC, ORGANIZATION OF ISLAMIC COOPERATION, available at <http://www.oicun.org/2/23/>.

147. Dimitrina Petrova, "Smoke and Mirrors": *The Durban Review Conference and Human Rights Politics at the United Nations*, 10 *HUM. RTS. L. REV.* 129 (2009).

148. *Id.*

149. Combating Defamation of Religions, HRC Res. 13/16, ¶ 2, U.N. Doc. A/HRC/RES/13/16 (15 Apr. 2010).

150. Combating Defamation of Religions, HRC Res 7/19, ¶ 2, U.N. Doc. A/HRC/RES/7/19 (27 Mar. 2008).

and perpetuating stereotypes about certain religions, in particular when condoned by governments.”¹⁵¹ Most controversially, the resolutions noted:

that everyone has the right to freedom of expression, which should be exercised with responsibility and may therefore be subject to limitations as provided by law and necessary for respect of the rights or reputations of others, protection of national security or of public order, public health or morals and respect for religions and beliefs.¹⁵²

Critics objected to the defamation of religion resolutions on a number of different grounds. They objected to the emphasis on Islam; questioned the idea that religions can be defamed; argued that it is not religions that should be protected, but the people who practice a specific religion; and charged that the defamation resolutions “entrench repression and violence against non-believers, members of religious minorities and political dissidents,” weaken and distort current international human rights guarantees on non-discrimination and freedom of expression and of religion, and are ripe for abuse.¹⁵³

In the HRC, the defamation resolutions were always put to a vote. The resolution gradually lost support, passing with only 20-17 in 2010.¹⁵⁴ In March 2011, the defamation resolution was replaced by the consensually adopted resolution on religious intolerance.¹⁵⁵ South Africa was one of the strongest defenders of the defamation resolutions and always voted in favor.¹⁵⁶ In fact, between 2008 and 2010 South Africa and Indonesia, an OIC member, were the only two countries that Freedom House classifies as “free” to vote for the resolution.¹⁵⁷ In 2010, Zambia voted against the resolution, while Cameroon, Ghana, Madagascar, and Mauritius abstained.¹⁵⁸ Furthermore, India, which holds one of the world’s largest Muslim populations, abstained on all four votes on the defamation resolutions, citing concerns that the notion of defamation could be abused to suppress free expression.¹⁵⁹

151. Combating Defamation of Religions, HRC Res 10/22, ¶ 4, U.N. Doc. A/HRC/RES/10/22, (27 Mar. 2009).

152. Combating Defamation of Religions, HRC Res. 4/9, ¶ 10, U.N. Doc. A/HRC/RES/4/9, (3 Mar. 2007).

153. *Over 100 Organisations Call on UN Human Rights Council to Reject “Defamation” and “Denigration” of Religions*, IFEX (9 Mar. 2011), available at http://www.ifex.org/international/2011/03/09/defamation_of_religions/.

154. Combating Defamation of Religions, HRC Res. 13/16, *supra* note 149.

155. Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence Against, Persons Based on Religion or Belief, HRC Res. 16/18, U.N. Doc. A/HRC/RES/16/18 (12 Apr. 2011).

156. Combating Defamation of Religions, HRC Res. 13/16, *supra* note 149, at 5.

157. FREEDOM HOUSE, *FREEDOM IN THE WORLD 2008–2010*.

158. Combating Defamation of Religions, HRC Res. 13/16, *supra* note 149.

159. Statement of India, U.N.H.R.C., 4th Sess., 31st plen. mtg., HRC Video Archive (30 Mar. 2007), available at <http://www.un.org/webcast/unhrc/archive.asp?go=070330>.

