VOLUME 52, NUMBER 2, SUMMER 2011

Hobbling the Monitors: Should U.N. Human Rights Monitors be Accountable?

Philip Alston

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The critical issue examined in this Article is whether a group of monitors explicitly created to hold governments to account can be subjected to a strong accountability regime controlled by those same governments, without destroying the independence that is considered to be the system's hallmark. In 2007, a group of powerful governments pushed through a Code of Conduct to regulate the activities of Special Rapporteurs ("SRs")—the United Nations' main system of human rights monitoring by independent experts. The same group has now proposed the establishment of a Legal Committee to enforce compliance with the Code through sanctions. Other governments, the SRs, and civil society groups are highly critical of the way the Code has been used so far to stifle the work of the monitors and strongly oppose the creation of any compliance mechanism. The Article notes the powerful pressures which have succeeded in insisting that almost all international actors should be accountable to their principals, and explores the strongest case that can be made for exempting SRs from this general trend. It concludes that existing forms of accountability are weak, and probably inadequate, but that serious concerns about the undermining of the SRs' independence are also warranted. It calls for a new approach that recognizes the multifaceted nature of the notions of independence and accountability and ends with a specific proposal for a legal committee designed to strengthen both notions and enhance the legitimacy of the system as a whole.

Introduction

A central dilemma in the human rights field is whether United Nations-appointed experts who monitor governmental human rights violations should be held to account by those same governments within the U.N. Human Rights Council ("HRC"). This apparently straightforward question is at the heart of a heated debate currently taking place within the United Nations. The question immediately raises a series of concerns. Would a substantively demanding type of accountability in the form of a compliance mechanism be fundamentally incompatible with the nature of the functions that such monitors perform? Can an appropriate balance be struck between the concern of states to exercise a degree of control over the conduct of the

* John Norton Pomeroy Professor of Law, New York University School of Law. The author was U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions from 2004 until 2010, and was elected Chairperson of the Annual Meeting "of special rapporteurs/representatives, independent experts and chairpersons of working groups of the special procedures of the Commission on Human Rights and of the advisory services programme" in June 2005. Because he chaired the Coordination Committee of Special Procedures from 2005–06 and was an *ex officio* member of the same Committee from 2006–07, he participated actively in many of the debates concerning the Code of Conduct which is the subject of this paper. However, the views expressed in this analysis reflect solely his personal opinions. He is grateful to Robert Keohane, Ryan Goodman, Jeff Dunoff, and participants in the Temple Law School international law workshop for helpful comments, and to Christiane Ahlborn and Sascha Bollag for research assistance. Work on this Article was supported by a grant from the Max Greenberg and Filomen D'Agostino Research Funds at the NYU School of Law.

monitors and the need to protect the latter's independence and effectiveness? And if a compliance mechanism is created, what standards should be used, who will decide when those standards have been breached, and what should be the consequences of a breach? Although these questions are currently being debated, their complexity has not been acknowledged, and the contending groups have adopted absolutist and starkly opposed positions. Many governments, perhaps the majority, insist not only that the monitors should be fully accountable to the HRC, but that a formal compliance mechanism endowed with sanctioning powers should be established.[1] Other governments, including those belonging to the European Union ("EU"), along with the monitors themselves and most civil society groups, believe that any such move would send a chilling message that would fatally undermine the independence of the monitoring system.[2] This article seeks to unpack the core question, to clarify the notions of accountability and independence that are at stake, and to propose both an analytical framework and an empirical proposal for addressing the problem in such a way as to avoid unhelpful polarization and respond to the legitimate concerns on each side.

This case study is of particular significance because of the light it sheds on the broader issue of international organization accountability, described by José Alvarez as "among the hottest topics in public international law."[3] The pressure to hold such organizations to account, along with other actors who operate on their behalf or under their auspices, has grown enormously over the past decade or so. It is hardly surprising that many of the governments whose human rights practices have been subject to critical, and sometimes damning, scrutiny are keen to exact accountability. But the demands for accountability emanate from a much broader range of actors. Taken together, they add up to a wide-ranging critique of the perceived immunity enjoyed by many international actors in terms of both legal responsibility and political and other forms of accountability. Some scholars have sought to hold international actors to standards derived from democratic theory,[4] while others have sought to promote accountability through the application of principles which resonate more with domestic administrative law.[5] Others

1. *See infra* text accompanying notes 10–13.

2. *See infra* text accompanying note 14.

3. J. E. Alvarez, *My Summer Vacation (Part IV): Misadventures in Subjecthood*, Opinio Juris (Sept. 29, 2010, 6:32 AM), http://opiniojuris.org/2010/09/29/my-summer-vacation-part-iv-misadventures-in-subjecthood.

4. Rubenfeld, for example, has portrayed international law as actively "antidemocratic" and international organizations such as the United Nations as being "famous for their undemocratic opacity, remoteness from popular or representative politics, elitism, and unaccountability. International governance institutions and their officers tend to be bureaucratic, diplomatic, technocratic—everything but democratic." *See* Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971, 2017–18 (2004). For more nuanced and compelling analyses, see José Alvarez, International Organizations as Law-makers 630–40 (2005); Robert Howse, *Transatlantic Regulatory Cooperation and the Problem of Democracy*, *in* Transatlantic Regulatory Cooperation 469 (George A. Bermann et al. eds., 2000).

5. *See generally* Jonathan G. S. Koppell, World Rule: Accountability, Legitimacy, and the Design of Global Governance (2010); Ruth W. Grant & Robert O. Keohane, *Accountability and*

remain highly skeptical of such efforts. For example, a recent commentator has gone so far as to characterize international organizations as "lawless creatures" which are "hydra-headed but directionless, self-consuming, and subject to perennial self-serving growth. Ludwig von Mises would have seen tyranny."[6] Whether in response to such critiques, or more as a result of the wider responsibilities entrusted to them along with the growing impact of their activities in a globalized world, there is now a strong and consistent trend for international actors of all kinds to accept forms of accountability which go well beyond a verbal give-and-take in the context of formal exchanges with government representatives.

The irony, however, is that the so-called "independent experts" who carry out the U.N. system's principal form of human rights monitoring have remained stubbornly resistant to such pressures. These experts operate under the rubric of the U.N. Human Rights Council's system of "Special Procedures."[7] Their task is to hold governments, as well as other actors—ranging from the United Nations itself, through corporations to armed opposition groups—to account for alleged or perceived violations of international human rights norms. While they conspicuously lack any formal powers of enforcement, the practical impact of their work can be significant, and there are many instances in which governments and even the United Nations itself have been successfully pressured to adopt major changes in terms of policy and practice.[8]

Despite the now voluminous literature on international accountability, none of the scholarship has yet sought to explore its implications in terms of the functions performed by the major international governmental human rights organizations and actors. This Article seeks to remedy that omission by focusing on probably the most intrusive and, from a governmental point of view, the most challenging part of the international human rights re-

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Abuses of Power in World Politics, 99 AM. POL. SCI. REV. 1 (2005); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005); Alasdair Roberts, *A Partial Revolution: The Diplomatic Ethos and Transparency in Intergovernmental Organizations*, 64 PUB. ADMIN. REV. 4, 410 (2004).

6. Matthew Parish, *An Essay on the Accountability of International Organizations*, 7 INT'L ORG. L. REV. 2, 49 (2010) ("For all their formalities, procedures, internal regulations, bulging legal departments and quasi-legal language in which they cloak their operations, their legal structure is a phantasm.").

7. A brief note on U.N. terminology as used in this Article is in order. The overall system of Special Procedures encompasses a range of individual mandate-holders whose designations vary from Special Rapporteur to Independent Expert, Working Group member, and Special Representative. Almost all perform monitoring functions, albeit of different types. For the purposes of this Article, the terms "monitor," "mandate-holder," and "Special Rapporteur" are used interchangeably. For more details, see Office of the United Nations High Commissioner for Human Rights, *Special Procedures of the Human Rights Council*, http://www2.ohchr.org/english/bodies/chr/special/index.htm (last visited Mar. 6, 2010).

8. According to a recent major study, "the U.N.'s independent experts have played a valuable and, in some cases, decisive role in drawing attention to chronic and emerging human rights issues and in catalyzing improvements in respect for human rights on the ground . . . . " TED PICCONE, CATALYSTS FOR RIGHTS: THE UNIQUE CONTRIBUTION OF THE U.N.'S INDEPENDENT EXPERTS ON HUMAN RIGHTS, FINAL REPORT OF THE BROOKINGS RESEARCH PROJECT ON STRENGTHENING U.N. SPECIAL PROCEDURES 9 (2010).

gime—the Special Rapporteurs and others who make up the system of Special Procedures. Although scholars have been silent in relation to the accountability of this group, governments have not. Their concern is predictable given the perception that the monitors are able to exert significant pressure at both the international and domestic levels for changes in law and policy. In 2007, a large and powerful group of governments moved to impose a form of accountability upon the system by adopting a Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council ("Code of Conduct").[9] Follow-up efforts by those governments are now focused on the creation of some form of sanctioning mechanism to discipline monitors who are found to have violated the Code. Although the Code's adoption and the proposed follow-up might seem to be a straightforward and relatively benign activity, the Code has actually been the subject of great controversy.

This is shown by the positions taken by the main participants in the major review of the Human Rights Council's performance during its first five years, which is to be completed in 2011. Three groups which together control a clear majority of the votes on the Council—the African Group,[10] the Non-Aligned Movement,[11] and the Organization of the Islamic Conference[12]—have each proposed the establishment of a "Legal Committee on Compliance with the Code of Conduct," the modalities of which would be "determined intergovernmentally."[13] In response to this concerted approach, the EU indicated that it "will strongly oppose any proposal aimed at questioning their independence, be it in the form of the establishment of a legal committee or any entity designed to monitor compliance with the

9. Human Rights Council Res. 5/2, Rep. of the Human Rights Council, 5th Sess., June 11–18, 2007, U.N. GAOR, 62d Sess., Supp. No. 53, A/62/53, at 74 (June 18, 2007) [hereinafter Human Rights Council Res. 5/2].

10. Statement by Nigeria on Behalf of the African Group Under Agenda Item 4.2: Discussion on Special Procedures Including the Presentation on Concrete Proposals, First Session of the Open-Ended Intergovernmental Working Group on the Review of the Work and Functioning of the Human Rights Council, para. ix, 2 (Oct. 27, 2010), *available at* http://portal.ohchr.org/portal/page/portal/HRCExtranet/1stWorkingGroupsessiononTheReview25-29Oct2010/27102010 (follow "Nigeria (African Group)" hyperlink; password available from http://www2.ohchr.org/english/bodies/hrcouncil/form.htm).

11. Intervention Made by Egypt on Behalf of the Non-Aligned Movement: Sub-Agenda Item 4.2 (Special Procedures), First Session of the Open-Ended Intergovernmental Working Group on the Review of the Work and Functioning of the Human Rights Council, 2 (Oct. 27, 2010), *available at* http://portal.ohchr.org/portal/page/portal/HRCExtranet1stWorkingGroupsessiononTheReview25-29Oct2010/27102010 (follow "Egypt (NAM)" hyperlink; password available from http://www2.ohchr.org/english/bodies/hrcouncil/form.htm) [hereinafter Intervention Made by Egypt].

12. Statement by Pakistan on Behalf of the OIC Member States, First Session of the Open-Ended Intergovernmental Working Group on the Review of the Work and Functioning of the Human Rights Council, para. xiv, 3 (Oct. 27, 2010), *available at* http://portal.ohchr.org/portal/page/portal/HRCExtranet/1stWorkingGroupsessiononTheReview25-29Oct2010/27102010 (follow "Pakistan (on behalf of the Organization of the Islamic Conference)" hyperlink; password available from http://www2.ohchr.org/english/bodies/hrcouncil/form.htm).

13. Intervention Made by Egypt, *supra* note 11, at 2.

Code of Conduct."[14] Norway, in a separate statement, indicated that any such move would "send a message of distrust rather than recognition" in relation to the work of the mandate-holders.[15] The monitors themselves have chosen not to cast the issue in terms of accountability, or to respond to the proposal to establish a compliance mechanism. Instead they have argued that they "should be able to determine their priorities and activities" within the parameters of the mandates accorded to them by the Council, and that any concerns raised by governments should be dealt with through an internal procedure that the mandate-holders themselves have set up.[16]

For their part, civil society groups have been strongly critical of what they portray as governmental efforts "to intimidate [the monitors], individually and collectively."[17] Consistent with this perception, and reflecting the view of virtually the entire community of human rights non-governmental organizations, Amnesty International indicated that it "firmly reject[s] proposals for a body, by whatever name, to oversee implementation of the [Code of Conduct]."[18] This view is further supported in a Brookings Institution study which recommended that:

> Proposals to create a formal "ethics committee" or panel of jurists to handle complaints of SP's [Special Procedures'] behavior should be rejected as a diversion that would unreasonably occupy the SPs' limited time in a series of potentially harassing, frivolous and politicized complaint procedures and would undermine rather than strengthen the SPs as a body of professional, independent U.N. experts.[19]

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14. Statement on Behalf of the European Union: Item 5: Discussion on All Concrete Proposals, First Session of the Open-Ended Intergovernmental Working Group on the Review of the Work and Functioning of the Human Rights Council, 1 (Oct. 29, 2010), *available at* http://portal.ohchr.org/portal/page/portal/HRCExtranet/1stWorkingGroupsessiononteReview25-29Oct2010/29102010/Tabam (follow "Belgium (European Union)" hyperlink; password available from http://www2.ohchr.org/english/bodies/hrcouncil/form.htm).

15. Statement by Norway, First session of the Open-Ended Intergovernmental Working Group on the Review of the Work and Functioning of the Human Rights Council, 1 (Oct. 29, 2010), *available at* http://portal.ohchr.org/portal/page/portal/HRCExtranet/1stWorkingGroupsessiononteReview25-29Oct2010/29102010/Tabam (follow "Afternoon" hyperlink; then follow "Norway" hyperlink; password available from http://www2.ohchr.org/english/bodies/hrcouncil/form.htm).

16. Review of the Human Rights Council, Contribution of the Special Procedures Mandate Holders, 1 (Oct. 8, 2010) [hereinafter Contribution of the Special Procedures Mandate Holders]; *id.* at 2 (arguing that the Coordination Committee established by the mandate-holders themselves should be viewed as "the primary interlocutor between States and mandate holders in relation to the Code of Conduct"); *infra* text accompanying notes 281–283 (describing the internal enforcement mechanisms).

17. *See, e.g.*, Amnesty Int'l, *Open Letter to Member States of the Human Rights Council*, AI Index OIR 41/024/2009 (June 11, 2009), *available at* http://www.amnesty.org/en/library/asset/IOR41/024/2009/en/0ad1acdb-5028-4064-8dba-507d44a0c06b/ior410242009en.pdf.

18. Open-Ended Intergovernmental Working Group on the Review of the Work and Functioning of the Human Rights Council, First Session, Geneva, Switz., Oct. 25–29, 2010, *List of stakeholder contributions*, 12, U.N. Doc. A/HRC/WG.8/1/CRP.2 (Oct. 29, 2010).

19. Piccone, *supra* note 8, ¶ 18, at 42.

In essence, the opposing sides in this debate have each adopted hard and fast positions, none of which have been supported by attempts to work through the complex issues raised by the various proposals.

The underlying conundrum, familiar enough in contexts such as judicial independence, is straightforward. In essence, increasing the degree of accountability demanded of the monitors is assumed to diminish their independence, and along with it, their ability to carry out their responsibilities. As the demands increase, there is presumed to be a vanishing point at which their much-vaunted independence effectively disappears. The challenge then is how to reconcile independence and accountability.

The Article proceeds in the following way. It begins by setting out and explaining the origins, rise and functioning of the Special Procedures system, and the challenges of reforming it. It argues that principal-agent theory, despite having been ignored in the human rights literature, provides an appropriate starting point from which to consider the Council-SRs relationship. It then suggests that a variant of that theory—principal-trustee theory—offers the most useful approach to accountability in this context. It then proceeds to examine the Code of Conduct, including its origins, content, and the criticisms directed at it, and poses the question of whether there should be a compliance mechanism to implement it, which would also have the power to sanction. This part of the Article seeks to construct the strongest possible arguments to support each side of the debate, an exercise that is necessary because neither set of protagonists have articulated their positions in any detail. Finally, the Article proposes the creation of a Legal Committee explicitly designed to respond to the major concerns that have emerged both from the engagement with theory and from the detailed review of the practice.

I. The Special Procedures System[20]

A. The Nature and Origins of the System

In June 2006, the Commission on Human Rights, which had been in existence since 1946, was dissolved and replaced by the Human Rights Council. The Council is slightly smaller numerically (forty-seven against fifty-three in the Commission), has a composition which reflects a different geo-political balance, and has a more explicit and demanding mandate. Its creation was supposed to be testimony not only to the rejection of the short-

20. *See generally* Olivier de Frouville, Les Procédures Thématiques: une contribution efficace des Nations Unies à la protection des droits de l'homme (1996); Jeroen Gutter, Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community (2006); Miko Lempinen, Challenges Facing the System of Special Procedures of the United Nations Commission on Human Rights (2000); Ingrid Nifosi, The UN Special Procedures in the Field of Human Rights (2005); Piccone, *supra* note 8.

comings of its predecessor, but also to the determination to put in place a far more effective mechanism for promoting respect for, and protecting the enjoyment of, human rights. The overall criteria against which the Council's performance should be measured are diverse and complex. In practice, however, it will be judged by most observers according to how well it does in responding to chronic violations of human rights and in monitoring and pressuring all states in relation to their human rights records. Hence the importance of the Special Procedures system, which is generally considered to be the Council's most effective mechanism for achieving these goals.[21]

The system originated in the 1960s with the appointment of a group to examine the practice of apartheid in southern Africa. Subsequent initiatives were taken sporadically and often in a determinedly *ad hoc* fashion. A system only began to emerge after 1980 when the Commission initiated the technique of establishing a "thematic" mandate to examine a particular phenomenon or type of violation on a global level. Starting with disappearances, extrajudicial executions, and torture, the thematic side of the Special Procedures system has grown exponentially. In 1985 there were three, in 1990 six, in 1995 fourteen, in 2000 twenty-one, and by December 2010, there were thirty-three.[22] In addition, there were eight[23] dealing with specific countries.[24] Thus, in the thirty years since the creation of the first mechanism, the Commission and the Council have created an average of slightly

21. Bertrand G. Ramcharan, The Protection Roles of UN Human Rights Special Procedures 3 (2009) (noting that "there is no other group of United Nations human rights actors playing a more important direct protection role at the present time . . . ").

22. The thirty-three mandates, in chronological order of their establishment, deal with: (1) disappearances; (2) extrajudicial executions; (3) torture; (4) freedom of religion or belief; (5) the sale of children, child prostitution, and child pornography; (6) arbitrary detention; (7) freedom of opinion and expression; (8) contemporary forms of racism, racial discrimination, xenophobia, and related intolerance; (9) independence of judges and lawyers; (10) violence against women; (11) toxic and dangerous products and waste; (12) extreme poverty; (13) migrants; (14) foreign debt; (15) the right to education; (16) the right to food; (17) the right to housing; (18) human rights defenders; (19) indigenous peoples; (20) people of African descent; (21) the right to health; (22) internally displaced persons; (23) trafficking in persons; (24) mercenaries; (25) terrorism; (26) international solidarity; (27) transnational corporations; (28) minority issues; (29) contemporary forms of slavery; (30) safe drinking water and sanitation; (31) cultural rights; (32) freedom of peaceful assembly and of association; and (33) discrimination against women. Office of the United Nations High Commissioner for Human Rights, *Special Procedures Assumed by the Human Rights Council: Thematic Mandates*, http://www2.ohchr.org/english/bodies/chr/special/themes.htm (last updated Nov. 1, 2010).

23. They are: Burundi, Cambodia, Democratic People's Republic of Korea, Haiti, Myanmar, the Palestinian territories occupied since 1967, Somalia, and Sudan. Office of the United Nations High Commissioner for Human Rights, *Special Procedures Assumed by the Human Rights Council: Country Mandates* (Aug. 1, 2010), http://www2.ohchr.org/english/bodies/chr/special/countries.htm.

24. Many governments, mostly from developing countries, would like to eliminate all country mandates on the grounds either that it is invidious to single out particular countries, or that when it is done the criteria used are arbitrary. Others argue that the credibility of the Council requires it to be able to adopt a graduated response which, in the case of countries in which gross violations persist, would mean a dedicated country rapporteur to study and make recommendations to the government concerned as well as to the Council. The gradual diminution in the number of country mandates over the past three years renders the role of the thematic mandates more important since they can report on the situation in relation to the rights with which they are concerned in all countries and can thus take up at least some of the vacuum created by the elimination of a country mandate.

more than one new thematic mechanism every year. Of the mandates held by individuals, ten address civil and political rights issues, ten deal with economic, social and cultural rights, and eight concern the rights of specific groups. In addition, there are five working groups—on disappearances, arbitrary detention, mercenaries, people of African descent, and discrimination against women in law and practice.

As explained below,[25] the main activities of the mandate-holders consist of on-site fact-finding, communicating complaints, and developing jurisprudence. Mandate-holders are variously titled "Special Rapporteur," "Independent Expert," "Representative," or "Special Representative" of the Secretary-General. In practice, very little significance is attached to the variations and efforts are underway to encourage more standardized usage of the term Special Rapporteur ("SR").[26]

Most appointments are made by the President of the Human Rights Council on the basis of a list presented by a Consultative Committee composed of one representative of each of the five regional groups. It puts forward a consensus nomination along with alternatives drawn from a list of experts nominated by governments or civil society groups. Those selected are generally prominent personalities from human rights-related backgrounds, including academics, lawyers, economists, and NGO leaders. The first female expert was not appointed until 1994 and the current proportion of women is only about one-third. The experts receive no financial reward for their work, although their expenses are covered. They rely upon the Office of the U.N. High Commissioner for Human Rights for administrative assistance, but they have long complained of the inadequacy of the services available to them as a result of chronic financial and staff shortages within the Office.[27]

An overview of the system's scope can be obtained from the program's key statistics. In 2009, for example, mandate-holders undertook seventy-three

25. *See infra* text accompanying notes 42–74.

26. In 2008, the Human Rights Council changed the title of the mandate-holder dealing with human rights defenders from "Representative of the Secretary-General" to "Special Rapporteur." Human Rights Council Res. 7/8, Rep. of the Human Rights Council, 7th Sess., Mar. 3–Apr. 8, 2008, U.N. GAOR, 63d Sess., Supp. No. 53, A/63/53, at 97 (Mar. 27, 2008). At the same time, the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises successfully resisted attempts to change his mandate to a Special Rapporteurship on the grounds that it might be misinterpreted as signaling a downgrading of the importance of the mandate. *See* Human Rights Council Res. 8/7, Rep. of the Human Rights Council, 8th Sess., June 2–18, 2008, U.N. GAOR, 63d Sess., Supp. No. 53, A/63/53, at 199 (June 18, 2008).

27. For example, at their 2010 Annual Meeting, the Special Procedures mandate-holders noted that "[t]he limited resources available negatively impacted on the capacity of mandates to enhance follow-up, conduct country visits and undertake other activities, including in relation to individual communications." Human Rights Council, *Report of the Seventeenth Meeting of Special Rapporteurs/Representatives, Independent Experts and Chairs of Working Groups of the Special Procedures of the Human Rights Council*, June 28–July 2, 2010, ¶ 13, U.N. Doc. A/HRC/15/44 (July 19, 2010) (by Shamshal Bari).

fact-finding missions to fifty-one countries[28] (up from fifty-three missions to forty-eight countries in the previous year).[29] They sent a total of 689 communications to 119 countries[30] (down from 1,003 to 128 countries in 2007),[31] and issued 223 press releases.[32] They submitted 136 reports to the Human Rights Council, forty-seven of which were annual reports providing an overview of the key issues and fifty-one of which were country mission reports.[33] A further twenty-four reports were submitted to the General Assembly.[34]

This flurry of activity has given the system a prominent profile. In 2003, U.N. Secretary-General Kofi Anan referred to the "indispensable role" of SRs "as front-line protection actors,"[35] and in 2006 he described them as "the crown jewel" of the U.N. human rights system.[36] Former U.N. High Commissioner for Human Rights Louise Arbour noted that SRs were "a unique link" among the different actors in the human rights field and stressed their importance as interlocutors "at the highest levels of the United Nations' intergovernmental machinery."[37] The Commission on Human Rights (the Council's predecessor) itself referred to the Special Procedures system as "an essential cornerstone" of U.N. human rights efforts[38] and Amnesty International observed that "they play a critical and often unique role in promoting and protecting human rights." Amnesty attributed this to the fact that they are "among the most innovative, responsive

28. Office of the High Commissioner for Human Rights, *United Nations Special Procedures: Facts and Figures 2009*, 10 (2009), *available at* http://www2.ohchr.org/english/bodies/chr/special/docs/Facts_Figures2009.pdf [hereinafter *Facts and Figures 2009*].

29. Office of the High Commissioner for Human Rights, *United Nations Special Procedures: Facts and Figures 2008*, 8 (2008), *available at* http://www2.ohchr.org/english/bodies/chr/special/docs/SP2008FactsFigures.pdf [hereinafter *Facts and Figures 2008*].

30. *Facts and Figures 2009*, *supra* note 28, at 7. That figure excludes "data from the Working Group on Enforced or Involuntary Disappearances which uses different working methods." In the period covered by its 2009 Annual Report (Dec. 5, 2008–Nov. 13, 2009) the Working Group transmitted 456 new cases of enforced disappearance to twenty-five Governments. *Id.*

31. Office of the High Commissioner for Human Rights, *United Nations Special Procedures: Facts and Figures 2007*, 17 (2007), *available at* http://www2.ohchr.org/english/bodies/chr/special/docs/SP2007FactsFigures.pdf.

32. *Facts and Figures 2009*, *supra* note 28, at 19. This represented a notable increase over the 177 statements released the previous year. *See Facts and Figures 2008*, *supra* note 29, at 16.

33. *Facts and Figures 2009*, *supra* note 28, at 13.

34. *Id.* at 18.

35. U.N. Secretary-General, *Report of the Secretary-General on the Work of the Organization*, ¶ 171, U.N. Doc. A/58/1 (Aug. 28, 2003).

36. Remarks of the U.N. Secretary-General, U.N. Human Rights Day (Dec. 10, 2006), http://www.un.org/events/humanrights/2006/sg-remarks.shtml.

37. Office of the United Nations High Commissioner for Human Rights, *High Commissioner's Strategic Management Plan 2006–2007*, 26 (2007), *available at* http://www.ohchr.org/Documents/AboutUs/hc_smp_2006-07.pdf.

38. United Nations, Econ. & Soc. Council, Comm'n on Human Rights, *Report of the Bureau of the Fifty-Fourth Session of the Commission on Human Rights Submitted Pursuant to Commission Decision 1998/112: Rationalization of the Work of the Commission*, ¶ 17, Observation 5, U.N. Doc. E/CN.4/1999/104 (Dec. 23, 1998) [hereinafter *Rationalization of the Work of the Commission*].

and flexible tools of the human rights machinery."[39] The mandate-holders, perhaps wary of being accused of false modesty, have characterized themselves as "the Council's most independent, objective, responsive, proactive, and flexible mechanisms."[40]

But the expansion and increased overall effectiveness of the Special Procedures system has inevitably brought with it concerns and objections on the part of some of the governments whose activities are being monitored and challenged in public reports, some of which succeed in drawing a broad audience. The objections range from the claim that state sovereignty is being undermined, through arguments that the generic techniques are overly intrusive or unfairly biased against governments, to dissatisfaction with the working methods, interpretations, or other activities of individual mandate-holders. As a result, as detailed below, efforts to rein in the Special Procedures system began in earnest in the mid-1990s, eventually leading to the Code of Conduct in 2007, and subsequent efforts to create a formal compliance mechanism linked to the Code.

B. The Principal Functions Performed

While the emphasis adopted by different mandate-holders varies considerably, four principal activities are generally undertaken: on-site fact-finding, communications to governments alleging violations, thematic analyses, and the shaping of jurisprudence.[41] A detailed examination of how each of these functions works in practice is well beyond the scope of the present Article, but a general understanding is indispensable for present purposes. Such an overview is particularly important in order to demonstrate that the Special Procedures system does not fall within the category of those human rights institutions which, according to Posner, "are talking shops where little is accomplished."[42] If this were in fact the case, then the issue of accountability would be solely of theoretical interest, and the degree of attention accorded to the issue by so many governments would be difficult to explain.

1. *Fact-Finding Missions*

The system of country visits, or on-site fact-finding, builds on a technique used in the human rights field at least since the minorities-protection

39. AMNESTY INTERNATIONAL, UNITED NATIONS SPECIAL PROCEDURES: BUILDING ON A CORNERSTONE OF HUMAN RIGHTS PROTECTION 5 (2005) [hereinafter BUILDING ON A CORNERSTONE].

40. Contribution of the Special Procedures Mandate Holders, *supra* note 16, at 1.

41. For a very useful survey of the approach adopted and the objectives of the system, see BUILDING ON A CORNERSTONE, *supra* note 39.

42. Eric A. Posner, *Human Rights, the Laws of War, and Reciprocity* 18 (John M. Olin Law & Econ. Working Paper No. 537, 2010). Even if Posner's assessment were considered to be accurate, it would not follow that no authority had been delegated by states to the mandate-holders. *See* Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 L. & CONTEMP. PROBS. 1, 4 (2008) (noting that delegation has taken place "even when states have granted an international body the authority to issue only nonbinding resolutions, policy proposals, or advisory opinions").

system of the League of Nations and further developed in the post-World War II context of U.N. oversight of the situation in trusteeship territories. Resources are available for each mandate-holder to undertake an average of two "missions" per year, although a few manage to do significantly more. Mostly, such missions focus on specific problems in an individual country, although in recent years they have also been undertaken to international institutions such as the World Bank or the World Trade Organization, as well as to countries which are considered to be following best practices—knowledge of which can usefully be disseminated by a mandate-holder. Country reports describe the human rights situation on the ground on the basis of interviews and the use of other fact-finding techniques. The extent to which deeper contextual analysis is undertaken varies but is in any event greatly constrained by strict maximum page limits of twenty-five to thirty pages per report. Detailed recommendations are then addressed to the government concerned, and sometimes also to other governments, international and regional organizations, and non-state actors. Often, although not always, these reports will be designed to mobilize pressure from peers or other stakeholders, with a view to inducing compliance by the state concerned.

A major weakness of the system flows from its inability to compel any particular state to cooperate either with a given mandate-holder or with the system as a whole. The desirability of cooperation has often been noted, particularly in the Declaration adopted at the Vienna World Conference on Human Rights in which all states agreed "to co-operate fully with [the special] procedures and mechanisms" and "to enable them to carry out their mandates in all countries throughout the world . . . ."[43] The Council has consistently reaffirmed this approach in relation to many of the individual mandates.[44] Some states have voluntarily agreed to issue a "standing invitation" which in principle means that they will accord access to any mandate-holder who requests to visit the country.[45] In practice there are enough political and other pressures upon states to ensure that the great majority have admitted at least some SRs at one time or another.[46] The most pressing problem, however, is that states will often pick and choose which mandates they invite, as a result of which the most pertinent ones are often blocked while those that are considered relatively "harmless" are happily admitted.[47]

43. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 95, U.N. Doc. A/CONF.157/23 (July 12, 1993).

44. *See, e.g.*, Human Rights Council Res. 13/26, Rep. of the Human Rights Council, 13th Sess., Mar. 1–26, 2010, U.N. GAOR, 65th Sess., Supp. No. 53, A/65/53, at 11 (Mar. 26, 2010) ("*Requests* all States to cooperate fully with the Special Rapporteur . . . . ").

45. As of December 31, 2009, sixty-six countries had issued such standing invitations. *See Facts and Figures 2009*, *supra* note 28, at 11.

46. As of 2010, twenty-five states have never received a visit, and nineteen others have refused to accept all requests to visit. *See* PICCONE, *supra* note 8, at 14.

47. The issue of whether or not states should feel obliged to issue an invitation flared up at the Human Rights Council in June 2008 when India and Russia, in particular, took umbrage at the following recommendation:

Assessing the impact of country visits, and explaining when, why, and how such impact might occur, is extremely difficult. It is also a much neglected dimension of human rights work in general. Even the largest of the civil society monitoring groups, Human Rights Watch, "has no truly systematized process for evaluating the effectiveness of its project work."[48] The United Nations is no different in this regard and various reasons can be suggested for such oversight. First, systematic under-funding makes the U.N. human rights program heavily dependent upon donor support,[49] which in turn encourages an emphasis on showing 'achievements' rather than undertaking critical evaluations. Second, such achievements tend to be measured in terms of easily-quantifiable inputs and formal outputs rather than impact. Third, even when human rights improvements on the ground can be shown, it remains very difficult to demonstrate any particular causal link to actions taken by the United Nations or the system of Special Procedures. In rare instances, governments will acknowledge such a link, but for the most part they insist that any changes in policy and practice were internally driven and unrelated to external pressures.

> The Council should acknowledge the vacuum that is created as a result of the ability of States in which serious concerns over extrajudicial executions have been identified to refuse to respond to requests to visit by the Special Rapporteur. The Council should look very closely at the failure in this regard of the countries named in paragraph 11 above.

Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 92, *delivered to the Human Rights Council*, U.N. Doc. A/HRC/8/3 (May 2, 2008) (by Philip Alston). Paragraph 11, to which reference was made, named twenty-two countries. They included India, which had first received a request to visit in 2000, and Russia, which had received such a request in 2003. India and Russia argued that because the issuance of an invitation was exclusively within the sovereign prerogative of the state concerned, the Special Rapporteur had violated the Code of Conduct by raising the issue in this way with the Council. They accordingly tabled a proposed amendment to the relevant resolution which would have terminated the Rapporteur's tenure forthwith. That proposal was eventually withdrawn, as noted below. *See infra* text accompanying note 161. In the process of the Human Rights Council's Universal Periodic Review of India's human rights record, India was pressed to issue a standing invitation to all Special Procedures mandate-holders, and especially to invite the Special Rapporteur on torture. Its response to both recommendations was the same: "India has been regularly receiving and will continue to receive Special Rapporteurs and other Special Procedures . . . taking into account its capacity, the priority areas for the country as well as the need for adequate preparations for such visits." Human Rights Council, Working Group on the Universal Periodic Review, *Response of the Government of India to the Recommendations Made by Delegations During the Universal Periodic Review of India*, ¶ 15, U.N. Doc. A/HRC/8/26/Add.2 (June 11, 2008).

48. Ian Gorvin, *Producing the Evidence that Human Rights Advocacy Works: First Steps Towards Systematized Evaluation at Human Rights Watch*, 1 J. Hum. Rts. Prac. 477, 478 (2009). This reluctance is by no means limited to Human Rights Watch. *See, e.g.*, Joseph H. Carens, *The Problem of Doing Good in a World that Isn't: Reflections on the Ethical Challenges Facing INGOs*, *in* Ethics in Action: The Ethical Challenges of International Human Rights Nongovernmental Organizations 257, 269 (Daniel A. Bell & Jean-Marc Coicaud eds., 2007) (noting concerns by non-governmental groups that "an emphasis on 'results' will undermine long-term, capacity-building approaches for which the ultimate benefits may be greater in the long run").

49. In the 2008–09 biennium, for example, the budget of the Office of the United Nations High Commissioner for Human Rights was $312,700,000, of which almost two-thirds (62.2%) came from voluntary contributions by governments and others. Office of the United Nations High Commissioner for Human Rights, *High Commissioner's Strategic Management Plan, 2010–2011*, 136 (Dec. 30, 2009), *available at* http://www.ohchr.org/Documents/Press/SMP2010-2011.pdf.

It is much more difficult, however, to understand why virtually no scholarly evaluation studies of the impact of reporting by Special Procedures mandate-holders have been undertaken. This is especially so in light of a spate of evaluative studies looking at the impact of human rights treaty ratification on state conduct.[50] Instead, all that are available are anecdotal accounts of instances in which government policies have been reversed, individuals released, and prosecutions undertaken, subsequent to reporting by Special Procedures mandate-holders.[51]

The reality, of course, is that different types of governments respond differently in practice. At one end of the spectrum is a group that remain largely impervious to international pressures, and that are especially unlikely to agree to visits by those mandate-holders whose mandates go to the heart of the violations of which they stand accused. Thus, Zimbabwe has rejected nine requests for visits over the past twelve years.[52] Eritrea and North Korea have comparable records, and Iran has permitted no visits since 2005.[53] At the other end of the spectrum, there are governments which decide that it is in their interests for a variety of reasons to adopt a policy of avowed openness to visits. Colombia, for example, facilitated the visits of six different SRs between October 2008 and December 2009 alone,[54] and the United States has accepted fourteen visits over the past twelve years.[55] In the middle, however, is a large range of countries that are not as committed to engagement but are nevertheless likely, under certain circumstances, to agree to a visit. Reasons might include: a wish to demonstrate that a change of government has brought a clean human rights broom; exposing the misdeeds of a previous government; helping to lock in policy changes; responding to pressures from international donors upon whom there is significant dependence; convincing an internal constituency of a commitment to human rights in one sphere or another; keeping up with neighboring countries that have adopted cooperative stances; or responding to international political pressures. China, for example, agreed to a visit by the Special Rapporteur on torture in 2005,

50. *See, e.g.*, BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); Emilie M. Hafner-Burton, Kiyoteru Tsutsui & John W. Meyer, *International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties*, 23 INT'L SOC. 115, 116 (2008); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost!: The Failure of International Human Rights Law to Matter Where Needed Most*, 44 J. PEACE RES. 407 (2007); Oona Hathaway, *Why do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588 (2007); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RESOL. 925 (2005).

51. *See, e.g.*, PICCONE, *supra* note 8, at 26–31; Office of the United Nations High Commissioner for Human Rights, *Positive Developments*, *Special Procedures Bulletin, Sixteenth Issue, January–March 2010*, 12 (2010), *available at* http://www2.ohchr.org/english/bodies/chr/special/docs/16th_Issue_Jan-March2010.pdf.

52. PICCONE, *supra* note 8, at 14.

53. *Id.*

54. Office of the United Nations High Commissioner for Human Rights, *Country Visits by Special Procedures Mandate Holders Since 1998, A-E*, http://www2.ohchr.org/english/bodies/chr/special/countryvisitsa-e.htm (last visited Apr. 9, 2011).

55. PICCONE, *supra* note 8, at 10.

but only after almost a decade of demarches by the United States and the EU.[56]

The growing sophistication of civil society, especially at the national level, provides another impetus for cooperation. Inviting a Special Procedure might be seen as a relatively effective but inexpensive way of demonstrating goodwill or of defusing pressure to take more far-reaching measures. In these contexts, civil society groups are becoming more adept at facilitating the work of the SRs, disseminating their findings, and bringing pressure to bear on governments to take some sort of action in response. The impact of these visits has also been increased by improved communications policies and practices on the part of SRs. Not so long ago, all but the most controversial reports tended to languish in Geneva, poorly reproduced, boringly presented, long delayed, and difficult for anyone outside Geneva to obtain. Today they are readily available in a timely fashion on the internet, can be reproduced in appropriate formats, and are able to be (albeit somewhat primitively) electronically translated at no cost.