In the context of the defamation resolutions, one should also mention South Africa's stance on HRC Resolution 6/37, "Elimination of all forms of religious intolerance and of discrimination based on religion or belief," which was sponsored by the EU.¹⁶⁰ The gist of the resolution was to promote tolerance through education and dialogue. The resolution also extended the mandate of the Special Rapporteur on freedom of religion or belief.¹⁶¹ The OIC objected to a number of aspects of the resolution: its failure to enshrine respect for all religions; its insistence on the "right" to change one's religion; and an approach that sees the solution in dialogue and tolerance.¹⁶² The OIC subsequently abstained from voting for the December 2007 resolution, which was adopted by 29-0 (eighteen abstentions).¹⁶³ South Africa also abstained, finding it "inconceivable" that the special rapporteur's mandate did not include "the key issue of monitoring the role that may be played by the media in inciting religious hatred," which South Africa regarded as a "glaring mistake."¹⁶⁴

In March 2009, South Africa was the only state to vote against Resolution 10/25, which was adopted 22-1 (twenty-four abstentions).¹⁶⁵ This EU-sponsored resolution built on the aforementioned Resolution 6/37 in its emphasis on dialogue, tolerance, and protection for religious minorities. Resolution 10/25 additionally urged states to ensure that persons of certain religions are not discriminated against in their access to social benefits, public services, humanitarian assistance, housing, etc.¹⁶⁶ The OIC raised various objections to the resolution but nevertheless said that it supported "the elimination of religious intolerance" and would thus abstain.¹⁶⁷ South Africa defended its No vote by questioning the resolution's insistence that the media has "an important role to play in promoting tolerance, respect for religious and cultural diversity."¹⁶⁸ South Africa wanted a greater castigation

160. Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, HRC Res. 6/37, U.N. Doc. A/HRC/RES/6/37, (14 Dec. 2007).

161. *Id.* ¶ 18.

162. Statement by Pakistan on behalf of the Organization of Islamic Conference, U.N.H.R.C., 6th Sess., 34th plen. mtg., Item 3, HRC Video Archive (14 Dec. 2007), available at <http://www.un.org/webcast/unhrc/archive.asp?go=071214>.

163. Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, HRC Res. 6/37, *supra* note 160, at 9. Cuba, India, Russia, and six African countries voted for the resolution.

164. Statement by South Africa, U.N.H.R.C., 6th Sess., 33rd plen. mtg., HRC Video Archive (14 Dec. 2007), available at <http://www.un.org/webcast/unhrc/archive.asp?go=071214>.

165. Discrimination Based on Religion or Belief and its Impact on the Enjoyment of Economic, Social and Cultural Rights, HRC Res. 10/25, U.N. Doc A/HRC/RES/10/25 (27 Mar. 2009).

166. *Id.*

167. Statement by Pakistan (on behalf of the Organization of Islamic Conference), U.N.H.R.C., 10th Sess., 44th plen. mtg., HRC Video Archive (27 Mar. 2009), available at <http://www.un.org/webcast/unhrc/archive.asp?go=090327>.

168. Statement by South Africa, U.N.H.R.C., 10th Sess., 44th plen. mtg., HRC Video Archive (27 Mar. 2009), available at <http://www.un.org/webcast/unhrc/archive.asp?go=090327>.

of the media for its alleged role “in perpetuating the negative stereotyping of religions and incitement to religious hatred.”¹⁶⁹ South Africa also pointed to the resolution’s mention of socioeconomic rights without any mention of their justiciability as a further reason for its vote.¹⁷⁰

Yet another instance of South Africa acting to limit freedom of expression revolves around the mandate for the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. During the HRC’s seventh session in March 2008, Canada submitted a draft resolution to extend the mandate of the aforementioned Special Rapporteur.¹⁷¹ However, Pakistan, on behalf of the OIC, put forward an amendment, co-sponsored by the African and Arab groups, requesting the Special Rapporteur to report on instances in which the abuse of the right of freedom of expression constitutes an act of racial and religious discrimination.¹⁷² This amendment, Pakistan claimed, would make the resolution more “balanced.”¹⁷³ Those who opposed the amendment argued that it shifted the focus of the resolution from the protection of the right of freedom of expression to limitations of that right.¹⁷⁴ However, the amendment was adopted by a vote of 27-17 (three abstentions), with South Africa voting for the amendment.¹⁷⁵ Cuba then proposed adding “the importance for all forms of media to report and to deliver information in a fair and impartial manner” to an article on the importance of the media for freedom of expression.¹⁷⁶ Cuba’s amendment was adopted by 29-15 (three abstentions), with South Africa again voting in favor.¹⁷⁷ The twice-amended resolution was adopted 32-0 (15 abstentions), with South Africa voting in favor and the original sponsors having withdrawn their support.¹⁷⁸