2. *Communications*

Another function performed by mandate-holders is to "communicate" with governments about alleged human rights violations either through "allegation letters" seeking an official response to alleged violations or through "urgent action" letters which allege imminent harm unless a government acts immediately. This system has several objectives, including raising international awareness of allegedly significant violations; giving states an opportunity to set the record straight and to justify their actions; generating a record of abuses alleged against states over time; providing an opportunity for the mandate-holder to offer an interpretation of the applicable law; and providing an incentive for governments to act to rectify any violations. The system's success is mixed at best, as can be illustrated by reference to the extrajudicial executions mandate which is the one of the very few to provide any detailed breakdown of statistics. Between December 2005 and March 2009, fifty-one percent of the 523 communications sent drew any response at all from the relevant government.[57] Of those, just under half, (or twenty-three percent of the total) were classified as "largely satisfactory," meaning that a reply "is responsive to the allegations and substantially clarifies the facts, but does not imply that the Government's actions necessarily complied with international human rights law."[58] These statistics, however, provide no indication as to whether any of the individuals or groups whose

56. *See* HENRY STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 752 (3d ed. 2008); *see also* Katie Lee, *China and the International Covenant on Civil and Political Rights: Prospects and Challenges*, 6 CHINESE J. INT'L L. 445, 452 (2007).

57. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,* 25–26, *delivered to the Human Rights Council*, U.N. Doc. A/HRC/14/24 (Apr. 29, 2010) (by Philip Alston).

58. *Id.*

rights were said to have been violated benefited in any direct way from the exchange of information.

While the low rate of response may be expected when governments are confronted with cases involving killings for which they are alleged to bear some responsibility, this outcome is made even more likely by the shortcomings of the communications system. Governments are well aware of most of these and there is, again unsurprisingly, little enthusiasm for genuine reform. There are various steps that could be taken to make the procedure more effective both in engaging states in dialogue and bringing relief in individual cases, including: undertaking a systematic evaluation of the effectiveness of the procedures used, developing a shared vision of the system's objectives in order to bring greater coherence, radically upgrading the technological arrangements used to manage the system, making it easier for complaints to be lodged, making more effective use of the information generated by the system, and the Council taking action when states consistently fail to cooperate with the system.[59]

3. *Thematic Analyses*

Many of the mandate-holders have also used their reporting opportunities to present detailed analyses of particular issues or themes that have arisen in the course of their country visits and their other exchanges with governments and other stakeholders. Thus, for example, the Special Rapporteur on violence against women undertook highly innovative in-depth global studies of issues such as: domestic violence and culturally justified practices that are violent to or subordinate women; the trafficking of women especially for sexual purposes; sexual brutality, enslavement, forced prostitution and forced pregnancy in the context of armed conflicts; and the impact of health and population policies on women's reproductive rights. These studies not only contributed enormously to shaping a whole new field of action at the international level in particular, but also in many national settings.[60]

The overall quality of the thematic reports presented by mandate-holders varies considerably, but it is clear that some have had a major impact when judged by the extent of concern expressed by governments, the amount of media coverage garnered, and the uptake of their ideas or analysis by judges, governments, human rights groups, scholars, and other potential users of the information. In addition, thematic studies can play an important role in informal agenda-setting, forcing the Council to acknowledge the importance of an issue which its member states would otherwise have opted to ignore.[61]

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59. *Id.* at 3–5, ¶¶ 6–17.

60. *See generally* Special Rapporteur on Violence against Women, *15 Years of the United Nations Special Rapporteur on Violence Against Women, (1994–2009)—A Critical Review*, *available at* http://www2.ohchr.org/english/issues/women/rapporteur/docs/15YearReviewofVAWMandate.pdf.

61. On informal agenda-setting, see Mark Pollack, *Delegation, Agency and Agenda Setting in the European Community*, 51 Int'l Org. 99, 124–28 (1997).

A recent example of such an exercise that drew considerable political attention was a study prepared jointly by several mandate-holders on "global practices in relation to secret detention."[62] Its presentation was delayed for several months by a coalition of angry governments and the study was widely reported in many of the countries identified.

4. *Influencing the Interpretation of the Norms*

The final function performed by SRs is to bring greater conceptual clarity to issues and to develop the normative understanding of the rights with which they are dealing. Relevant activities range from the elaboration of legal interpretations of specific provisions, through the preparation of interpretive guidelines or best practice suggestions, to the recommendation of general policy approaches to be considered by diverse actors. These goals are sometimes implicit in each of the three other functions described above.[63] In other instances, however, an SR might make a specific effort to propose new international standards, either to be adopted in practice by relevant actors, or to be formally endorsed by the Human Rights Council or the General Assembly.[64]

C. Why Do States Cooperate with the System?

Each of these four functions fits squarely within the types of authority which states regularly delegate to international actors.[65] Since this Article is concerned almost entirely with the costs that many states consider to be

62. Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin, U.N. Doc. A/HRC/13/42 (Feb. 19, 2010).

63. Many examples could be given, but one will suffice. In 2010, the Council specifically called upon "the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation" to "clarify further the content of human rights obligations, including non-discrimination obligations in relation to safe drinking water and sanitation, in coordination with States, United Nations bodies and agencies, and relevant stakeholders." Human Rights Council Res. 15/9, Rep. of the Human Rights Council, 15th Sess., Sept. 13–Oct. 1, 2010, U.N. GAOR, 65th Sess., Supp. No. 53, A/65/53/Add.1, at 30, ¶¶ 1, 4 (Sept. 30, 2010).

64. Thus, for example, the final output of the six-year mandate of John Ruggie as Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises was the drafting of a body of Guiding Principles. In the draft of his final report Ruggie states that "[t]he Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved." *See* Special Representative of the Secretary-General on the Issue of Hum. Rts. and Transnat. Corps. and Other Bus. Enters., *Guiding Principles for the Implementation of the United Nations "Protect, Respect and Remedy" Framework*, ¶ 13 (Draft Jan. 21, 2010), *available at* http://www.reports-andmaterials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf?039af3d0.

65. *See* Bradley & Kelley, *supra* note 42, at 10–16.

imposed as a result of this system of delegation, it is reasonable to ask why states acting rationally would agree to delegate authority to experts whose stance on a particular issue is often going to be very difficult to predict with any certainty, given the vagueness of the norms, the difference of approach adopted by different SRs, and the extensive room for discretion contained in most mandates. Various answers can be suggested. One is that a given state might value an exposé of the shortcomings of other states more than it worries about the possibility of exposing itself to such criticism. Thus, the United States has actually opened itself up to a significant number of on-site missions by SRs presumably because it is confident that their findings, even if negative, will be politically manageable in both domestic and international terms. The advantage is that it is then well placed to argue that other states, such as China or Russia, should follow suit, and it perceives a strategic advantage flowing from this tradeoff. Linked to this is the proposition that a mandate-holder can give voice to criticisms of the practices of a given state which, if expressed by another state would immediately be dismissed as biased and unreliable.[66] In the case of extrajudicial killings by the military in the Philippines, for example, the United States remained largely silent about the issue until it was given prominence by an SR report. Immediately after the publication of the report the United States for the first time took a strong public stance against the killings.[67] SRs can gain access to sources and places which other states cannot, and they bring a reputation for expertise and impartiality that far exceeds anything another government can match. This, in turn, will make cooperation more likely.[68] Another common motivation for delegation in the human rights area is to constrain successor governments. The assumption is that the human rights agent will be well placed to expose and criticize violations committed by a subsequent government of a different political complexion.[69]

In other words, there are various benefits that flow from the system, and these help to explain why states have established it and permitted it to evolve in various directions. The system as a whole enables states to demonstrate their commitment to respecting human rights, and to do so at what is anticipated to be a very low cost. Linked to this is the function of seeking to

66. This might be a form of what has been called "laundering." *See* Kenneth Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. Conflict Resol. 3, 18 (1998).

67. *See* Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Philippines*, U.N. Doc. A/HRC/8/3/Add.2 (Apr. 16, 2008) (by Philip Alston); *see also Extrajudicial Killings in the Philippines: Strategies to End the Violence, Statement Before the Senate Subcommittee on East Asian and Pacific Affairs*, 107th Cong. (2007) (statement of Eric G. John, Deputy Assistant Sec'y of State for E. Asian and Pac. Rel.), *available at* http://merln.ndu.edu/archivepdf/EAP/State/81754.pdf.

68. Darren G. Hawkins et al., *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, *in* Delegation and Agency in International Organizations 3, 18–19 (Darren G. Hawkins et al. eds., 2006).

69. *See* Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Int'l Org. 421, 439 (2000).

impose some costs on states that are flouting the established norms, thus enhancing the credibility of the commitments given by all states. Given the empirically demonstrated reticence of states to take formal action to condemn other states' human rights records, the system also helps to overcome a collective action problem by empowering individual experts to expose and criticize such violations. Another benefit relates to the pooling of information, thus forming a knowledge base which might otherwise not exist in relation to specific issues, policies, and empirical practices. This function can also lead to a reduction in the transaction costs of international cooperation, by facilitating standard-setting and other cooperative approaches to shared human rights challenges.

Finally, the Special Procedures system can also be viewed as engaging in the generation of an interpretive jurisprudence which is especially important in a field such as human rights law which combines a vast scope with a bevy of often very vague and open-ended norms. Thus, certain activities undertaken by some SRs have generated accepted interpretations of norms, the precise content of which had either not been addressed or deliberately left vague by the treaty drafters.[70] In these respects, the SRs can be seen as exercising significant authority in relation to their particular international interpretive community through their capacity to persuade others of the validity of their interpretations.[71] In addition, SRs have contributed significantly to a process of cross-fertilization by which standards derived from different treaties and other instruments are read in conjunction with one another, thereby giving rise to an expansive jurisprudence which is less likely to emerge from the work of, for example, a treaty body charged with interpreting the norms of a single treaty.[72]

D. The Challenges of Coherence and Reform

It has often been acknowledged, in principle, that the Special Procedures system lacks the degree of overall coherence that it should have. There is no question that it is long overdue for a systematic review which would reduce overlaps, delineate the boundaries of mandates more clearly, and identify efficiencies which could come from better coordination. Most importantly, such reforms would introduce measures designed to make the system more

70. Perhaps the best example is the development of an elaborate set of norms governing the rights of a previously invisible category of persons, those who are internally displaced. *See generally* CATHERINE PHUONG, THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS (2005).

71. *See, e.g.*, Ian Johnstone, *The Role of the UN Secretary General: The Power of Persuasion Based on Law*, 9 GLOBAL GOVERNANCE 441 (2003) (characterizing international law as a process of justificatory discourse, and arguing that the U.N. Secretary-General derives much of his influence not from the formal powers delegated to him by states, but because his views carry normative weight within the relevant interpretive community).

72. *See* Judith L. Goldstein & Richard H. Steinberg, *Negotiate or Litigate: Effects of WTO Judicial Delegation on U.S. Trade Politics*, 71 L. & CONTEMP. PROBS. 257, 271 (2008) (arguing that the WTO "Appellate Body has read language across agreements cumulatively in a way that has generated an expansive set of legal obligations").

effective in encouraging proactive policies to promote the enjoyment of human rights, ending ongoing violations, and reducing impunity.

The need for major reform stems from the fact that the system evolved incrementally and without any vision of an appropriate overall structure or architecture. Instead, its shape represents the accumulation of a succession of *ad hoc* decisions taken over a period of many years, each made in response to diverse pressures and with different constituencies and widely differing expectations as to what would be achieved. Given the propensity of intergovernmental organizations to follow precedent, rather than to tailor new initiatives in such a way that they carefully reflect the particular needs they are supposedly designed to meet, it is not surprising that the techniques developed in relation to the earliest of the mandates were simply recycled even as the system as a whole took on a far more elaborate character and was tasked with performing a much wider range of functions. At various stages along the way the resulting lack of coherence was acknowledged by different actors who would call for a review or a rationalization of the emerging system. But such calls were generally resisted. And when reforms were actually undertaken they generally failed to bring significant change, let alone to introduce any greater element of coherence or systemic vision.[73]

The most obvious explanation for this state of affairs is that it reflects the deep ambivalence built into a system established by governments whose rational self-interest is generally not perceived to lie in the construction of a powerful, coherent, and effective human rights regime which might constrain their options and condemn their excesses. It is true that some of them have, from time to time, been compelled whether by their domestic constituencies, by pressures from their international allies or peers, or perhaps most importantly by the sense that there was political advantage to be gained at the expense of one or other of their adversaries, to endorse a new initiative designed to address some form of major human rights abuse. But even in these situations their natural instincts are to seek the moral kudos that can be earned by being seen to do "something," combined with making sure that the measures taken will have a limited impact and will not create precedents which will return to haunt governments in relation to their own points of vulnerability. Thus, the incentives to introduce meaningful reforms and to increase the coherence and effectiveness of the system are very limited.

However, this type of rational state actor analysis takes us only so far in understanding the dynamics of the international human rights regime. As constructivist scholars have long pointed out, the range of actors shaping the regime is much more diverse than just governments and the range of processes at work extend well beyond those which governments themselves

73. The best illustration of this oft-repeated phenomenon is the experience of a wide-ranging review undertaken in 1999. *See infra* text accompanying notes 85–97.

can control.[74] In particular, clusters of governments are strongly supportive of individual mandates which they support for ideological, political or sometimes even principled reasons. They then provide the necessary degree of political support for the relevant experts to extend the interpretation of their mandates, and to expand the techniques that they use in an effort to enhance their impact. But because formal decision-making within the Human Rights Council remains highly contested, such evolutionary changes are not officially ratified. Instead, informal and unarticulated trade-offs are made by which advances in relation to a mandate which is disliked by a given government are tolerated in return for advances in relation to one which is favored. Similarly, a given mandate-holder might be offending one group of governments because of his or her focus on certain issues or countries but simultaneously appealing to that same group because of a focus on other issues or countries. One result of these political dynamics is that a radical disjunction emerges between the formal inter-governmentally sanctioned framework and the nature or characteristics of the actual regime.

Hence the vital need for major reforms to overcome the disjunction. However, it is precisely because of these complexities that the various stakeholders—governments, experts, the U.N. bureaucracy, and civil society—are generally very reluctant to bring about the basic structural reforms which would be necessary to consolidate the plethora of mandates and procedures into a fully fledged system. And it is precisely for this reason that the Code of Conduct assumes particular importance. As noted below, its proponents have sought to present it as an attempt to impose greater coherence upon the system and to improve its overall effectiveness, while not directly upsetting the delicate balance of interests reflected in the overall system. Its opponents, however, see it very differently. Before reviewing the radically different perceptions of the Code held by these groups, we examine the origins of the initiative and the major thrust of its provisions.

II. The Code of Conduct

A. The Code's Emergence from a Protracted Reform Process

For the last three decades of its existence, starting in the mid-1970s, the Commission on Human Rights was engaged in a never-ending process of would-be self-reform. It was as though its inability to deal effectively with situations of major violations of human rights was the fault of one or another procedural defect, and that once it was taken care of, the political will required to act in a more principled, consistent and effective manner would magically be found. As its membership expanded (from thirty-two in 1967,

74. *See generally* John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 Int'l Org. 855 (1998).

to forty-three in 1980 and fifty-three in 1992),[75] the proportion of members from developing countries increased steadily. So too did the range of disagreements between those states acting under the umbrella of the Group of 77 and the once dominant Western states.[76] The latter were arguing that the Commission needed to be more responsive to major violations and to meet more often and for longer sessions. They also sought the strengthening of the secretariat and the creation of an Office of the High Commissioner. The G77, led by the unlikely pairing of Pakistan and India, countered that the Commission should move beyond its obsession with violations and instead be "constructive and remedial," which translated into the avoidance of "judgemental, selective or inquisitorial approaches."[77] They also wanted much greater emphasis placed on economic, social, and cultural rights and for priority to be accorded to the struggle against apartheid.

In the broader context of diplomatic negotiations over the various positions, the Special Procedures system featured prominently, although it was then only in its infancy. The G77 agenda was not lacking in ambition—it called for abandonment of the entire system. The thematic mechanisms would be replaced by geographically-balanced working groups consisting of Geneva-based diplomats, thus eliminating the elements of both independence and expertise, and replacing them with exclusively political criteria.[78] In addition, alleged human rights violations would be dealt with by the confidential "1503" complaints procedure, which is widely considered to be highly ineffectual.[79] In effect, this would have meant the end of the practice of appointing SRs focusing on a single country, but it was also worded so as to leave intact the mechanisms addressing the situations in South Africa and the Occupied Palestinian Territories. The proposals were criticized at the time as being "aimed at eviscerating serious Commission scrutiny of violations."[80] At the end of the day, various other compromises were reached and the Special Procedures system remained in place. Indeed, the independence

75. Philip Alston, *The Commission on Human Rights*, *in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 126, 194 (Philip Alston ed., 1992).

76. Between 1978 and 1984, these disagreements were fought out largely within the Working Group on Further Promotion and Encouragement of Human Rights, created by the Commission to drive the reform process. Its reports are contained in Rep. of the Informal Working Group of 10 Members Established Under Commission On Human Rights, 34th through 40th Sess.: E/CN.4/L.1413 (Mar. 7, 1978); E/CN.4/L.1482 (Mar. 16, 1979); E/CN.4/L.1577 (Mar. 9, 1981); E/CN.4/L.1577 (Mar. 25, 1982); E/CN.4/1983/65 (Mar. 25, 1983); E/CN.4/1983/64 (Mar. 25, 1983); E/CN.4/1984/73 (Mar. 13, 1984). The final document contains a brief review of the various proposals that remained outstanding when the process was abandoned.

77. Reed Brody, Penny Parker & David Weissbrodt, *Major Developments in 1990 at the UN Commission on Human Rights*, 12 HUM. RTS. Q. 559, 563 (1990) (citing Draft Non-Aligned Movement Position Paper 2–3 (1990)).

78. *Id.*

79. *Id.* The "1503" procedure was established under Econ. & Soc. Council Res. 1503 (XLVIII) (May 27, 1970). For a critique, see Alston, *supra* note 75, at 145–55.

80. Brody, Parker, & Weissbrodt, *supra* note 77, at 563.

of SRs was actually strengthened by virtue of an increase in the standard term of office from two years to three.[81]

The next wave of reform efforts was focused much more heavily on the system of Special Procedures. The Asian Group's unsuccessful reform proposals in the 1980s were given new salience and impetus by Western efforts to sanction China in the Commission in the wake of the suppression of the democracy movement in Tiananmen Square in 1989. For several years, the Commission was heavily divided in response to efforts to condemn China and establish some form of reporting on developments.[82] China responded by giving new life to the earlier Asian Group's emphasis on constructive approaches, designed to re-orient the Commission away from its "adversarial" concern with violations in specific states and towards one emphasizing dialogue and cooperation. In particular, the sovereign equality of states was presented as a "basic principle of human rights."[83]

The Asian Group thus pressed the Commission to undertake a new reform process with particular emphasis on Special Procedures. As a result, the Commission agreed in April 1998 to an overall review of its procedures.[84] But this time, instead of the usual closed-door diplomatic negotiations, the Bureau took the unusual decision of launching a highly consultative public process.[85] Perhaps as a result, the outcome not only failed to endorse most of the Asian Group's suggestions, but even made various recommendations pointing in the opposite direction. The 1999 report characterized the system of Special Procedures as "one of the Commission's major achievements" and called for their strengthening.[86] The importance of country-specific mechanisms was also endorsed. Far from imposing a straitjacket on the SRs, the report concluded that the "mandate of each mechanism can only be decided case-by-case in light of the requirements of the situation," and went on to emphasize the importance of "frank and genuine dialogue; the identification of opportunities for advice and assistance to willing Governments; and objective monitoring and fact-finding."[87] It referred to "the independence, objectivity and overall integrity of the mechanisms" as "paramount considerations."[88]

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81. Econ. & Soc. Council Res. 1990/48, *Enlargement of the Commission on Human Rights and the Further Promotion of Human Rights and Fundamental Freedom*, 14th Plenary Meeting, ¶ 4 (May 25, 1990).