Free expression has also come under threat through efforts to write additional standards into international law.¹⁷⁹ In this push, South Africa has

169. *Id.*

170. *Id.*

171. Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, HRC Res. 7/36. U.N. Doc. A/HRC/RES/7/36 (28 Mar. 2008).

172. ISHR, HUMAN RIGHTS COUNCIL, DAILY UPDATE, 7TH SESSION 13 (2008), available at http://olddoc.ishr.ch/hrm/council/dailyupdates/session_007/28_march_2008.pdf.

173. *Id.*

174. *Id.*

175. HRC, *Report of the Human Rights Council on its Seventh Session*, ¶ 305, U.N. Doc. A/HRC/7/78 (14 July 2008).

176. Statement by Cuba, U.N.H.R.C., 7th Sess., 42nd plen. mtg., HRC Video Archive (28 Mar. 2008), available at <http://www.un.org/webcast/unhrc/archive.asp?go=080328>.

177. HRC, *Report of the Human Rights Council on its Seventh Session*, *supra* note 175, ¶ 309.

178. Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *supra* note 171.

179. For more on the politicking over additional standards, Petrova, *supra* note 147, at 7.

staunchly supported the initiative and even acted as chair of the relevant committee, the Ad Hoc Committee for the elaboration of standards.¹⁸⁰ In their pursuit, South Africa and its allies dismissed numerous UN reports that found no need for such additional standards or that warned of the dangers of limiting free speech.¹⁸¹ Consider, for example, Article 20(2) of the International Covenant on Civil and Political Rights, which is often brought up in the discussion about additional standards. Article 20(2) explicitly states, “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”¹⁸² Article 20(2), a rights-limiting provision, has always been interpreted narrowly; the provision has its origins in the type of incitement used against the Jews and other groups during the Holocaust.¹⁸³ For South Africa, such a narrow interpretation is not enough; it wants, among other things, an expanded notion of “incitement to religious hatred.”¹⁸⁴ To see what this might mean, consider a proposal from South Africa’s ally on the issue of additional standards, the OIC, to criminally prosecute those who fall foul of the “legal prohibition of publication of material that negatively stereotypes, insults, or uses offensive language on matters regarded by followers of any religion or belief as sacred or inherent to their dignity as human beings.”¹⁸⁵

C. Sexual Orientation and Gender Identity

In June 2011, South Africa tabled a resolution titled “Human rights, sexual

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180. Statement by South Africa, U.N.H.R.C., 10th Sess., 38th plen. mtg., HRC Video Archive (24 Mar. 2009), available at <http://www.un.org/webcast/unhrc/archive.asp?go=090324>.
181. U.N. High Commissioner for Human Rights, Report on Incitement to Racial And Religious Hatred and the Promotion of Tolerance, U.N. Doc. A/HRC/2/6 (20 Sept. 2006); UN Group of Five Experts, Report on the Content and Scope of Substantive Gaps in the Existing International Instruments to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, at 130, U.N. Doc. A/HRC/4/wg.3/6 (27 Aug. 2007). For a report that instructed the Council to “to consider the possibility of adopting complementary standards,” see Special Rapporteur on Freedom of Religion or Belief and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Report pursuant to H.R.C. Dec. 1/107, at 61, U.N. Doc. A/HRC/2/3 (20 Sept. 2006).
182. International Convention on Civil and Political Rights, *adopted* 16 Dec. 1996, G.A. Res. 21/2200, U.N. GAOR, 21st Sess., art. 20(2), U.N. Doc. A/Res/21/2200 (1996) (*entered into force* 23 March 1976).
183. U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, THE DANGEROUS IDEA OF PROTECTING RELIGIONS FROM “DEFAMATION”: A THREAT TO UNIVERSAL HUMAN RIGHTS STANDARDS 5 (2009), available at http://www.uscirf.gov/images/stories/pdf/uscirf_policy_focus_final.pdf.
184. U.N.H.R.C., 10th Sess., 38th plen. mtg., *Statement by South Africa*, H.R.C. Video Archive (24 Mar. 2009), available at <http://www.un.org/webcast/unhrc/archive.asp?go=090324>.
185. Permanent Mission of Pakistan to the United Nations and Other International Organizations, Pakistan Submission to Ad Hoc Committee on the Elaboration of Complementary Standards, in COMPILATION OF SUBMISSIONS 38–41 (2009), available at <http://www.eyeontheun.org/assets/attachments/documents/7752.pdf>.