82. *See generally* ANN KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE (1999).

83. H.E. Ambassador Wu Jianmin, Head of the Chinese Delegation to the U.N. Comm'n, Statement to the Human Rights Commission, Apr. 8, 1997, *excerpted in* HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 791–92 (3d ed. 2008).

84. Comm'n on Human Rights Decision 1998/112, *Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights*, 60th Meeting (Apr. 24, 1998).

85. The various consultations held are described in detail in the report. *See Rationalization of the Work of the Commission*, *supra* note 38, at 8–9, ¶ 2.

86. *Id.* at 11, ¶ 11.

87. *Id.* at 16–17, ¶ 25.

88. *Id.* at 18, ¶ 28.

The 1999 report also addressed in some detail the obligations of governments towards the system. It called for "protection [of individuals, the media, and NGOs] against adverse consequences for dealings with special procedures";[89] called upon the Commission to "conduct regular, focused and systematic reviews of serious incidents or situations involving a failure or denial of cooperation by Governments";[90] and pointed to the "urgent need for more serious, focused and systematic utilization and follow up of the reports of special procedures, their recommendations and related Commission conclusions."[91]

In addition, the report encouraged the "application and development of best practices, which should be reflected in the manual for special procedures mechanisms"[92] which had been adopted by the SRs themselves in 1998. And, of the greatest significance in the present context, the report proposed "that the Secretary-General expedite his work on the preparation of a code of conduct for experts on mission."[93] This recommendation is of particular interest for several reasons. First, it is the first time that the idea of a code of conduct was endorsed by a Commission or Council organ. Second, the reference is actually somewhat confused because, while envisaging a code specifically for SRs, it actually refers to a very different exercise which was then current and resulted in the eventual adoption of a set of regulations for experts on mission throughout the U.N. system.[94] Third, the recommendation envisaged a code which would "scrupulously" uphold the independence of mandate-holders and the "integrity of their offices."[95] Fourth, the authors of the report noted that they were "most encouraged at the support expressed for this idea by representatives of the special procedures," and they recommended that the Secretary-General (who would do the drafting rather than the representatives of states) should take "into account comments and suggestions from the annual meeting of special procedures."[96] Finally, the report recommended that any alleged infringements of the code should be dealt with by "the annual meeting of special procedures, with any observations or recommendations in this connection being reported to the Commission."[97]

However, the relevant parts of the report were never acted upon by the Commission. This was due in good part to the fact that those states which had been most active in promoting it in the first place were unhappy with

89. *Id.* at 22, ¶ 39.
90. *Id.* at 23, ¶ 42.
91. *Id.* at 26, ¶ 48.
92. *Id.* at 21–22, ¶ 38.
93. *Id.* at 20.
94. U.N. Secretary-General, *Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission*, U.N. Doc. ST/SGB/2002/9 (June 18, 2002) [hereinafter *Regulations Governing the Status*].
95. *Rationalization of the Work of the Commission*, *supra* note 38, at 20, ¶ 35.
96. *Id.*
97. *Id.*

the outcome. Instead, as the political climate in the Commission grew more confrontational, attention turned to the biggest reform of all—abolition of the Commission. It was thus in the context of debates over the shape of a new Council that the specific reform proposals relating to the Special Procedures resurfaced. In this setting, those who favored radical reforms went on the offensive, while those who were concerned to protect the *acquis* in relation to the Special Procedures were left in a defensive posture.[98]

In 2004, the Asian Group within the Commission put forward a new proposal. It referred in passing to the 1999 report by the Bureau, but only as background to its assertion that it was necessary, five years later, to "further fine-tune the [Bureau's] work [through] a more focused review limited specifically to standardization and codification . . . and devising a comprehensive manual as a framework for their operations containing a stipulated code of conduct."[99] The proposed code would include: (a) a standardized procedure for dealing with allegations; (b) measures to enhance confidentiality of allegations; (c) guidelines for media interaction which would limit comments by SRs to cases of "extraordinary incidents involving gross violations," and even then, to occur only after the concerned government had responded; (d) standardized guidelines for country missions, involving close coordination with the government in relation to the itinerary and activities to be undertaken during the visit; and (e) "reporting schedules, guidelines and procedures."[100] In other words, the proposed code was viewed as a means of eliminating much of the discretion vested in SRs, establishing uniform procedures to be applied in relation to all mandates regardless of the difference in nature among them, and significantly reducing public comment or timely disclosure of information by mandate-holders.[101]

Although the Asian Group's proposals had been quite far-reaching, the Organization of the Islamic Conference ("OIC") put forward a "paper" in May 2005 that went even further in spelling out specific proposals.[102] The OIC had become a key player in many of the reform discussions, especially through the insistent and informed advocacy of states such as Algeria, Egypt, and Pakistan. Algeria, like China in the aftermath of Tiananmen

98. *See, e.g.*, NETHERLANDS ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS, THE FUNCTIONING OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS (1999), *reprinted in Rationalization of the Work of the Commission*, *supra* note 38; WALTER KÄLIN & CECILIA JIMENEZ, SWISS MINISTRY OF FOREIGN AFFAIRS, REFORM OF THE UN COMMISSION ON HUMAN RIGHTS 18–31 (2003); *Report of the Task Force on Reform of the U.N. Commission on H.R.*, A.B.A. SEC. INT'L L. (Apr. 16, 2005).

99. Asian Group, *Non-Paper on Enhancing the Effectiveness of the Special Mechanisms of the Commission on Human Rights*, 1 (2004) (delivered to the 61st Comm'n on Human Rights), *available at* http://www.achrweb.org/Review/2005/94-05-SPs-Add1.pdf.

100. *See generally id.*

101. For a detailed discussion of the Asian Group's 2004 non-paper, see SANDEEP PRASAD & KATHERINE MCDONALD, ACTION CANADA FOR POPULATION AND DEVELOPMENT, BUILDING THE UN HUMAN RIGHTS COUNCIL AND ITS SPECIAL PROCEDURES: NOTES FOR SEXUAL RIGHTS AND REPRODUCTIVE RIGHTS ADVOCATES (2006), *available at* http://files.creaworld.org/files/HRC_Report_Sept2006.pdf.

102. Organization of the Islamic Conference Working Group on Human Rights and Humanitarian Affairs, *Paper Regarding the Reform of the UN Human Rights System* (May 20, 2005).

Square, had been stung by efforts by Western states to place the internal armed conflict in Algeria on the Commission's agenda in the late 1990s. It reacted harshly to criticism, whether by individual states, the U.N. High Commissioner for Human Rights, or the Special Procedures mandate-holders, and thus began a series of efforts to rein in the powers available to the relevant actors to criticize state conduct in such contexts.[103] The OIC's proposed reforms to the Special Procedures system put clearly back on the agenda many of the key issues that were to be fiercely contested in the years ahead.

These various proposals all contributed in some part to the overall pressure to abolish the Commission on Human Rights altogether and to replace it with something better. Its successor, the Human Rights Council, met for the first time in June 2006. It was instructed by the General Assembly to "assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures . . . ." It was directed to complete that review by June 2007,[104] an artificial but nonetheless effective deadline which also ensured that the time available for drafting and adopting a code of conduct was somewhat truncated. The Council got to work on that issue in November 2006 by requesting its Open-ended Intergovernmental Working Group to "draft a code of conduct regulating the work of the special procedures."[105]

It is important to recognize that the Special Procedures occupied an important but contested place in this process. In particular, those states which would have been happy to relegate the Special Procedures to marginality, if not quite oblivion, had to deal with the fact that the Council's overall credibility, and thus its capacity to achieve its other objectives, depended in the eyes of most observers on its ability to do two things: to respond to crisis situations and grave violations, and to undertake routine monitoring which covered all states, rather than just a handful of pariahs.

Thus the overall monitoring system would also need to be able to draw on information about violations of rights generated by credible sources from within the Council's own system. For this purpose the system of Universal Periodic Review ("UPR") was created to engage in a systematic examination of every state's human rights record every four years.[106] Its goal was in part to demonstrate that the Council would not perpetuate the double standards of the Commission by focusing only on human rights problems in a rela-

103. *See infra* text accompanying notes 141–43.

104. G.A. Res. 60/251, ¶ 6, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

105. Human Rights Council Res. 2/1 (Nov. 27, 2006), Rep. of the Human Rights Council, 2d Sess., Sept. 18–Oct. 6, Nov. 27–29, 2006, A/HRC/2/9, at 7 (Mar. 22, 2007) [hereinafter Human Rights Council Res. 2/1].

106. For details of the way in which the review works and the outcomes, see Office of the United Nations High Commissioner for Human Rights, *Human Rights Council Universal Periodic Review*, *available at* http://www.ohchr.org/EN/HRBODIES/UPR/Pages/UPRMain.aspx (last visited Mar. 6, 2011).

tively small range of countries, almost all of which were in the South. The means by which the UPR is conducted are still evolving, but 126 countries had been reviewed as of December 2010.[107] While it is still too soon for any strong conclusions as to the success or failure of the mechanism, the outcomes achieved so far could have been far worse.[108] What is clear is that there remains considerable room for improvement.[109]

These competing considerations help to explain the context in which discussions of the Code commenced. We turn now to examine the shape that the Code took when finally adopted in June 2007.

B. An Overview of the Code

The resolution adopting the Code[110] consists of two parts. The main part of the resolution is three pages in length and constitutes, in effect, a preamble which lays out both the legislative authority for the Code and the objectives sought to be achieved.

The core of the Code concerns the rights and responsibilities of the mandate-holders, although those particular terms are not used. Instead the Code talks of their prerogatives and the characteristics of their office or mandate. Their "prerogatives" are said to be "circumscribed by their mandate, the mandate of the Human Rights Council, and the provisions of the Charter of the United Nations."[111] Curiously, Article 6 of the Code is headed "prerogatives," yet three of the four items listed thereunder are in fact limitations or instructions as to how any prerogatives implicit in their mandate are to be constrained in practice. They include the obligation to cross-check facts, to

107. Office of the United Nations High Commissioner for Human Rights, *Human Rights Council Universal Periodic Review*, *available at* http://www.ohchr.org/EN/HRBodies/UPR/Documents/uprlist.pdf.

108. *See, e.g.*, Elvira Domínguez Redondo, *The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session*, 7 CHINESE J. INT'L L. 721 (2008). Redondo praises the process on the grounds that no state has withdrawn from the process, a systematic documentary overview of global human rights practices is being built up, and a genuine process of peer review by countries of one another's performance is being undertaken. *Id.* at 733, ¶ 41. But she also notes the "severe lack of reporting" of the process in the national-level media, thus casting doubt on its impact beyond the confines of the United Nations in Geneva. *Id.* at 734, ¶ 43; *see also* WILLY FAUTRÉ, HUMAN RIGHTS WITHOUT FRONTIERS INTERNATIONAL, THE UNIVERSAL PERIODIC REVIEW OF CHINA AT THE UN IN GENEVA: RELIGIOUS FREEDOM COVERAGE 7 (2000), *available at* http://www.hrwf.org/Joom/images/reports/2009/2009%20un%20upr%20china.pdf ("[I]independent voices such as human rights NGOs and other stakeholders (victims, human rights defenders, and so on), national human rights institutions, U.N. experts and U.N. Special Rapporteurs are muted, cannot participate in the interactive dialogue and influence the final report, especially through some contribution to the recommendations."); Gareth Sweeney & Yuri Saito, *An NGO Assessment of the New Mechanisms of the UN Human Rights Council*, 9 HUM. RTS. L. REV. 203 (2009).

109. A recent governmental report criticizes the Council "for failing to address meaningfully many human rights situations (for example, in Iran and Guinea), and for being dominated by bloc politics." It offers the explanation that "many U.N. members do not wish to see the U.N. develop the capacity to operate as an effective human rights watchdog." *See* UNITED KINGDOM FOREIGN & COMMONWEALTH OFFICE, ANNUAL REPORT ON HUMAN RIGHTS 2009 59 (2010), *available at* http://centralcontent.fco.gov.uk/resources/en/pdf/human-rights-reports/human-rights-report-2009.

110. Human Rights Council Res. 5/2, *supra* note 9.

111. *Id.* pmbl. ¶ 13.

pay particular attention to information provided by states, and to take account only of human rights standards applicable to the state concerned.[112] The fourth "prerogative" is an entitlement to draw the Council's attention to "any suggestion likely to enhance the capacity of special procedures to fulfill their mandate."[113] These prerogatives are then distinguished from the mandate-holders' absolute independence, although the obvious potential conflict between the two is not acknowledged.[114] Article 11(f) of the Code does, however, spell out an important prerogative, which is to have access to official security protection, if sought, during country visits.

But the main thrust of the Code is to spell out various responsibilities incumbent upon the mandate-holders. In addition to the various general principles, noted below, they are required to restrict their sources of information to those that are "objective and dependable,"[115] to engage in dialogue with states in most contexts and to take full account of their views, and to act in ways that are "likely to promote a constructive dialogue among stakeholders."[116] Although the Code says very little about the obligations of states to cooperate with the special procedures system, the resolution that adopted it called upon all states to do so.[117]

The Code's defining characteristic, and the one that carries within it the seeds of conceptual confusion, is its hybrid nature. This is manifested most of all in terms of the heterogeneous sources of authority and inspiration upon which it draws. Without acknowledging the fact, it seeks to achieve a synthesis of four very different and potentially incompatible, reference models. The first is that of the 'independent expert,' whose status is unique and for whose effective functioning judgment and discretion are indispensable. The expert's independence is even said to be "absolute."[118] Moreover, the non-institutional basis of the post is recognized by the statement that "[m]andate-holders exercise their functions on a personal basis . . . ,"[119] and must be free to make their own assessments.[120] The second model is that of the U.N. official, underscored by the resolution's reference to Article 100 of the U.N. Charter, which governs Secretariat members and seeks to ensure respect for "the exclusively international character of [their] responsibilities."[121] Moreover, a large proportion of the formulations used in the Code have been taken directly or adapted from the U.N. regulations governing officials and experts on missions.[122] The third is that of the judge, recog-

112. *Id.* arts. 6(a)–(c).
113. *Id.* art. 6(d).
114. *See id.*
115. *Id.* art. 8(c).
116. *Id.* art. 13(b).
117. *See id.* pmbl. ¶ 1.
118. *See id.* pmbl. ¶ 13.
119. *See id.* art. 4(1).
120. *See id.* art. 3(a).
121. *See id.* pmbl. ¶ 7.
122. *Regulations Governing the Status*, *supra* note 94.

nized by the fact that various provisions are clearly adapted from statements of judicial independence. This is despite the fact that the Code explicitly acknowledges the "non-judicial character of the [mandate-holders] reports and conclusions."[123] And the fourth is that of an agent who shall act so as "to maintain and reinforce the trust they enjoy of all stakeholders,"[124] which they do in part by promoting "dialogue and cooperation."[125]

The hybrid nature of the document is also illustrated by its uncertain status. On the one hand, it is presented as a "code of conduct" rather than a set of rules or regulations. Such codes are often self-regulating, eschew precise directives, and are generally not legally binding upon those to whom they are addressed. This softer nature is reinforced by the stated objective of defining "standards of ethical behaviour," which are generally quite distinct from legal rules. The Code also seeks to define standards of "professional conduct," which again invites comparison with best practices statements and professional codes of self-regulation, rather than a statute. The terms used by the Council to describe the Code's broader objectives also downplay formal regulatory aspirations by noting that it is designed to "assist all stakeholders . . . to better understand and support the activities of mandate-holders" and to "enhance the cooperation between Governments and mandate-holders."[126]

But, in contrast to the signal sent by the language just cited, the Council resolution authorizing the drafting of a code described it as "*regulating* the work of the special procedures."[127] And the resolution which actually endorsed the code refers to the need for "the adoption of principles and regulations" and the desirability of spelling out "the rules and principles governing the behavior of mandate-holders."[128] The interchangeable use of the terms "principles," "rules," and "regulations" to describe the content of the Code sends at best a mixed and at worst a confused message as to the status to be attributed to the document. By the same token, the regulatory intent is made clear by the consistent use throughout the Code of the mandatory "shall" rather than the precatory "should."

The Code's hybrid nature is also illustrated by the way in which it alternates between using the relatively well-defined language of law and administrative practice on the one hand, and open-ended ethical and moral language on the other. In the former category, for example, it highlights the importance of the "notions of impartiality and objectivity, as well as . . . expertise,"[129] requires mandate-holders to "[e]xercise their functions in accordance with their mandate and in compliance with" various legal instru-

123. *See* Human Rights Council Res. 5/2, *supra* note 9, art. 8(c).
124. *Id.* art. 3(h).
125. *Id.* art. 11(e).
126. *See id.* pmbl. ¶¶ 6, 11.
127. *See* Human Rights Council Res. 2/1, *supra* note 105, ¶ 3 (emphasis added).
128. Human Rights Council Res. 5/2, *supra* note 9, pmbl. ¶¶ 5, 14.
129. *Id.* pmbl. ¶ 4.

ments,[130] and to conduct field visits "in compliance with the terms of reference of their mandate."[131] In the latter category, the Code can almost be read as an exercise in Aristotelian virtue ethics. It talks of the need to enhance the mandate-holders' "moral authority,"[132] and goes on to urge them to keep "constantly . . . in mind the fundamental obligations of truthfulness, loyalty and independence,"[133] to demonstrate their "probity, impartiality, equity, honesty and good faith,"[134] to be "guided by the principles of discretion, transparency, impartiality, and even-handedness,"[135] and to "show restraint, moderation and discretion."[136] There is thus a strong contrast between the insistence that external standards, whether contained in international instruments or laid down in resolutions of the Council, be complied with, and reliance upon the mandate-holders to conduct themselves virtuously in accordance with their own internal standards of decency.

The question that then arises is whether it matters that the Code is so much of a hybrid. Is there a problem with the fact that it draws liberally upon language, concepts and specific formulations drawn from areas or professions in which the approach to accountability is so different? Judges are clearly independent and their accountability is strictly limited to issues of outright misconduct. International officials are bureaucrats who are directly and comprehensively accountable to a superior officer. Agents who are accountable to a diverse range of stakeholders will be balancing a range of considerations and their accountability will not be reducible to restrictive rules and regulations. And independent experts will be hired because of the trust vested in them and will be accorded wide discretion.

In essence, the Code confuses what have been termed integrity-based and rule-based approaches.[137] The assumptions underpinning each are very different. The Code's emphasis on terms such as probity, equity, good faith, etc, its references to ethics and codes, and its recognition of various forms of autonomy, all point to an integrity-based system. Under such systems the individual appointee's professional integrity is central, trust is manifested, discretion and judgment are expected to be shown, and accountability is used to build trust and understanding and improve the functioning of the office-holder. In contrast, the Code's emphasis on rules and regulations, its mandatory language, and the inflexible manner in which it has been invoked, all point to a rule-based approach. Under that model, precise instructions are given, incentives and disincentives are set up, the emphasis is on

130. *Id.* art. 3(c).
131. *Id.* art. 11(a).
132. *Id.* pmbl. ¶ 12.
133. *Id.* art. 3(d).
134. *Id.* art. 3(e).
135. *Id.* art. 8(a).
136. *Id.* art. 12(b).
137. *See* Mark Philp, *Delimiting Democratic Accountability*, 57 POL. STUD. 28, 36–41 (2009).

strict compliance, and penalties play a prominent role in inducing conformity.

While these two categories are not hard and fast, and different accountability models will reflect different balances, the contrast between the two is sufficiently great as to suggest that they cannot be combined in their entirety into a single coherent instrument. The essential ethos of the accountability mechanism has to be oriented either towards integrity and trust or towards rules and insistence upon compliance. The distinction is well captured by Philp, who argues that accountability cannot be so structured as to render office-holders "wholly subservient to those they serve . . . – since, in the extreme, that process ensures that their agency is eclipsed and they will have nothing left to account for."[138]

As we shall see in the following section of the Article, the approach adopted by the great majority of governments that have invoked the Code is deeply informed by the rules-based or compliance model.

C. The Code as an Effort to Constrain or Undermine the Special Procedures

In contrast to the general reaction of the international human rights community, the general thrust of this Article is that there is a need for a code of conduct of some sort to govern the work of mandate-holders and that the Code, as adopted, is potentially workable. Nevertheless, the Code is widely perceived as an effort to hobble the United Nation's most effective human rights monitors. It is thus important to get a sense of why the Code has been seen in such a negative light.

While various governments had suggested the need for some kind of regulatory instrument, the Code as it emerged was essentially an Algerian initiative, driven by its Permanent Representative to the United Nations in Geneva, Idriss Jazaïry. While Ambassador Jazaïry was always careful to act under the aegis of the African Group within the Council, and was strongly supported in his efforts by states such as China, Cuba, Egypt and Pakistan, as well as by the Organization of the Islamic Conference (an umbrella grouping of Islamic states), it was ultimately his personal project. He commissioned a respected Algerian jurist, Fatsah Ougergouz, to prepare a first draft of the Code; he revised and submitted each of the successive drafts to the Council; he conducted the negotiations and wrote the notes explaining which proposals had been accepted and which rejected; and the timing of the adoption of the draft on June 18, 2007 was dictated in significant part by the fact that Algeria's membership of the Council ceased at the end of that day. And, most unusually for such an important initiative, the draft

138. *Id.* at 41.

resolution containing the Code was put forward by a sole sponsor—"Algeria (on behalf of the African Group)."[139]

Two factors seem likely to have been important in motivating his investment in the initiative. The first is the extent to which his background enabled him to see first-hand the power that could be exercised by both civil society groups and international officials. From 1984-1992 he was head of the secretariat of a U.N. specialized agency, and was subsequently the head of an international NGO working in the development field.[140] These experiences would have given him deep insights into the ways in which individuals who are sometimes able to act largely independently of states can shape international policy and constrain state's domestic options. Such independence is understandably going to be seen in a different light when one is acting instead as the ambassador of a state, charged with defending its human rights record.

The second motivation probably stemmed from Algeria's direct experience with the Special Procedures system and the High Commissioner for Human Rights in the late 1990s and early 2000s. By 1998 it was estimated that some 70,000 persons had been killed in an internal conflict and many observers were critical of the government's inadequate response.[141] Mary Robinson, the High Commissioner at the time, called upon the government to admit the relevant SRs, but was roundly rebuffed by the Foreign Minister.[142] In 2005, two SRs publicly expressed their concern that a proposed amnesty law would apply to individuals accused of large-scale killings and disappearances and that the responsibility of governmental forces for human rights violations had not been adequately acknowledged.[143] The government rejected the allegations, but Ambassador Jazaïry expressed deep resentment that the SRs had intervened in such matters.

The Council authorized the drafting of a code on 27 November, 2006.[144] The first draft was unveiled on March 13, 2007, thus demonstrating unu-

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139. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council," Algeria (on behalf of the African Group): Draft resolution, 5/. . . Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council*, U.N. Doc. A/HRC/5/L.3 (June 15, 2007).

140. He was the second President of the International Fund for the Agricultural Development, based in Rome, and on the expiration of his two terms in that office, he became the Chief Executive of a London-based consortium of NGOs fighting poverty and exclusion in Africa—l'Association de cooperation et de recherche pour le développement (ACORD). *See* http://www.mission-algerie.ch/files/Curriculum-Vitae%20-%20Idriss%20Jazairy.pdf.

141. *See* HUMAN RIGHTS WATCH, *Algeria*, in WORLD REPORT 1999 (1999), *available at* http://www.hrw.org/legacy/worldreport99/mideast/algeria.html.

142. *Algeria: A Change of French Tone?*, ECONOMIST, Oct. 9, 1997, *available at* http://www.economist.com/node/102214.

143. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions: Summary of Cases Transmitted to Governments and Replies Received*, Comm'n on Human Rights, at 25–27, U.N. Doc. E/CN.4/2006/53/Add.1 (Mar. 27, 2006).

144. Human Rights Council Res. 2/1, *supra* note 105.

sual efficiency and commitment on the part of the Council's Open-ended Intergovernmental Working Group.[145] The Coordination Committee of Special Procedures was skeptical of the initiative and argued that any such endeavor should be more limited in scope and less directive in nature. Many Latin American and Western states were also dubious of the idea, but were not strongly motivated to oppose it. Alarm bells sounded on June 5, 2007, however, when Ambassador Jazaïry tabled a revised version of the Code[146] that was said to have incorporated suggestions made by various, albeit unidentified, delegations.[147] The new Algerian draft would have radically reduced the scope of activities for most SRs, as well as seriously restricted their independence. The details of country visits, for example, would have had to be planned in close cooperation with the government concerned, which would also have been given a carte blanche to impose whatever "security" measures they felt were warranted.[148] Mandate-holders could not make any public statements without first giving the state concerned "adequate time for investigation, reply and, when appropriate, action,"[149] thus implying a delay of many months. Urgent appeals to governments, which had hitherto been made in a variety of situations,[150] would now be restricted to those involving either the actual loss of human life or "eminently life-threatening" situations.[151] And the routine complaints, the so-called "allegation letters," could only be sent if the original complaint did not have "political motivations," if it identified the rights alleged to have been violated, if the complainants had both direct and reliable knowledge of the violation, if

145. Permanent Delegation of the African Union in Geneva, Revision of Mandates Working Group on the Implementation of Paragraph 6 of Resolution 60/251: Draft Code of Conduct for Mandate Holders: African Group Proposal (Mar. 13, 2007).

146. Revision of Mandates Working Group on the Implementation of Paragraph 6 of Resolution 60/251: Draft Resolution/Rev.2: Code of Conduct for Mandate Holders of the Special Procedures of the Human Rights Council: Algeria on behalf of the African Group, (June 13, 2007) [hereinafter Draft Resolution/Rev.2].

147. Ambassador Idriss Jazaïry, Permanent Rep. of Algeria, Open-ended consultations on Rev.1: Draft Resolution: Code of Conduct for mandate-holders of the Special Procedures of the Human Rights Council, on behalf of the African Group, Introduction, at 2 (June 11, 2007) [hereinafter Open-ended consultations].

148. Draft Resolution/Rev.2, *supra* note 146, art. 10. It is relevant to note that certain governments have often invoked security justifications in order to restrict the movement or access of human rights fact-finders, and to monitor their activities and conversations. In explaining the purport of the proposal, Ambassador Jazaïry stated that: "The effectiveness of mandate-holders will be impaired if these experts working for the U.N. do not observe certain customary practices observed by the U.N. system such as preparing visits with, and communicating with the State through, normal diplomatic channels." Open-ended consultations, *supra* note 147, art. 7, at 4.

149. Draft Resolution/Rev.2, *supra* note 146, art. 12(a).

150. The mandate-holders' own rules governing the circumstances in which an urgent appeal was appropriate required the alleged violation to be "ongoing or imminent." The rationale offered by the mandate-holders for such appeals was "to ensure that the appropriate State authorities are informed as quickly as possible of the circumstances so that they can intervene to end or prevent a human rights violation." MANUAL OF THE UNITED NATIONS HUMAN RIGHTS SPECIAL PROCEDURES, art. 47 (Draft June 2006), *available at* http://www2.ohchr.org/english/bodies/chr/special/docs/Manual_English_23jan.pdf.

151. Draft Resolution/Rev.2, *supra* note 146, art. 14.

domestic remedies had been exhausted, and if the relevant situation was not being dealt with by any other human rights procedure.[152] A conservative estimate is that this would have eliminated at least ninety percent of the allegation letters previously sent to governments. Finally, the draft proposed the establishment of an "Ethics Committee of the Human Rights Council."[153] In other words, the Code's application would be overseen by the governments themselves.

The draconian nature of these proposals spoke volumes about the motivations of the sponsors. They could not, as proclaimed by Ambassador Jazaïry, have been designed to "enhance the moral authority of mandate-holders and their independence in the context of their recognized prerogatives and accountability therefore."[154] To most observers, they amounted to a concerted effort to limit the mandate-holders' scope of action, introduce extensive delays in their work, and put governments firmly in the driver's seat in relation to the work of SRs seeking to hold those governments to account. Human rights groups were highly critical, and governments from regions other than Africa and Asia could no longer remain above the fray. In response to the strong outcry that greeted Ambassador Jazaïry's new draft, extensive consultations took place among delegations, NGOs lobbied strongly, and SRs made known their view that the proposed approach would be disastrous for the system. As a result, the most problematic of the proposed amendments were dropped in a further revised version tabled on June 13, 2007, and a final third revised version was submitted two days later.

Since its adoption, reactions to the Code have been predictably polarized. The Council itself asserted that the Code is designed to "strengthen the capacity of mandate-holders to exercise their functions whilst enhancing their moral authority and credibility."[155] Its stated purpose is to "enhance the effectiveness of the system of special procedures by defining the standards of ethical behavior and professional conduct that special procedures mandate-holders . . . shall observe whilst discharging their mandates."[156] The principal sponsors of the Code have continued to repeat the mantra that its overriding objective is to enhance the system's effectiveness, rather than to undermine or limit it.

But the reaction of many Western governments, as well as that of almost all civil society groups, has been far more negative. Many feared, in the words of Amnesty International, that it was essentially an endeavor to "emasculate [the Special Procedures mandate-holders] by imposing unneces-

152. *Id.* art. 9(a). The last of these restrictions was especially broad: "The communication should not refers [sic] to a situation that is being or already has been dealt with by a Special Procedure, a Treaty Body or other U.N. or similar regional complaints procedure in the field of human rights." *See id.*

153. *Id.* art. 16.

154. Open-ended consultations, *supra* note 147, at 2.

155. Human Rights Council Res. 5/2, *supra* note 9, pmbl. ¶ 12.

156. *Id.* art. 1.

sary restrictions on their working methods."[157] And the mandate-holders themselves, while open to some form of code, observed in relation to the final draft of the Code of Conduct that "while the Council's role is to lay down broad principles to govern the system, an initiative which seeks to micro-manage the approach adopted by the mandate-holders would undermine the essential principles of independence, competence, objectivity, impartiality and good faith upon which the system has been constructed."[158]

Over the three years since its adoption, the fears of many civil society groups and mandate-holders would seem to have been vindicated. The Code has been regularly invoked by states in chastising SRs. Code-based objections have been raised in relation to the work of a significant number of Special Procedures mandate-holders, and hotly contested debates over the Code have been held in both the Human Rights Council and the General Assembly, as the analysis below illustrates.

In 2008, a group of states consisting of Egypt, India, the Russian Federation, Singapore and Sri Lanka,[159] channeled their express dissatisfaction with the Special Rapporteur on extrajudicial executions, into a draft decision under which that and perhaps other mandates would have been listed as vacant.[160] After lengthy negotiations the draft was withdrawn by the cosponsors in return for the adoption of a Presidential Statement which significantly changed the rules relating to the tenure in office of mandate-holders.[161] The Statement invited states to inform the President of any "cases of persistent non-compliance by a mandate-holder"[162] with the Code and opened up the possibility that the Council could "consider such information and act upon it as appropriate."[163] While the Statement indicates that this would be especially appropriate when consideration is being given to the renewal of an individual's mandate (generally after three years for a thematic rapporteur, but generally after one year in the case of country rapporteurs), it

157. BUILDING ON A CORNERSTONE, *supra* note 39, at 3.

158. Coordination Committee of Special Procedures, A Note by the Special Procedures' Coordination Committee in Response to Discussions on a Code of Conduct and Annex: Possible Elements of a Code of Conduct, 3 (Apr. 13, 2007), *available at* http://www2.ohchr.org/english/bodies/chr/special/docs/note_code_of_conduct.pdf.

159. According to Sri Lanka: "[T]he present mandate holder has failed to achieve the required standards of mandate holders with regard to cooperation, transparency and dialogue with all stake holders, in particular with States. This has resulted in a failure to fully observe the Code of Conduct . . . ." *Sri Lanka Joins India, Russia in Supporting Mandate, Not Mandate Holder*, THE PERMANENT MISSION OF SRI LANKA TO THE UNITED NATIONS OFFICE AT GENEVA (June 5, 2008), http://www.lankamission.org/content/view/350/49.

160. *See* Human Rights Comm'n, *Organizational and Procedural Matters: Egypt (on behalf of the African Group), India, Russian Federation, Singapore, Sri Lanka: draft decision, 8/. . . Appointment of special procedures mandate-holders*, U.N. Doc. A/HRC/8/L.15 (June 12, 2008) ("*Decides* to include in the list of vacancies for appointment of special procedures mandate-holders . . . those thematic mandates in respect of whom the current mandate-holder has completed his or her first term of three years.") (emphasis in original).

161. Human Rights Comm'n, *Terms of office of special procedure mandate-holders*, U.N. Doc. 8/PRST/2 (June 18, 2008).

162. *Id.* ¶ 3.

163. *Id.* ¶ 4.

explicitly leaves open the possibility that this might occur at any time. Even before the Statement had been adopted, the representative of Jordan indicated that he planned to indict the Special Rapporteur on torture on the basis of the new procedure.[164] Thus the only formal procedural development subsequent to the Code's adoption was used to dramatically reduce the security of tenure enjoyed by mandate-holders.

In 2009, the African Group formally invoked this procedure by registering a statement calling for the dismissal of the Special Rapporteur on extrajudicial executions based on alleged violations of the Code. The offending report dealt with killings by police death squads and by the military in Kenya.[165] Egypt, reading a text adopted by the African Group, stated that the Rapporteur's call for the resignation of Kenya's Attorney-General was "unprecedented" and "illegal," condemned the shocking and unusual language of his statement, asserted that his report had been prepared by a nongovernmental organization rather than himself, and claimed that it had been made public before it had been presented to the Kenyan Government.[166] The statement concluded by lodging an "official rejection by the African Group of the renewal of the mandate of Mr. Alston."[167] In the absence of any procedure enabling him to reply publicly to the Council, the Special Rapporteur refuted each of these allegations in a note sent privately to the President of the Council.

Surprisingly, however, the Council did not take specific action against the Special Rapporteur. Instead, it adopted, without a vote, a resolution sponsored by Cuba, acting on behalf of the Non-Aligned Movement,[168] and cosponsored by China and the Russian Federation,[169] recalling that mandate-holders must "exercise their functions with full respect for and strict observance of their mandates . . . [and] comply fully with the provisions of the

164. Int'l Serv. for Human Rights, Council Monitor: Daily Update Human Rights Council, 8th Session 5 (June 18, 2008). Ultimately, Jordan's plans were not pursued because the accused Special Rapporteur had visited Jordan before either the Code or the new procedure had been adopted.

165. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Kenya*, U.N. Doc. A/HRC/11/2/Add.6 (May 26, 2009) (by Philip Alston).

166. Statement by Egypt, on behalf of the African Group (June 9, 2010), *available at* http://webcast.un.org/ramgen/ondemand/conferences/unhrc/eleventh/hrc090608am-eng.rm?start=00:08:06&end=00:13:24.

167. *Id.*

168. The Non-Aligned Movement ("NAM"), which currently consists of 118 members, is one of the more active blocs operating within the Council. *See Members, Observers and Guests*, Summit of the Non-Aligned Movement, http://www.namegypt.org/en/AboutName/MembersObserversAndGuests/Pages/default.aspx (last visited Mar. 7, 2011). It regularly adopts detailed statements of the policies that its members should pursue vis-à-vis the Council, and these generally include a focus on measures to ensure that the Special Procedures are preserved from "politicization and double standards, so as to enhance the effectiveness of the system." XV Summit of Heads of State and Government of the Non-Aligned Movement, Sharm el Sheikh, Egypt, July 11–16, 2009, *Draft Final Document*, at 30, Doc. NAM2009/FD/Doc.1 (July 16, 2009).

169. Human Rights Comm'n, Rep. of the Human Rights Council, 11th Sess., U.N. Doc. A/HRC/11/37, at 83 (Oct. 16, 2009).

code of conduct."[170] The resolution also called upon the Office of the High Commissioner for Human Rights "to assist the special procedures further with a view to contributing to their awareness of and full compliance with the code of conduct."[171] In presenting the draft, however, Cuba made clear that it was in fact following up on the African Group's statement. While not referring to any individual mandate-holder it recited, by way of example of problems afflicting the system generally, each of the specific Code violations alleged by the African Group.[172]

It is unclear why the sponsors decided not to dismiss the mandate-holder given the egregiousness of the alleged violations, especially that of having simply reproduced an NGO report and presented it as his own. Several possible explanations may be suggested. The first is that the Kenyan delegation was itself divided on the issue, and the Prime Minister of Kenya subsequently issued a statement endorsing the Special Rapporteur's report and noting that Kenya had recognized "that extrajudicial killings were a serious problem in our country, and accepted most of Prof. Alston's recommendations on how to put an end to this terrible scourge."[173] The African Group may have been unwilling to act in contradiction of a clear statement by the Prime Minister of the country concerned. A second explanation is that the allegations made were factually unfounded, and a dismissal on that basis would have put the entire process in a bad light. A third explanation is that the co-sponsors were more interested in sending a clear signal to all SRs to restrain their activities than in taking steps against an individual expert.

These events, along with criticism of other SRs, led a coalition of thirty-seven NGOs to issue an "Open Letter" to the member states of the Human Rights Council to signal their concern at the "extraordinary personal attacks by some States on the integrity of mandate holders and specific threats to their independence."[174] They focused, in particular, upon the Special Rapporteurs on freedom of expression and on extrajudicial, summary or arbitrary executions who, they claimed, had been "subjected to threats of disciplinary action [at the Council's June 2009 session] because they offered their expert analysis and recommendations on important human rights issues that they brought to the attention of this Council in the proper exercise of their mandates."[175] But the NGOs' concerns went beyond those individual cases, and their letter spoke of "what appears to be a coordinated effort to intimidate Special Procedures, individually and collectively," the consequences of

170. Human Rights Council Res. 11/11, System of Special Procedures, 11th Sess., June 2–18, 2009, U.N. GAOR, 64th Sess., Supp. No. 53, A/64/53, at 141 (June 18, 2009).

171. *Id.*

172. Cuba Delegation, Presentación del proyecto de resolución L.8 Fortalecimiento del sistema de procedimientos especiales, *available at* http://portal.ohchr.org/portal/page/portal/HRCExtranet/11thSession/DraftResolutions/AHRC11L.8/Presentation.pdf.

173. Raila Odinga, *Africans must lead the global struggle against impunity*, DAILY NATION, June 17, 2009, *available at* http://www.nation.co.ke/oped/Opinion/-/440808/612428/-/4la5xa/-/.

174. *See Open Letter to Member States of the Human Rights Council*, *supra* note 17.