orientation, and gender identity," which was adopted by 23-19 (three abstentions).¹⁸⁶ The resolution expressed grave concern at violence and discrimination committed against people because of their sexual orientation, requested a report on violence and discriminatory laws and practices against persons because of their sexual orientation, and called for dialogue on the report's findings.¹⁸⁷ South Africa was widely praised for its leadership on such a progressive resolution and for its courage in the face of vehement opposition from most of the OIC and the African Group, South Africa's usual allies.¹⁸⁸

Commendable as the June 2011 resolution is, in March 2011 South Africa had presented a draft resolution that was much more in keeping with South Africa's usual actions on the HRC: speaking the language of human rights but in reality blocking their advancement. The March 2011 draft resolution sought to establish an open-ended working group to define "sexual orientation" and its scope and parameters in international human rights law.¹⁸⁹ The draft resolution further stated that the aforementioned working group should be the "single modality and framework" for all HRC deliberations on sexual orientation.¹⁹⁰ This meant that no further discussion on matters related to sexual orientation would be permitted until the meaning of sexual orientation in the context of international law had been defined. Under pressure from the United States, which threatened to put forward its own draft resolution, South Africa withdrew its draft.¹⁹¹ Further pressure from international and especially South African civil society was decisive in pushing South Africa towards the progressive resolution of June 2011.

D. Development and Economic Rights

Yet another source of disagreement on the HRC has been over the status of and duties associated with economic rights. At bottom, the dispute is over

186. Human Rights, Sexual Orientation and Gender Identity, HRC Res. 17/. . ., U.N. Doc. A/HRC/17/L.9/Rev.1 (15 June 2011).

187. *Id.*

188. Press Release, ISHR, Historic Decision: Council Passes First-Ever Resolution on Sexual Orientation and Gender Identity (17 June 2011), *available at* <http://www.ishr.ch/news/historic-decision-council-passes-first-ever-resolution-sexual-orientation-gender-identity>. For criticism of South Africa from the African Group, see: Statement by Nigeria (On Behalf of the African Group, U.N.H.R.C., 17th Sess., 31st plen. mtg., HRC Video Archive (17 June 2011), *available at* <http://www.un.org/webcast/unhrc/archive.asp?go=110617>.

189. The imperative need to respect the established procedures and practices of the General Assembly in the elaboration of new norms and standards and their subsequent integration into existing international human rights law, HRC Res. 16/. . . ¶ 1, U.N. Doc. A/HRC/16/L.27 (21 Mar. 2011).

190. *Id.* ¶ 2.

191. Press Release, ISHR, South Africa Tables Historic Resolution on Sexual Orientation and Gender Identity (12 June 2011), *available at* <http://www.ishr.ch/news/south-africa-tables-historic-resolution-sexual-orientation-and-gender-identity>.

who should carry the burden of securing the various economic rights that are claimed. Developing countries look to the international community to carry a larger burden, whereas industrialized states insist that the state is primary in realizing the economic rights of its people. Central to these disputes are assertions of a right to development,¹⁹² which in turn have been accompanied by claims that economic rights are just as important as political rights and that all rights are indivisible.