175. *Id.*

which were "severely eroding the Council's legitimacy and credibility."[176] They concluded by focusing on a generalized misuse of the Code:

> [T]here is an escalating tendency among too many States to utilize the Special Procedures Code of Conduct as the basis for political attacks on the independence of individual Special Procedures and the entire Special Procedures system. Too often any difference of views about a situation, a mandate or a recommended course of action is turned into an issue of the Code of Conduct. This is a highly selective interpretation of the Code of Conduct, ignoring its fundamental requirement that States refrain from undermining the independence of the Special Procedures mandate holders.[177]

The NGO coalition concluded by calling "on all States to act in good faith to ensure that the long term integrity and credibility of the Human Rights Council itself are not sacrificed to political expedience."[178]

But the relevant states were far from chastened by these criticisms. In November 2009, they persuaded a majority in the General Assembly to refuse even to "take note" of the report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, let alone to endorse it, as would generally be the case, because of purported Code violations.[179] Other allegations of Code violations have been directed at, inter alia, the Special Rapporteur against Torture,[180] and the Special Rap-

176. *Id.*

177. *Id.*

178. *Id.*

179. The report in question had analyzed "the gendered impact of counter-terrorism measures both on women and men, as well as the rights of persons of diverse sexual orientations and gender identities." Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, U.N. Doc. A/64/211, at 8 (Aug. 3, 2009) (by Martin Scheinin). Zambia, on behalf of the African Group, condemned the report as "an attempt to introduce notions of sexual orientation and gender identity that had no foundation in international human rights law." By redefining "notions around gender, [and] thereby re-classifying women and men," the Special Rapporteur "had engaged in activities that fell beyond the scope of his mandate" and, specifically, had "disregarded articles 3, 6(a) and 6(b), 7, 8(c) and 8(d), and 13 of the code of conduct." Press Release, General Assembly, Girl Child, Eliminating Racism, Protecting Human Rights while Countering Terrorism among Issues, as Third Committee Approves Five More Texts, Concludes Session, U.N. Doc. GA/SHC/3970 (Nov. 24, 2009), *available at* http://www.un.org/News/Press/docs/2009/gashc3970.doc.htm.

180. In 2009, for example, the Government of Equatorial Guinea accused him of a violation of the Code because it had been unable to review the draft of the report. *See* Republica de Guinea Ecuatorial Delegation, Dialogo Interactivo con el Relator Especial sobre la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes (Mar. 10, 2009), *available at* http://portal.ohchr.org/portal/page/portal/HRCExtranet/10thSession/OralStatements/100309/Tab1/Tab/Guinea%20Ecuatorial.pdf. Pakistan, on behalf of the Organization of the Islamic Conference, objected to the Special Rapporteur's report, arguing that capital punishment should be seen as a form of cruel and inhuman punishment and called upon him to "discharge his duties consistent" with the Code. Comments by Pakistan, on Behalf of the OIC (Mar. 10, 2009), *available at* http://portal.ohchr.org/portal/page/portal/HRCExtranet/10thSession/OralStatements/100309/Tab1/Tab1/Pakistan%20on%20behalf%20of%20OIC.pdf.

porteur on the right to food.[181] Under challenge from states' representatives, the High Commissioner for Human Rights has assured the Assembly that her Office was taking the Code very seriously.[182]

During the Council's debates in March 2010, Nigeria, on behalf of the African Group, called upon the mandate-holders to "strictly abide" by the Code,[183] and Algeria called for "meticulous respect" (*respect minutieux*) of both the Code and the individual terms of reference pertaining to each mandate.[184] The European Union, on the other hand, commented that the work of the Special Procedures mandate-holders was "essential to the work and credibility" of the Council and urged it "to protect their independence and autonomy."[185] The High Commissioner for Human Rights stressed the need for the experts to be able "to work in full independence and latitude" and observed that "[c]andid and robust interaction with governments flows directly from mandate-holders' knowledge, independence, and operational space."[186]

Energetic invocation of the Code by a group of countries within the Human Rights Council has led Human Rights Watch to be strongly critical of them as "spoilers" who aim to restrain the Special Procedures through the use of an "intrusive 'code of conduct.'"[187] It has also argued that the Code is part of a series of techniques devised by "repressive leaders in the Council" to "limit the ability of these [independent] voices to be heard."[188] But while most civil society representatives have expressed concern that the shadow of the Code has had a chilling effect on the work of mandate-holders, at least one has implicitly endorsed it by calling for it to "be wielded in [order to] combat" anti-Zionism amongst the mandate-holders.[189]

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181. In March 2010, Brazil accused the Special Rapporteur, who comes from Belgium, of "misusing his mandate and independence to 'advance trade interests'" of Western Europe. International Service for Human Rights, *Council holds interactive dialogue with Special Rapporteur on food* (Aug. 24, 2010), http://www.ishr.ch/council-news/699-council-holds-interactive-dialogue-with-special.

182. Press Release, General Assembly, Ordinary People Throughout World Want Human Rights of Universal Declaration 'Translated into Reality', U.N. High Commissioner Tells Third Committee, U.N. Doc. A/SHC/3956 (Oct. 21, 2009), *available at* http://www.un.org/News/Press/docs/2009/gashc3956.doc.htm.

183. Statement dated Mar. 4, 2010 by Nigeria on behalf of African Group on Annual Report of the High Comm'r for Human Rights (Items 2), 1 (Mar. 4, 2010).

184. Human Rights Council, Statement by Ambassador Idriss Jazaïry, Permanent Rep. of Algeria, 13th Sess., 2 (Mar. 4, 2010).

185. Permanent Rep. of Spain to the U.N., Statement by H.E. Ambassador Javier Garrigues on behalf of the E.U. addressed to the United Nations Office in Geneva, 1 (Mar. 4, 2010).

186. U.N. High Comm'r for Human Rights, Introduction of the Annual Report, Address by the U.N. High Comm'r for Human Rights, 1 (Mar. 4, 2010) (by Navanethem Pillay).

187. Kenneth Roth, *Taking Back the Initiative from the Human Rights Spoilers*, *in* World Report 2009 12 (Human Rights Watch ed. 2009), *available at* http://www.hrw.org/sites/default/files/reports/wr2009_web.pdf.

188. Kenneth Roth, *The Abusers' Reaction: Intensifying Attacks on Human Rights Defenders, Organizations, and Institutions*, *in* World Report 2010 24 (Human Rights Watch ed. 2010), *available at* http://www.hrw.org/sites/default/files/related_material/introduction.pdf.

189. David Matas, Inst. for Int'l Aff. of B'Nai Brith Can., Reforming the "Reformed" United Nations Human Rights Council 53 (2009), *available at* http://www.bnaibrith.ca/files/

This review of the problematic ways in which the Code has been invoked by states and the highly negative perceptions of it on the part of the SRs and civil society reflects the very polarized nature of the debate. This makes it all the more important to cut through the suspicions and anxiety, which have understandably dominated the debate, and instead reflect on the legitimate question that lies at the heart of the controversy: whether there should be a compliance mechanism.

III. Should There Be a Compliance Mechanism?

The question to be addressed in this section is not whether there should be a code, or whether such a code should be based on voluntary self-regulation. For practical, if not philosophical, purposes both of these questions have been definitively answered by the Human Rights Council. The Code has been adopted, by consensus, and the model adopted is clearly not based on notions of integrity and self-regulation but of rules and compliance. Thus the bone of contention is whether a compliance mechanism should be created in order to create stronger measures of accountability than those that currently exist. In brief, existing arrangements revolve around the mandate-holder's annual presentation of one or more reports to the Council, the "interactive dialogue" between the Council and the expert, and the adoption of a resolution based on this process. The term "compliance mechanism" is used in this context in contradistinction to these latter techniques and signifies an institutional arrangement which would be specifically tasked to review or evaluate compliance with the Code. Any such mechanism should also be distinguished from the procedure established by the mandate-holders themselves to consider complaints directed at the conduct of mandate-holders. This is dealt with below,[190] and it suffices to note here that it has been rejected as lacking impartiality by those governments who are pressing for the introduction of substantive and formal accountability arrangements.

The analysis that follows is divided into three parts. The first reviews the types of abuses or misconduct that might be alleged against a SR. The second and third parts seek to put forward the strongest possible versions of the arguments that might be used by each of the two principal protagonists in this debate. The case in favor of establishing a compliance mechanism explores the arguments in favor of stronger accountability which might have been articulated by the governmental proponents of this measure. And the case against establishing a new mechanism spells out the arguments that might have been invoked by the SRs and other opponents.

11052009.pdf. Matas's attack seems to be entirely directed against Richard Falk, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, although even Matas himself notes that neither Israel nor the United States has ever suggested that Falk had in fact violated the Code in his activities as a Special Rapporteur.

190. *See infra* notes 279–80 and accompanying text.

A. Types of Potential Abuses

Before considering whether it is appropriate or necessary to establish substantive accountability mechanisms for SRs, it is important to get a sense of the types of violations, abuses, or forms of misconduct of which they might be accused. By the same token, it is clearly beyond the scope of the present analysis to provide a comprehensive listing of such acts or omissions which might be considered to fall foul of the Code of Conduct. This is all the more so, given that the Code is replete with different prohibitions and invocations—such as the call to show even-handedness, restraint, and moderation, or to focus exclusively on the implementation of the mandate—many of which will be very difficult to interpret, certainly in the abstract, but perhaps even in context. Rather, the objective here is to suggest some of the concrete situations which might arise, in order to illustrate the relevance of an accountability mechanism. This review also enables us to draw certain conclusions as to the approach that should be adopted. For present purposes, the standards reflected in the Code can be classified under five headings: (1) respect for the mandate, (2) independence and impartiality, (3) integrity, (4) professionalism, and (5) diligence.[191]

1. *Respect for the Mandate*

The Code stresses the fact that SRs must "exercise their functions in strict observance of their mandate."[192] It may be speculated that a violation of this standard would probably result from either the use of techniques or procedures which were explicitly precluded by the terms of the mandate, or by focusing on issues which were explicitly excluded from its purview. The problem, however, is that such boundaries are usually set implicitly. Thus, unlike the situation in regard to holding judges or prosecutors to account for failures to respect the relevant rules, mandates are not readily translatable into clear rules. Instead, Special Procedures mandates are often notoriously porous because they reflect compromises among widely differing diplomatic and other perspectives, which involve contentious points being papered over by the use of vague and intentionally manipulable language.

2. *Independence and Impartiality*

The Code makes independence not just a right, but also an obligation when it requires SRs to be "free from any kind of extraneous influence, incitement, pressure, threat or interference" and enjoins them to be even-handed in gathering information.[193] Independence would clearly be abused

191. These categories track those identified by Mégret in relation to prosecutors before international courts and tribunals. *See* Frédéric Mégret, *International Prosecutors: Accountability and Ethics* 40 (Leuven Ctr. for Global Governance Studies, Working Paper No. 18, 2008).

192. Human Rights Council Res. 5/2, *supra* note 9, art. 7.

193. *See id.* art. 8(a).

by accepting a bribe from any source, including a government. Other gifts or rewards, including "remuneration from any governmental or non-governmental source" are also prohibited.[194] It is not difficult to envisage problematic borderline situations which might raise questions about compliance with these provisions.

Impartiality would be compromised by a failure to seek or take account of information from a relevant party, or by working closely in the drafting of report with a party that represents one side of a disputed issue. A SR would also risk an allegation of partiality if he or she expresses strong and prejudicial views in advance of gathering information from all appropriate sources. In terms of other abuses, it must suffice to say that there would be many ways in which a SR could conceivably transgress the broadly drawn requirements to demonstrate independence and impartiality.

3. *Integrity and Discretion*

The Code spells out "fundamental obligations of truthfulness [and] loyalty"[195] and calls upon SRs to "[u]phold the highest standards of . . . integrity, meaning, in particular, though not exclusively, probity, impartiality, equity, honesty and good faith."[196] It also calls upon them to behave "in such a way as to maintain and reinforce the trust they enjoy of all stakeholders"[197] and to ensure the "confidentiality of sources of testimonies if their divulgation could harm witnesses."[198] Abuses of the integrity principle might include dishonesty through deliberate misrepresentation of facts or information, making payments to witnesses in such a way as to undermine their objectivity, and intentionally deceiving government or civil society representatives. The category of discretion raises more complex issues, especially in light of the fact that the nature of the tasks entrusted to a SR clearly relies heavily upon her ability to exercise her discretion in relation to a wide range of issues. While it is not difficult to imagine cases of indiscretion in terms of the inappropriate divulging of information, it becomes more problematic to demonstrate a failure to exercise discretion in a considered and defensible manner.

4. *Professionalism*

The Code requires a "professional, impartial assessment of facts"[199] and this could readily be violated by an intentionally distorted evaluation which could not reasonably be justified by the facts presented. Similarly, SRs are required to "[r]ely on objective and dependable facts based on evidentiary

194. *Id.* art. 3(j).
195. *Id.* art. 3(d).
196. *Id.* art. 3(e).
197. *Id.* art. 3(h).
198. *Id.* art. 8(b).
199. *Id.* art. 3(a).

standards that are appropriate to the non-judicial character" of their reports.[200] While the question of the appropriate standard of proof in this context is a complex one with no clear-cut answer,[201] there may be situations in which no reasonable evidentiary standards can be met in order to support allegations made.

Other abuses which would violate an obligation to behave professionally would include abusive behavior vis-à-vis any party including a government official, sexual harassment or misconduct, or a failure to pay debts incurred.

5. *Diligence*

The general requirement to show diligence and the Code's call for SRs to demonstrate efficiency and competence[202] are closely linked to other elements such as professionalism and impartiality. Diligence may also be defined to encompass the notion of due diligence. This emphasizes a SR's responsibility to do everything reasonably possible to gather relevant information or to seek out crucial witnesses to an important event. The obligation could, for example, be violated by a failure to undertake basic research before presenting a report, a failure to take adequate measures to get input from a government in response to alleged violations, or a failure to present an adequate or competent report.

Several conclusions emerge from this brief survey. The first is that the language of the Code lends itself to a large number of potential allegations of violations, as a result of the open-endedness of the language combined with the very extensive number of different standards identified. The second is that the determination of whether an act or omission violates the code will very often involve a difficult judgment call reflecting the large zone of discretion which is inherent in the role of a SR. The third is that it will be essential to distinguish between minor and major infractions of the Code, and intentional and unintentional abuses. And a fourth is that even for infractions at the more serious end of the spectrum, the appropriate penalties might vary widely. In other words, the oft mooted threat of dismissal would remain an extreme and highly unusual step.

B. The Case for a Compliance Mechanism

For at least a decade, accountability has been one of the most persistent and difficult challenges confronting international actors. As they wield ever more power, both soft and hard, demands have grown more insistent that they be accountable not only to states but to a range of other constituents.

200. *Id.* art. 8(c).

201. For a detailed critique of the standards applied both by U.N. Special Procedures mandate-holders and by the International Court of Justice, see Simone Halink, *All Things Considered: How the International Court of Justice Delegated its Fact-Assessment to the United Nations in the Armed Activities Case*, 40 N.Y.U. J. INT'L L. & POL. 13 (2008).

202. Human Rights Council Res. 5/2, *supra* note 9, art. 3(e).

The challenge reflects the fact that the familiar means through which accountability is usually exacted at the national level are generally unavailable internationally. Most international actors enjoy immunity before domestic courts and cannot be sued in international tribunals;[203] nor can they be called to account before national legislatures. And they are relatively, although by no means entirely, impervious to popular protests which fail to achieve a certain international threshold. But because the powers vested in international actors are often extensive and their capacity to influence the conduct and policies of a wide range of actors is steadily increasing, there is considerable pressure to identify effective means whereby different constituencies, and particularly governments, are able to exert a degree of control even in situations in which extensive powers have been delegated.

In the following analysis, we note briefly the impact of the trend upon international organizations generally, and upon international humanitarian actors, including in relation to their field activities. We then consider the state of the art in relation to several sets of actors whose role is, at least in part, potentially analogous to that of the SPs.

1. *The Acceptance of Accountability in Other Contexts*

An overview of the approach prevailing in comparable areas of international governance is instructive. While there remain some international agencies whose accountability in practice leaves much to be desired, the general principle that actors who wield significant power should be accountable is today taken for granted in most areas and does not need to be justified. It is somewhat ironic, then, that the principle has gained least traction internationally precisely in relation to those actors who are themselves fully engaged in seeking to ensure the accountability of others in relation to human rights norms.

Sustained demands for international actor accountability have arisen in relation to traditional forms of international organization such as the United Nations,[204] the World Bank,[205] or the International Monetary Fund,[206] as

203. In limited contexts, some national courts have begun to seek remedies in situations in which upholding the immunity of international organizations would have adverse human rights implications. *See* August Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, 7 CHINESE J. INT'L L. 285, 294 (2008).

204. *See, e.g.*, ENVISIONING REFORM: ENHANCING UN ACCOUNTABILITY IN THE TWENTY-FIRST CENTURY (Sumihiro Kuyama & Michael Ross Fowler eds., 2009); Gerhard Hafner, *Accountability of International Organizations — A Critical View*, *in* TOWARDS WORLD CONSTITUTIONALISM 585 (Ronald St. John Macdonald & Douglas M. Jonhnston eds., 2005).

205. For a critique see DAVID IAN SHAMAN, THE WORLD BANK UNVEILED: INSIDE THE REVOLUTIONARY STRUGGLE FOR TRANSPARENCY (2009). In response to such criticisms the Bank established the Inspection Panel Bank in 1993 to enable affected groups to lodge complaints about adverse effects resulting from projects due to the Bank's failure to act in accordance with its own policies and procedures. More generally, it has also recognized that "transparency and accountability are fundamentally important to the development process and central to achieving the Bank's mission to alleviate poverty." *See* Operations Policy and Country Services, WORLD BANK, TOWARD GREATER TRANSPARENCY THROUGH ACCESS TO INFORMATION: THE WORLD BANK'S DISCLOSURE POLICY 1 (2009), *available at* http://siteresources.

well as far more flexible and less formally institutionalized actors such as the Internet Corporation for Assigned Names and Numbers ("ICANN"),[207] or the Global Compact for corporate responsibility.[208] In addition to pressures from governments and other stakeholders, these initiatives have also been strongly pushed and monitored by carefully focused initiatives such as the International Accountability Project[209] and the One World Trust's Global Accountability Project.[210]

In the humanitarian field, broadly defined, accountability initiatives have emerged in relation to both inter-governmental and non-governmental ("NGO") activities. The former include, for example, the Office of the U.N. High Commissioner for Refugees,[211] those monitoring elections,[212] and U.N. human rights field workers.[213] In addition, the International Committee of the Red Cross has codified a detailed set of professional standards for humanitarian actors.[214]

At the level of NGOs, the major agencies came under significant pressures in the early years of the twenty-first century to demonstrate that they were not a law unto themselves and that they were accountable to various constituencies. While many of these pressures were political, such as the attack on Amnesty International by the President and senior Bush administration officials in the wake of criticism of the Guantanamo Bay detention facility,[215] scholars and others were also strongly insistent upon the need for

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worldbank.org/EXTINFODISCLOSURE/Resources/R2009-0259-2.pdf?&resourceurlname=R2009-0259-2.pdf.

206. *See, e.g.*, Catherine Weaver, *The Politics of Performance Evaluation: Independent Evaluation at the International Monetary Fund*, 5 REV. INT'L ORGS. 365 (2010).

207. *See* Jonathan Koppell, *Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder,"* 65 PUB. ADMIN. REV. 94, 95 (2005).

208. *See generally* Andreas Rasche, *Toward a Model to Compare and Analyze Accountability Standards – The Case of the UN Global Compact*, 16 CORP. SOC. RESP. & ENVTL. MGMT. 192 (2009).

209. The IAP focuses particularly on forced displacement issues and does this in large part by through "global policy advocacy [that] targets the policies and accountability mechanisms of the international financial institutions . . . and private financial institutions that have signed the Equator Principles." INT'L ACCOUNTABILITY PROJECT (Mar. 6, 2010), http://www.accountabilityproject.org/section.php?id=15.

210. *See Global Accountability Report*, ONE WORLD TRUST, http://www.oneworldtrust.org/index.php?option=com_content&view=article&id=73&Itemid=60. (last visited Mar. 6, 2011).

211. *See* Volker Turk & Elizabeth Eyster, *Strengthening Accountability in UNHCR*, 22 INT'L J. REF. L. 159 (2010); Office of the United Nations High Commissioner for Refugees, Code of Conduct, 1–2 (June 2004), http://www.unhcr.org/405ac6d27.html.

212. *See* Anne van Aaken & Richard Chambers, *Accountability and Independence of International Election Observers*, 6 INT'L ORG. L. REV 541 (2009).

213. *See* George Ulrich, *The Statement of Ethical Commitments of Human Rights Professionals: A Commentary*, *in* THE PROFESSIONAL IDENTITY OF THE HUMAN RIGHTS FIELD OFFICER 49 (Michael O'Flaherty & George Ulrich eds., 2010).

214. *See* INT'L COMM. OF THE RED CROSS, PROFESSIONAL STANDARDS FOR PROTECTION WORK CARRIED OUT BY HUMANITARIAN AND HUMAN RIGHTS ACTORS IN ARMED CONFLICT AND OTHER SITUATIONS OF VIOLENCE (2009).

215. *See* SourceWatch, *Bush Administration Flip Flops: Amnesty International*, http://www.sourcewatch.org/index.php?title=bush_administration_flip_flops:_Amnesty_International (last visited Mar. 6, 2011) (documenting criticism of Amnesty International by the Bush administration after publication of the 2005 Human Rights Report, which discussed human rights violations at Guantanamo Bay).

NGOs to demonstrate that they themselves were accountable.[216] This eventually led to the adoption in 2005 of the International Non-Governmental Organizations' Accountability Charter. In it the signatories, who included Amnesty International, Greenpeace, the International Save the Child Alliance, Oxfam International and Transparency International, declared that:

> We should be held responsible for our actions and achievements. We will do this by: having a clear mission, organizational structure and decisionmaking processes; by acting in accordance with stated values and agreed procedures; by ensuring that our programs achieve outcomes that are consistent with our mission; and by reporting on these outcomes in an open and accurate manner.[217]

Amnesty International, as one of the eight out of sixteen signatories to have filed a compliance report three years after the Charter's adoption, acknowledged its "clear responsibility to act with transparency and accountability" and stated its willingness "to adhere to an externally generated code of conduct, to lead by example and to encourage others to follow."[218]

Of course it does not automatically mean that the SRs need to follow suit just because accountability mechanisms have been applied to a wide array of human rights and humanitarian actors in recent years. But it is clear that there is now an increasingly strong presumption that any international agency or actor, whether official or civil society-based, will need to address very clearly the challenges posed by this virtually universal move to accountability.

An argument that might be made by the SRs to differentiate themselves from these actors is that their independence is so essential to their functions that they should be exempted from requirements that apply to others. The problem with this argument is that there are various actors for whom independence is equally important but who are nonetheless subject to various forms of accountability. In the section below we consider three such groups.

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216. *See, e.g.*, Jem Bendell, *Debating NGO Accountability*, U.N. Doc. UNCTAD/NGLS/2006/1 (2006); Kenneth Anderson, *The Ottawa Convention Banning Landmines, The Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91 (2000); Robert Blitt, *Who will Watch the Watchdogs? Human Rights Non-Governmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261 (2004); Hugo Slim, *By What Authority? The Legitimacy and Accountability of Non-governmental Organizations* (presented at the International Council on Human Rights Policy International Meeting on Global Trends and Human Rights—Before and After September 11, Jan. 10–12, 2002), *available at* http://www.jha.ac/articles/a082.htm.

217. International Non Governmental Organisations Accountability Charter 4 (2005), http://www.ingoaccountabilitycharter.org/wpcms/wp-content/uploads/INGO-Accountability-Charter_logo.pdf.

218. AMNESTY INTERNATIONAL, *International Non-Governmental Organizations Accountability Charter Annual Report 2007* 1, July 2007, *available at* http://www.amnesty.org/en/library/asset/IOR80/003/2007/en/f98c9885-33bf-4477-89aa-762d12f7dc1e/ior800032007eng.pdf.

2. *Actors in Situations Potentially Analogous to That of SPs*

There are various international actors for whom the balancing of independence and accountability poses a particular challenge. They are: (i) civil servants, (ii) expert members of treaty monitoring bodies, and (iii) judges.

a. International Civil Servants

SRs are clearly not assimilable to international civil servants who are employed as officials on a full-time basis by an international organization.[219] However, the United Nations has developed a category of individuals who perform comparable functions on an occasional basis: so-called "experts on mission."[220] This is the broad category within which mandate-holders are placed for the purposes of determining their privileges and immunities. But the relevant rules provide very limited guidance on the question of independence, which is hardly surprising since they were designed to provide non-U.N. *officials* with protection comparable to that provided to U.N. officials.[221] But the difference between the officials and SRs is that the former, unlike the latter, are not expected to be "independent" in the full sense of exercising their own independent judgment and discretion. Nevertheless, independence is important as illustrated by Article 100 of the U.N. Charter, which provides that "the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization." They are, instead, "responsible only to the Organization."[222]

In terms of internal arrangements to promote the accountability of U.N. officials, far-reaching changes were introduced in 2009. The General Assembly described the old administrative justice system as being "slow, cumbersome, ineffective and lacking in professionalism"[223] and called for one which would be "independent, transparent, professionalized, adequately resourced and decentralized."[224] The system is complex, and involves judicial bodies to which disputes or appeals against administrative sanctions can be brought.[225]

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219. *See generally* ACCOUNTABILITY, INVESTIGATION AND DUE PROCESS IN INTERNATIONAL ORGANIZATIONS (Chris de Cooker ed., 2005).

220. *See* U.N. Secretary-General, Bulletin on Regulations Governing Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission, U.N. Doc. ST/SGB/2002/9 (June 18, 2002).

221. *See* Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15.

222. For a detailed analysis of the law and practice relating to Article 100, see Christoph Schreuer & Christian Ebner, *Article 100*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1230 (Bruno Simma, ed., 2nd ed. 2002).

223. G.A. Res. 61/261, pmbl. ¶ 5, U.N. Doc. A/RES/61/261 (Apr. 4, 2007).

224. *Id.* ¶ 4.

225. For an overview of the system, see U.N. Secretary-General, *Administration of Justice at the United Nations: Rep. of the Secretary-General*, U.N. Doc. A/65/373 (Sept. 16, 2010).

Among the stated purposes of the new approach is "to ensure that individuals and the Organization are held accountable for their actions . . . ."[226] From the perspective of the present analysis, the most significant element of the new system is not that officials accused of misconduct are held to account, but that the responses of senior managers, including the Secretary-General, to such allegations are now subject to more meaningful scrutiny, review and appeal.[227]

But while the United Nations's system for exacting internal administrative accountability is relatively robust, its position in regard to ensuring accountability for alleged criminal wrongdoing is far less satisfactory.[228] This is demonstrated by the responses to allegations of widespread sexual abuse and exploitation on the part of U.N. officials, peacekeepers, and other experts. The claims prompted the establishment of several investigations and the adoption of gradually more stringent standards of accountability. In 2003, primarily in response to allegations concerning aid workers and refugees in West Africa,[229] a Secretary-General's Bulletin prescribed "[s]pecial measures for protection from sexual exploitation and sexual abuse."[230] Since then, a range of institutional measures have been adopted to ensure that the United Nations takes effective action in this respect within its own sphere of competence.[231] However, the United Nations, along with the majority of member states, have continued to resist giving any sort of automatic waiver of immunity, which would subject the accused wrongdoers to the jurisdiction of the state in which the offense was committed.

The 2003 rules provided only that cases supported by evidence "may, upon consultation with the [U.N.] Office of Legal Affairs, be referred to national authorities for criminal prosecution."[232] After years of further deliberation this approach was confirmed in 2010, when the General Assembly could do no more than strongly urge "[s]tates to take all appropriate measures to ensure that crimes by United Nations officials and experts on mis-

226. G.A. Res. 61/261, *supra* note 223, pmbl. ¶ 8.

227. *Id.* ¶ 25.

228. This is relevant in the present context to the extent that an SR could conceivably be accused of criminal wrongdoing, such as sexual assault.

229. *See* G.A. Res. 57/306, U.N. Doc. A/RES/57/306 (Apr. 15, 2003).

230. U.N. Secretary-General, *Bulletin on Special Measures for Protection from Sexual Exploitation and Sexual Abuse,* U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003) [hereinafter U.N. Secretary-General, *Special Measures*]. The Bulletin applies only to "all staff of the United Nations." *Id.* at § 2.1. But "United Nations forces conducting operations under United Nations command and control" are covered by a separate standard which is contained in Secretary-General's Bulletin on "Observance by United Nations forces of international humanitarian law." U.N. Secretary-General, *Bulletin on Observance by United Nations Forces of International Humanitarian Law*, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003). Section 7 of that Bulletin dealt with sexual exploitation and abuse. *Id.* § 7.2.

231. *See, e.g.*, U.N. Secretary-General, *Implementation of the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel: Rep. of the Secretary-General*, U.N. Doc. A/64/176 (July 27, 2009); U.N. Secretary-General, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse: Rep. of the Secretary-General*, U.N. Doc. A/64/669 (Feb. 18, 2010).

232. U.N. Secretary-General, *Special Measures*, *supra* note 230, § 5.

sion do not go unpunished . . . without prejudice to the privileges and immunities of such persons and the United Nations . . . ."[233] In essence, the burden of prosecution was placed upon the state of nationality, which has in the past regularly proved unwilling to act in such circumstances.

The conclusion is that the accountability of international civil servants has been very significantly enhanced in recent years. Internal accountability has been transformed, and there are continuing efforts to strengthen the unsatisfactory arrangements that still exist in relation to responsibility for alleged criminal wrongdoing. In the former context the principle of independence has been protected by ensuring that the system itself and the procedures used are carefully designed for that purpose.

b. Members of Treaty Monitoring Bodies

Members of U.N. treaty monitoring bodies such as the Human Rights Committee are subject to no external form of accountability beyond non-reelection after a four year term. The International Covenant on Civil and Political Rights, for example, says only that the members of the Human Rights Committee shall be "persons of high moral character and recognized competence in the field of human rights";[234] shall "serve in their personal capacity";[235] and shall "perform [their] functions impartially and conscientiously."[236] The Committee itself, however, has adopted internal Guidelines relating to the independence of its members. Independence is characterized as an "essential" principle which requires:

> . . . that the members are not removable during their term of office and are not subject to direction or influence of any kind, or to pressure from the State or its agencies in regard to the performance of their duties . . . .[237]

The remaining provisions of the Guidelines address the conduct of Committee members by requiring them to recuse themselves in relation to reports and communications from their own country of nationality. They are also urged, but in solely hortatory terms, not to participate in the governance of international NGOs that deal with the Committee. Finally, it is said that they "should abstain from participation in any political body of the United Nations or of any other intergovernmental organization concerned with human rights" and "abstain from acting as experts, consultants or counsels for any Government in a matter that might come up for considera-

233. G.A. Res. A/C.6/65/L.3, ¶ 2, U.N. Doc. A/RES/A/C.6/65/L.3 (Oct. 22, 2010).

234. International Covenant on Civil and Political Rights art. 28(2), Dec. 16, 1966, 999 U.N.T.S. 172.

235. *Id.* art. 28(3).

236. *Id.* art. 38.

237. 1 Rep. of the Human Rights Comm., Annex III, ¶ 1, U.N. Doc. A/53/40 (SUPP) (Sept. 15, 1998).

tion before the Committee."[238] Tellingly, there is no prohibition on working for their own or any other governments either on a full-time or other basis.

The question then is what conclusions can be drawn for present purposes from the status of treaty body members. It strengthens the hand of those who advocate an integrity-based approach, since compliance is overseen exclusively by the Committee itself. And, as far as is publicly known, they have never been formally invoked against any expert.

The analogy with SRs is not entirely compelling, however. The Committee's position that its members should not be "subject to direction . . . of any kind"[239] contrasts with the situation of SRs who are regularly directed by the Council to examine or refrain from examining certain issues or to use or not use particular techniques or working methods.

Moreover, the Committee's functioning is governed by the treaty, which does not specifically require even self-regulation. Similarly, this treaty excludes the option of removability from office. In contrast, the terms on which SRs serve are at the discretion of the Council. It has excluded the option of self-regulation and kept open the possibility of removal of SRs before the end of their terms of office. This is not to say that the ways in which the Council has chosen to exercise its discretion are necessarily compatible with a genuine commitment to the SRs' independence, but just that the analogy with treaty body members is not very helpful.

c. Judges

Few observers would be likely to press very far with an analogy between SRs and judges. The problem, however, is that the drafters of the Code of Conduct clearly drew directly from the Bangalore Principles of Judicial Conduct, one of the main international statements on judicial independence, in formulating aspects of the Code, including its key provision about independence, contained in Article 3(a).[240] The question then is whether the standards adopted in relation to international judges shed light on how to balance considerations of independence and accountability of the SRs.

International standards relating to the independence of the judiciary are plentiful and are helpful up to a point. Judicial independence is guaranteed under the provisions of virtually every relevant human rights treaty,[241] and a

238. *Id.* ¶ 9.

239. *Id.* ¶ 1.

240. *See* the Bangalore Principles of Judicial Conduct of 2002, *reproduced in* Report of the Special Rapporteur on the Independence of Judges and Lawyers, Annex, U.N. Doc. E/CN.4/2003/65 (Jan. 10, 2003), *available at* http://www.unodc.org/pdf/crim/corruption/judicial_group/Bangalore_principles.pdf.

241. *See, e.g.*, Universal Declaration of Human Rights art. 10, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights art. 14(1), Dec. 16, 1966, 1976 U.N.T.S. 172; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, C.E.T.S. 005; African Charter on Human and Peoples' Rights art. 7, June 27, 1981, 21 I.L.M. 58; American Convention on Human Rights art. 8, Nov. 22, 1969, 1144 U.N.T.S. 123.

large number of soft law standards, having been adopted in an endeavor to spell out in detail the requirements that flow from the general principle. The best known are the Bangalore Principles of 2002, which were preceded by the 1985 Basic Principles on the Independence of the Judiciary.[242] The latter are indeed "basic." The section dealing with judicial independence states that:

> 1. The independence of the judiciary shall be guaranteed by the State . . . .
> 2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

The Principles also acknowledge "the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions."[243] While the Bangalore Principles are more detailed, they are largely confined to a list of do's and don'ts aimed at the personal conduct of the judge, primarily because of the need for relevance across a broad range of legal systems. As a result they are silent on many of the contextual or environmental elements that most commentators consider to be essential to any comprehensive notion of judicial independence.[244]

The scholarly literature does not, however, provide straightforward guidance as to how these gaps might be filled. The literature reflects three rather different approaches. The first focuses on institutional dimensions and emphasizes factors such as judicial tenure (for life or at least a significant period), a judicial appointments process that is not monopolized solely by one branch of government, the judiciary's control over its own budget and administration, and fair and transparent methods for disciplining or removing judges.[245] The second approach downplays the direct importance of these institutional factors and stresses the ability of judges to exercise discretion in particular cases and to make decisions without fear of adverse consequences.[246]

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242. Basic Principles on the Independence of the Judiciary, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985) (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, It., Aug. 26–Sep. 6, 1985, *endorsed by* G.A. Res. 40/32, U.N. Doc. A/RES/40/32 (Nov. 29, 1985); G.A. Res. 40/146, U.N. Doc. A/RES/40/146 (Dec. 13, 1985)).

243. *Id.* ¶ 7.

244. A major study commissioned by the Asian Development Bank echoed this diversity of scholarly opinion by concluding that "there is no single agreed upon model of (or precise set of institutional arrangements for) judicial independence." It also noted that "there is no consensus even on a common definition of .judicial independence." Asian Development Bank, *Judicial Independence: Overview and Country-Level Summaries, Judicial Independence Project* (Oct. 2003) *available at* http://www.adb.org/Documents/Events/2003/RETA5987/Final_Overview_Report.pdf.

245. Matthew D. McCubbins & Daniel B. Rodriguez, *The Judiciary and the Role of Law*, *in* THE OXFORD HANDBOOK OF POLITICAL ECONOMY 273 (Barry R. Weingast & Donald A. Wittman eds., 2006).

246. John Ferejohn, *Independent Judges*, 72 S. CAL L. REV. 353 (1999).

The third approach emphasizes that "independence is a relative term to be understood by analyzing the judicial entity in terms of its independence from some other entity." A variation of this is the view that judicial independence is best seen as "an outcome that emerges from strategic interactions among the judiciary, the legislature, and the executive." It thus "waxes and wanes with changes in the political composition of [the] three branches of government."[247]

Therefore, even if the appropriateness of analogizing international judges to SRs were to be accepted, no single conception of independence necessarily follows.

In terms of accountability, the 1985 Principles provide clearly for sanctions to be applied under certain circumstances. In a section titled "discipline, suspension and removal," they acknowledge that judges are subject to suspension or removal, but "only for reasons of incapacity or behavior that renders them unfit to discharge their duties."[248] But they also require that except perhaps in relation to decisions of the highest court or of the legislature in impeachment or similar proceedings, such measures "should be subject to an independent review."[249] While procedures vary widely, virtually every national jurisdiction contains some provision for holding judges accountable in various ways, including through removal in extreme cases. But it is also consistently required that any such "review should be conducted by people who do not have prior relationships with the judges in question."[250]

This is also the case in relation to international courts and tribunals, although there is no uniformity in terms of the procedures. Most of the relevant treaties are terse on the subject of dismissal and make the courts themselves either the sole actors or the key player in relation to any proposed dismissal. Judges of the International Court of Justice,[251] the International Tribunal on the Law of the Sea,[252] and the African Court on Human and Peoples' Rights,[253] for example, can only be dismissed by the unanimous vote of all the other judges. The Inter-American Court requires a vote by a two-thirds majority of the member states of the Organization of American States as well as of the States Parties to the Convention,[254] while the

247. McNollgast, *Conditions For Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105, 108 (2006).

248. Office of the United Nations High Commissioner for Human Rights, *supra* note 242, ¶ 18.

249. *Id.* ¶ 20.

250. MARIA DAKOLIAS, THE JUDICIAL SECTOR IN LATIN AMERICA AND THE CARIBBEAN: ELEMENTS OF REFORM 17–18 (World Bank Technical Paper No. 319) (1996).

251. Statute of the International Court of Justice art. 18, Jun. 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

252. Statute of the International Tribunal for the Law of the Sea art. 9, Dec. 10, 1982, 1833 U.N.T.S. 561.

253. Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights art. 19, Jun. 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

254. Statute of the Inter-American Commission on Human Rights art. 8, O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88 (1979), *available at* http://www1.umn.edu/humanrts/oasinstr/zoas4cms.htm.

European Court of Human Rights requires the vote of two-thirds of the judges.[255] The Rome Statute provides that a judge of the International Criminal Court may be removed for "serious misconduct or a serious breach" of duty only if a recommendation adopted by a two-thirds majority of the other judges is approved by a two-thirds majority vote of the States Parties.[256] The Statute provides less stringent requirements for taking disciplinary measures in response to misconduct of a less serious nature.[257] Where international courts have adopted their own internal codes of conduct, they have generally emphasized the exclusively self-regulating nature of any such standards.[258]

A significantly lower level of protection against dismissal is provided in the two tribunals established in 2009 to deal with internal administrative misconduct. Judges of both the United Nations Dispute Tribunal and the United Nations Appeals Tribunal may be removed for misconduct through a simple majority vote of the U.N. General Assembly.[259] In setting up these tribunals the General Assembly requested the Internal Justice Council to draft a code of conduct for the judges.[260] The draft code submitted by the Council in 2010 contains detailed provisions concerning independence, impartiality, integrity, propriety, transparency, fairness, and competence and diligence.[261] The document indicates that its purpose is "to provide guidance," which means that the code would be part of an integrity-based, or self-regulating, system.[262] For present purposes, the emphasis on accountability is important, but it is also significant that the draft code makes no provision for a formal compliance mechanism.

What conclusions emerge from the foregoing survey of judicial accountability? First, even if the appositeness of the analogy between judges and SRs is open to question, it remains relevant because the drafters of the Code of Conduct considered there to be important similarities. Second, our review demonstrates that there is no intrinsic impediment to procedures to disci-

255. Convention for the Protection of Human Rights and Fundamental Freedoms art. 23, Nov. 4, 1950, C.E.T.S. No. 005 (as amended by Protocol No. 14).