During HRC sessions, South Africa has frequently drawn attention to economic rights. In its most recent foreign policy blueprint, South Africa declared its intention to seek “the acknowledgement of economic, social and cultural rights [as being] on par with all other human rights” and to work with the NAM “to develop a legally binding instrument on the right to development.”¹⁹³ However, there are two problematic aspects of South Africa’s approach to economic rights.

The first relates to South Africa’s insistence that political and economic rights are equally important. The concern here is not with the vapidness of a claim of equivalence:¹⁹⁴ Which political and which economic rights are we talking about? Is the right to not be tortured just as important as the right to housing? Rather, claims that political and economic rights are equally important create space for states to deflect attention away from their violations of political rights by pointing to their progress on realizing certain economic rights.¹⁹⁵ Furthermore, although South Africa has spoken up to remind states that political rights are also important,¹⁹⁶ it frequently neglects political rights. In its comments on Singapore’s UPR presentation, for example, South Africa praised Singapore’s economic achievements but said nothing about the curtailment of political freedoms in the country.¹⁹⁷ In fact, South Africa encouraged Singapore to “maintain this focus.”¹⁹⁸ Moreover, South Africa has signed on to resolutions that open the door to legitimize authoritarian systems, such as the Cuba-sponsored resolution on international solidarity, which claims that it is “persuaded that sustainable development can be promoted by peaceful coexistence, friendly relations and cooperation among states with different social, economic or political systems.”¹⁹⁹

192. Bonny Ibhawoh, *The Right to Development: The Politics and Polemics of Power and Resistance*, 33 HUM. RTS. Q. 76 (2011).

193. S. Afr. Dep’t. Int’l Relations & Cooperation, *supra* note 9, at 19.

194. For a critical perspective, see Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 CAL. W. INT’L L.J. 473 (1985).

195. Ibhawoh, *supra* note 192, at 76, 95.

196. ISHR, HUMAN RIGHTS COUNCIL WORKING GROUP ON THE FUTURE SYSTEM OF EXPERT ADVICE, HIGHLIGHTS, WEDNESDAY 25 APRIL 2007, AFTERNOON (2007), available at http://olddoc.ishr.ch/hrm/council/wg/wg_reports/highlights/wgexpert_highlights_25_april_07.pdf.

197. Statement by South Africa, U.N.H.R.C., 11th Sess., 9th plen. mtg., HRC Video Archive (6 May 2011), available at <http://www.un.org/webcast/unhrc/archive.asp?go=110506>.

198. *Id.*

199. Human Rights and International Solidarity, HRC Res. 6/3, U.N. Doc. A/HRC/RES/6/3 (27 Sept. 2007). The resolution was adopted 32-12 (one abstention). South Africa voted in favor.

The second concern relates to the state's duty to secure the economic wellbeing of its people. The original Declaration on the Right to Development was explicit: "the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their states."²⁰⁰ However, in HRC resolutions, states are assigned "the primary responsibility . . . for the creation of national and international conditions favourable to the realization of the right to development."²⁰¹ The responsibilities of national governments are reduced, while blame and duty claims are pushed beyond the national level. International factors no doubt often contribute to local poverty, but the governments of poor countries should also bear much blame in this regard. South Africa repeatedly reminds the international community of its duties to the poor, but has been unwilling to blame the governments of poor countries or to stress their duties. To take one example, during South Africa's comment on Zimbabwe's UPR presentation, South Africa noted that Zimbabwe faces many obstacles to improving its human rights situation, among which South Africa chose to single out economic sanctions, rather than the government's repression and economic mismanagement.

E. Universal Periodic Review

One of the biggest flaws of the CHR was its selective scrutiny of abusive regimes; Cuba, for example, received a lot of attention, while Saudi Arabia did not. To address the selectivity problem, the creators of the HRC gave the new body a universal peer review mechanism whose regular reviews of all states were to be objective, universal, and cooperative.²⁰² However, many details were left unspecified; the modalities of the UPR were to be finalized during the HRC'S first year. During this time, it was quickly agreed that the UPR would be based on a report on the human rights situation in a specific country. However, many disagreements remained.

From the beginning, the African Group and South Africa argued for a mechanism that would leave states with maximal control over the final report. This would limit opportunities for criticism and would yield recommendations with as little binding power as possible. There are many examples of African efforts to make the UPR as unthreatening as possible. South Africa argued that a national report, drawn up by the state, should be the basis of

200. Declaration on the Right to Development, G.A. Res 41/128, U.N. Doc. A/RES/41/128 (4 Dec. 1986).

201. The Right to Development, HRC Res. 12/23, U.N. Doc. A/HRC/RES/12/23 (2 Oct. 2009); The Right to Development, HRC Res. 21/32, U.N. Doc. A/HRC/RES/21/32 (11 Oct. 2012).

202. G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (3 Apr. 2006).

review,²⁰³ thus marginalizing other sources of information (for example, from NGOs, special procedures, UN treaty bodies, and the OHCHR).²⁰⁴ The African Group said the national report should be written by states, with the option of consulting with national NGOs.²⁰⁵ The African Group further maintained that NGOs should play no role at the international (HRC) level.²⁰⁶ This was problematic because many states are hostile to NGOs and it would be easier for these local NGOs to speak before an international organization. The African Group's proposal would also exclude influential international NGOs like Amnesty International and Human Rights Watch from the process.

As for what to do when the state under review did not accept the recommendations made to it, the African Group dismissed the need for a vote and argued instead that the HRC should only adopt recommendations that had the consent of the concerned state.²⁰⁷ This would effectively give the state under review veto power over the HRC's decision.²⁰⁸ South Africa strongly defended the African position, arguing that a consensus outcome was obligatory because the role of the international community was limited to providing assistance.²⁰⁹

There was also some debate about the frequency of country reviews. Pakistan, on behalf of the OIC, proposed that the frequency should depend on a state's level of development, with developed countries reviewed every three years and developing countries every five to seven years.²¹⁰ The African Group wanted a cycle of three to five years, but agreed with the principle that developed and developing countries should be treated differently. This meant that countries with lesser domestic human rights problems should be reviewed more often than countries that typically have more serious human rights problems. Moreover, South Africa originally wanted the six weeks set aside for the UPR process to take place during the HRC's regular sessions, which would have had the effect of displacing the HRC's other work.²¹¹

203. ISHR, HUMAN RIGHTS COUNCIL WORKING GROUP TO DEVELOP THE MODALITIES OF THE UNIVERSAL PERIODIC REVIEW, 3RD SESSION 7 (2007), available at http://olddoc.ishr.ch/hrm/council/wg/wg_reports/wg_upr_03.pdf.

204. Allehone M. Abebe, *Of Shaming and Bargaining: African States and the Universal Periodic Review of the U. N. Human Rights Council*, 9 HUM. RTS. L. REV. 1, 11 (2009).

205. ISHR, HUMAN RIGHTS COUNCIL WORKING GROUP TO DEVELOP THE MODALITIES OF THE UNIVERSAL PERIODIC REVIEW, 3RD SESSION, *supra* note 203, at 7.

206. *Id.*

207. *Id.* at 10.

208. *Id.* at 9.

209. *Id.* at 10.

210. ISHR, HUMAN RIGHTS COUNCIL, WORKING GROUP TO DEVELOP THE MODALITIES OF THE UNIVERSAL PERIODIC REVIEW (UPR) GENEVA 4 (2006), available at http://olddoc.ishr.ch/hrm/council/wg/wg_reports/wg_upr_nov_2006.pdf.

211. US Mission Geneva, Cable No. 07GENEVA1656, *Human Rights Council Organizational Mtg.* (25 Jun. 2007), available at <http://wikileaks.org/cable/2007/06/07GENEVA1656.html>.

Although not all of the South African and the African Group's proposals were adopted, the modalities that were eventually adopted put states in a very dominant position. Even so, it was still possible to ask tough questions during the review. When Western states appeared for review, South Africa went straight to the biggest human rights problems in these states. South Africa thus raised questions about racism and xenophobia (Belgium, Denmark, Germany, Netherlands, Norway, Portugal, and Sweden), immigrants (France, Germany, and Sweden), indigenous peoples (Australia, Canada, New Zealand, and Sweden), gender equality or sexism (Australia, Netherlands, and Sweden), and discrimination on the basis of sexual orientation (Australia). South Africa's interventions on Western states' presentations were tough and terse, but largely reasonable.

However, despite a declaration from South Africa's current foreign minister, Maite Nkoane-Mashabane, that the review process should be "conducted and finalised in an open, transparent, and fair manner,"²¹² South Africa has failed to be tough on developing countries. It has occasionally asked hard questions of developing countries, such as Chad²¹³ and Russia,²¹⁴ but generally South Africa avoided suggestions that the state under review is violating political or civil rights. South Africa commented on the first-time presentations of Algeria, Azerbaijan, Burundi, Botswana, the Democratic Republic of Congo, Malaysia, Pakistan, Rwanda, Saudi Arabia, and Singapore without raising concerns about violations of political or civil freedoms. When South Africa did touch upon such violations, it did so briefly and through a cloud of praise, thanks, and excuses. South Africa's recommendations that Swaziland protect the institutions intended to protect democracy, that Cuba "look into the improvement of . . . access to justice,"²¹⁵ and that China intensify its efforts at fostering civil society participation²¹⁶ were as tough as South Africa got on these countries.

V. CONCLUSION

This article provided considerable evidence that apart from South Africa's eventual stance on sexual orientation and, on a charitable reading, its stances on racism and economic rights, South Africa's actions at the HRC have de-

212. Nkoane-Mashabane, *supra* note 5.

213. Statement by South Africa, U.N.H.R.C., 5th UPR, 3rd Plen. Mtg, HRC Video Archive (5 May 2009), available at <http://www.un.org/webcast/unhrc/archive.asp?go=090505>.

214. Statement by South Africa, U.N.H.R.C., 4th UPR 5th Plen. Mtg, HRC Video Archive (4 Feb. 2009), available at <http://www.un.org/webcast/unhrc/archive.asp?go=090204>.

215. Statement by South Africa, U.N.H.R.C., 4th UPR 7th Plen. Mtg, HRC Video Archive (5 Feb. 2009), available at <http://www.un.org/webcast/unhrc/archive.asp?go=090205>.

216. Statement by South Africa, U.N.H.R.C., 4th UPR 11th Plen. Mtg, HRC Video Archive (9 Feb. 2009), available at <http://www.un.org/webcast/unhrc/archive.asp?go=090209>.

liberately obstructed international progress on human rights. When one puts together South Africa's efforts to weaken the UPR, its objection to country-specific mandates and even to criticism of specific countries, its complaints about the use of special sessions to focus on specific countries,²¹⁷ its repeated votes in favor of making the staff of the OHCHR "more representative," and its support for a code of conduct for special rapporteurs, then it becomes clear that South Africa has been after a wholesale dismantling of the HRC's ability to independently assess and put pressure on a specific country over its human rights record. South Africa's actions on the HRC confirm the claims of those who argue that the country has become a defender of unpalatable regimes and an obstacle to the international promotion of human rights.

When Kofi Annan first presented his plans for a new United Nations human rights body he explicitly argued that only states with a strong commitment to human rights should become members. Annan's proposal stems from a liberal view that those who respect human rights at home are more likely to work for their promotion internationally. Few would question that South Africa is serious about respecting human rights domestically. However, there is a disjuncture between South Africa's domestic commitments and its foreign policy, which, as this article has shown, frequently hinders the international promotion of human rights. Contrast, for example, South Africa's behavior with that of Zambia, a country much poorer than South Africa and holding only a "partly free" ranking from Freedom House, but which has been a far stronger defender of human rights at the HRC. South Africa's (and Zambia's) actions on the Council thus raise questions about the link between regime type and support for human rights and points to a fruitful avenue for future research.

217. Abebe, *supra* note 204, at 1–35.