256. Rome Statute of the International Criminal Court art. 46, U.N. Doc. A/CONF.183/9 (July 17, 1998).

257. *See id.* art. 47.

258. *See, e.g.*, International Criminal Court, Code of Judicial Ethics art. 11, I.C.C. Doc ICC-BD/02-01-05 (Mar. 9, 2005), *available at* http://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf (stating that the principles contained in the Code are "guidelines" which are "advisory in nature" and designed to assist judges "with respect to ethical and professional issues . . . . " Article 11 (2) adds that nothing in the Code is "intended in any way to limit or restrict the judicial independence of the judges.").

259. G.A. Res. 63/253, Annex I art. 4, ¶ 10, Annex II art. 3, ¶ 10, U.N. Doc. A/RES/63/253 (Dec. 24, 2008).

260. G.A. Res. 62/228, ¶ 37(c), U.N. Doc. A/RES/62/228 (Feb. 6, 2008).

261. Rep. of the Internal Justice Council, Code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, Annex, U.N. Doc. A/65/86 (June 15, 2010).

262. *Id.* pmbl. ¶ 8. In 2010 the General Assembly decided to give further consideration to the proposal in 2011.

pline and, in rare cases, remove judges. Indeed, this appears to be a standard approach, even if the procedures used differ significantly. Third, virtually all of the procedures incorporate mechanisms designed to promote self-regulation, at least in the first instance. And fourth, whenever external disciplinary arrangements have been established, they are explicitly designed to minimize political influence.

Having reviewed the extent to which actors in positions potentially analogous to those of SRs are subject to accountability mechanisms, we turn now to analyze whether SRs should be considered to wield power of the type that would warrant holding them to account.

3. *Power: Mandate-Holders as "Power-Wielders"*

The trigger for accountability is power. In other words, it is those who wield power of some sort—or "power-wielders" as Grant and Keohane call them—who must be held to account in terms of appropriate standards of conduct.[263] It is widely assumed that international organizations, in general, wield sufficient power of various types, so as to give rise to significant accountability concerns.

Accordingly, in addressing the issue of accountability one of the major English language textbooks on international organizations invoke Frankenstein's monster's assertion: "You are my creator, but I am your master; obey!"[264] This reflects the fear that bodies created by states to be subordinate might instead run amok and dictate to the states that created them.

But it is reasonable to ask whether any SRs realistically exercise such powers. As Turpin has noted in the context of ministerial responsibility at the national level, "[w]ithout an ability to effectuate results, the responsibility of such persons would be merely emblematic or dramatic . . . [responsibility should merely] be commensurate with the extent of the power possessed."[265] In other words, if SRs are relatively powerless, they should be held to very low levels of responsibility or accountability. At one extreme, mandate-holders could assert, with some justification, that they are virtually powerless. They cannot visit a country without the approval of the government; they cannot issue public statements without first notifying governments; their reports can be, and all too often are, largely ignored by the governments to which they are addressed; and the public debate about their reports in the Human Rights Council and the General Assembly are frequently perfunctory. Eric Posner, for example, has argued that "[e]ven when

263. Grant & Keohane, *supra* note 5, at 29.

264. *See* JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW v (2002); *see also* JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 585, n.3 (2005) (citing Klabbers to substantiate the analogy).

265. Colin Turpin, *Ministerial Responsibility, in* THE CHANGING CONSTITUTION 109, 111 (Jeffrey Jowell & Dawn Oliver eds., 3d ed. 1994).

human rights organizations serve as perfect agents, they have no ability to compel their principals to obey their judgments." Moreover, "[e]ven when they can trust the agency, the states themselves have trouble living up to their obligations to sanction other nations that are criticized by the agency."[266]

At the other extreme, it can be argued that the formal indicia of power like those cited by Posner, which focus almost entirely on the existence of meaningful sanctions, constitute only a small part of the picture. Instead, it could reasonably be inferred from the constancy and severity of the attacks levied by affected governments against relevant SRs that the latter must be exercising at least some power. At the very least, they enjoy the power to name and shame.[267] This flows from their ability to provide an authoritative version of otherwise contested facts by relying on their expertise, reputation for objectivity and reliability, privileged access to relevant sources, and the ability to speak freely as a result of the immunity conferred upon them by virtue of the position's legal status.

The truth, as it often does, lies between these two extremes. Some reports, while being roundly and aggressively denounced, do indeed succeed in exacting a significant degree of accountability from the government(s) or other actors concerned. For instance, far more serious domestic investigations might be compelled, prisons might be closed, senior officials might be removed from office, electoral campaigns might be influenced, stability of a government might be threatened, important policies might be called into question, and consistent denials of responsibility might have to be abandoned in the face of evidence to the contrary. None of these consequences is undesirable or inappropriate, provided only that the mandate-holder has applied the relevant norms faithfully, taken account of competing factual narratives and weighed the evidence carefully, and abided by the admonition to avoid political partisanship.

In addition to these potential country-specific impacts, SRs create social knowledge and develop important forms of, and claims to, expertise. They have thus played important roles in providing justifications for novel interpretations of existing norms, promoting new norms and prompting new standard-setting activities, delegitimizing common practices, and even creating new rights-holders. By the same token, it should also be acknowledged that not all SRs have the capacity to assert such influence, whether because of the marginality of the mandate, the absence of a strong support-

266. Posner, *supra* note 42, at 18.

267. *See* Emilie Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORG. 689, 690–91 (2008) (arguing that governments named and shamed as human rights violators often take certain positive steps, whether motivated by efforts to reform or as a strategic response, but that this does not necessarily lead to a cessation of violations, nor preclude subsequent deterioration of the situation). *Cf.* Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L. J. 231, 266–69 (2009) (cautioning against use of overly broad or vague definitions of reputation as a factor explaining compliance with international law).

ive constituency, the inexperience of the mandate-holder, the lack of available resources, or other reasons. In such circumstances, there will also be a risk that a mandate-holder perceives that there is nothing to be lost by engaging in dysfunctional behavior, which might be more effective in compelling governmental attention. In other words, it is the mandate-holder's weakness, rather than strength, which might encourage pathologies, such as disregard for the need to establish a strong empirical basis for reporting, over-stating the extent of problems observed, or failure to feel especially constrained by the limitations, which should result from either the applicable normative framework or the mandate accorded by the Council.

The conclusion to be made from this review is that SRs do, or at least can, exercise significant powers and should thus be subject to accountability.[268] Additional arguments in favor of this conclusion can be drawn from the observation that SRs might be considered to share some of the broader pathologies exhibited by international organizations generally, in addition to their own.[269] These include: the development of routinized (if not unthinking) ways of looking at issues that play down the specificities of a given situation and generate formulaic recommendations; the application of an overly specialized or compartmentalized approach that privileges particular norms or issues while not taking adequate account of the constraints imposed by other legitimate considerations (whether normative or empirical);[270] the absence of adequate feedback mechanisms to channel criticisms of the outputs of SRs;[271] the lack of serious attempts at evaluating the impact of reporting and of the other activities of mandate-holders and the system as a whole;[272] and the entrenched reluctance of a bureaucracy such as the

268. Barnett and Finnemore, for example, have contrasted the growing power of international organizations with their lack of transparency and weak accountability mechanisms. In order to counter this "undemocratic liberalism" they argue for "procedures that, if not democratic, at least provide some accountability and representation." MICHAEL N. BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS 172 (2004).

269. *See generally* Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699, 699-732 (1999).

270. In relation to bureaucracies, for example, Barnett and Finnemore have observed that "[b]ureaucrats necessarily flatten diversity because they are supposed to generate universal rules and categories that are, by design, inattentive to contextual and particularistic considerations." *Id.* at 721. While their observations are illustrated by reference to the one-size-fits-all approach attributed to the International Monetary Fund in the 1990s by many of its critics, the same critique has particular resonance in the context of an enterprise that is self-consciously designed to promote universal normative standards.

271. This pathology results from an understandable, and sometimes justified, tendency to ignore or downplay complaints or suggestions emanating from a government which has been the target of criticism, combined with the marked reluctance of civil society groups at the domestic level and international non-governmental organizations to voice strong criticisms of mandate-holders because of a perceived partnership in seeking change and the assumption that such criticism would damage the overall standing of the individual mandate-holder and perhaps even of the system itself.

272. This is due to factors such as the diversity of criteria for effectiveness which different actors would identify, the difficulty of identifying performance indicators, and the extent to which the capacity to undertake an in-depth evaluation is often confined to the key actors such as the government or civil

United Nations to countenance, let alone invite or generate, critiques of its performance.

Against these arguments in favor of accountability, we turn now to consider whether strong counterarguments can be mounted to the effect that the Special Procedures system is different in some essential ways and should consequently be exempted from substantive accountability.

C. Making the Case Against a Compliance Mechanism

As noted earlier, there has been an almost uniform rejection on the part of the mandate-holders themselves, as well as civil society organizations, of the need for, or desirability of, subjecting the SRs to a compliance mechanism. In essence, the SRs' expressed opposition is based upon the adequacy of existing reporting arrangements combined with the potential role that should be played by self-monitoring mechanisms they have established. In addition to considering these arguments, the challenge in this part of the Article is to construct the strongest possible set of normative and empirical arguments in support of the SRs' rejection of any additional accountability mechanism.

1. *Reputational Incentives*

One argument that SRs might advance would be based on the public trust that has been vested in them. The claim would be that they have been appointed because of their high moral standing and expertise and that their probity and bona fides should therefore be taken for granted in the absence of any explicit evidence to the contrary. Any measures beyond routine political accountability are thus inappropriate and unnecessary. Such an argument might be made by analogy with national level courts. Slaughter has argued that the latter may be "deemed to act legitimately without direct accountability," both because they have earned public trust and because they are considered to be "[i]nsulated institutions . . . designed to counter the voters' changing will and whim, in order to garner the benefits of expertise and stability and to protect minorities."[273] But apart from downplaying the extent to which courts are in fact accountable and significantly responsive to public opinion, this analogy seems rather weak in relation to the SRs, whose impact is significantly dependent upon moving the political process, rather than remaining insulated from it.

Reputational incentives could also be invoked as a factor that would motivate the SRs to abide by the rules of the game, even in the absence of any formal sanctioning mechanism. These incentives would cover two separate categories identified by Grant and Keohane: peer and public reputational

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society groups whose objectivity in such matters is questionable. *See* Barnett & Finnemore, *supra* note 269, at 724.

273. Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 177, 195–96 (Michael Byers ed., 2000).

mechanisms.[274] Peer accountability, in turn, can be divided up into a concern by the SRs to be taken seriously by other SRs, and to produce work, which has an impact on their peers in treaty monitoring bodies and elsewhere. It would also extend to a sense of responsibility to peers not to do anything that might bring the system as a whole into disrepute. In this sense, the SRs would be among those policy-makers who, at least in part, are "motivated by a desire to avoid the sense of shame or social disgrace that commonly befalls those who break widely accepted rules."[275] Public accountability extends this logic to embrace the SRs' reputational concerns vis-à-vis a broader audience, including the human rights community more generally defined, governments, media, and public opinion. Steffek characterizes this as the "default sanctioning mechanism" because it can involve "a shift in public opinion that leads to a loss of reputation."[276]

While it may be the case that many SRs will feel significantly constrained to play by the rules out of reputational concerns, it is not clear that this will apply equally to all. Some SRs earn their living from sources closely related to their human rights work, but others such as judges or academics with tenure, individuals working for civil society groups, or those who are already retired, might have fewer concerns about reputation loss.

2. *Recontracting Incentives*

One of the principal incentives that a SR has to abide by the rules is the prospect that her appointment will not be renewed at the end of her initial three-year term. The rules provide that only one renewal is permitted, thus limiting the total term to six years.[277] Delegation theory would suggest that the threat of non-renewal would play a very important role in ensuring a mandate-holder's responsiveness to the Council, at least in her first term of office.

The possibility of non-renewal has been used against country SRs,[278] but it is made easier in their case because their appointments are generally only made one year at a time. This makes it possible for a state that does not like a particular report to move immediately. Moreover, it does not have to pre-

274. Grant & Keohane, *supra* note 5, at 37.

275. Oran R. Young, *The Effectiveness of International Institutions: Hard Cases and Critical Variables*, *in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 160, 177 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

276. Jens Steffek, *Public Accountability and the Public Sphere of International Governance*, 24 ETHICS & INT'L AFF. 45, 55 (2010).

277. Human Rights Council, Presidential Statement on terms of office of special procedure mandate-holders, U.N. Doc. A/HRC/8/PRST/2 (June 18, 2008), *available at* http://ap.ohchr.org/documents/E/HRC/p_s/A_HRC_PRST_8_2.pdf ("a special procedure mandate-holder's tenure shall not exceed six years in a particular position").

278. In 2005 the position of Special Rapporteur on Afghanistan was eliminated following a highly critical report by the then SR, Professor Cherif Bassiouni, that accused American forces in Afghanistan of committing various human rights violations, including torture. Warren Hoge, *Lawyer Who Told of U.S. Abuses at Afghan Bases Loses U.N. Post*, N.Y. TIMES, Apr. 30, 2005, at A7.

sent the non-renewal in terms of dismissal but just as a routine decision not to renew a mandate or an appointment. Non-renewal has not, however, so far been used in relation to the thematic SRs, who make up the great majority of the mandate-holders. This is partly because the three-year term provides some protection and partly because thematic mandate-holders can usually be assured of support from more diverse constituencies than is often the case of country SRs. And, perhaps most importantly, non-renewal will rarely be able to be discussed by the Council in a way that focuses solely on the propriety or otherwise of a particular alleged misdeed on the part of a SR. Any threat not to renew the mandate of a thematic SR will sound alarm bells for those who support the mandate in general. For this reason, it seems unlikely that threat of non-recontracting will act as a strong deterrent to misconduct by an individual SR.[279]

3. *The Sufficiency of Reporting Combined with Self-Regulatory Mechanisms*

One of the arguments promoted by the SRs is that existing reporting arrangements are sufficient to provide accountability. Existing arrangements involve the presentation of an annual report by the SR, an "interactive dialogue" between the SR and stakeholders, particularly affected governments who have the opportunity to respond to any allegations, and the adoption of a resolution by the Council relating to the mandate in question.

In theory, the SRs are correct in that these arrangements should provide ample opportunity for an aggrieved government to raise specific objections and, where warranted, to seek to ensure that the Council adopts sanctions of some sort against the SRs. In practice, the Council is sufficiently stalemated in geopolitical terms that it has rarely been able to agree on any such measures. But even if some SRs were occasionally sanctioned, it does not necessarily follow that these essentially dialogical forms of responsiveness are sufficient to ensure accountability in the broad sense of the term explored below.

This is implicitly acknowledged by the SRs, who in their approach have primarily relied on the argument that self-regulation is the optimal accountability model. In this they might echo the advice of the former head of Médecins Sans Frontiers, who argued that "[r]eal accountability in humanitarian action must be rooted in a sense of accountability to ourselves" and that the "best remedy for serious abuses in humanitarianism is internal deliberation and pluralism within our organizations."[280]

In 2007, when the first draft of the Code was being debated, the SRs expressed the view that codes of conduct for professional groups should aim

279. For a similar conclusion in relation to the ICC Prosecutor, see Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 524 (2003).

280. Thomas Linde, *Accountability and Independence in Humanitarian Action*, 21 REFUGEE SURV. Q. 235, 238 (2002).

"to encourage and facilitate self-regulation. In order to be effective [they] need to be internalized [which] requires a sense of ownership and a participatory process . . . ." They urged that the Code should address only general principles, while the "operational elements" could be addressed by the Manual, which the SRs had adopted for their own internal guidance.[281] Within three months of the Code's adoption, in September 2007, the Coordination Committee, representing all of the mandate-holders, adopted an interim Internal Advisory Procedure to Review Practices and Working Methods (the "IAP"). The final version, adopted in June 2008, was almost identical. The IAP was clearly designed to promote the vision of self-regulation by establishing an internal mechanism, which would examine the appropriateness of the SRs' methods of work (while not reviewing their substantive assessments). It would also consider "whether specific acts or practices align with best practices as presented in the Manual or [. . .] could be considered a practice prejudicial to the integrity, independence, and impartiality of the system . . . ."[282]

States, as well as other stakeholders, can activate the procedure through a written communication. The Chair of the Coordination Committee can opt to take no further action: (i) if "appropriate corrective action" has already been taken or is going to be; (ii) if intervening events have made action unnecessary; (iii) if the matter relates to "substantive determinations . . . within the scope" of the relevant mandate; or (iv) if the allegation is clearly unfounded. If, however, further action is warranted, a response is sought from the mandate-holder, and information may be obtained from any other relevant parties. The Committee will not "make findings of fact about any matter that is reasonably in dispute," but "[i]n an egregious case, where the [Committee] finds that the conduct of the subject mandate-holder threatens the integrity of the system of Special Procedures as a whole," it will inform the mandate-holder and submit its findings to the President of the HRC.[283]

In October 2010, as proposals were made by various groupings of influential states to establish a "Legal Committee on Compliance with the Code of Conduct,"[284] the Coordination Committee chose not to address that proposal in its submission to the Council. Instead it reiterated the utility of the IAP and called upon the Council to strengthen the role played by the Committee.[285] This approach was mirrored in the Brookings Institution study of the Special Procedures system, which urged states to use the IAP, if they have a problem with a SR, called upon the Coordination Committee to be more transparent, and urged the Council President to "re-direct Council

281. Coordination Committee of Special Procedures, *supra* note 158.

282. Coordination Committee of Special Procedures, Internal Advisory Procedure to Review Practices and Working Methods (June 25, 2008), *available at* http://www2.ohchr.org/english/bodies/chr/special/docs/IAP_WorkingMethods.pdf.

283. *Id.* at 2.

284. *See supra* text accompanying notes 10–16.

285. Contribution of the Special Procedures Mandate Holders, *supra* note 16.

discussion of an SP's conduct to the Coordination Committee . . . ." The study did, however, suggest that "[t]he High Commissioner's Office or a small group of former mandate-holders, appointed by the Coordination Committee, could also be involved as observers to the Committee's deliberations."[286]

As far as can be ascertained, no state has yet referred a case to the IAP, and the proposal to add external observers to the process looks like a weak concession designed to counter the informal reaction of state representatives who have rejected the IAP as not being an impartial body for the resolution of disputes. It is difficult to reject this characterization insofar as the procedure is designed to arbitrate major conflicts that arise between a SR and a state, rather than just to improve the internal functioning of the system.

4. *Humanitarian Exceptionalism*

It might seem rather surprising, at first glance, even to ask whether human rights and humanitarian actors should be subjected to lower standards of accountability than other actors. Indeed, the opposite assumption would seem to be a better starting point. In other words, those whose professional *raison d'être* is to hold others to account would be the first to assume that they themselves should be accountable.

But there are two different streams of thinking that could feed into an argument that the SPs should be immune from accountability because of the nature of the work they are doing. The first builds on understandings of international organizations enjoying some form of immunity in this regard as well.[287] The privileges and immunities, expressly granted to organizations like the United Nations render them largely immune from the jurisdiction of national courts. Even beyond this immunity, the United Nations was long seen as occupying a "superior legal and moral position" which was interpreted as enabling it to decide which of the laws of war would apply to its own operations.[288] Even today, the question of whether the United Nations itself is bound by human rights norms,[289] and thus whether it can violate them,[290] remain a vexed one. But as illustrated by the examples cited above, this island of relative immunity is rapidly being whittled down and

286. *See* PICCONE, *supra* note 8, at 42, ¶¶ 17–18.

287. Simon Chesterman, *UNaccountable? The United Nations, Emergency Powers, and the Rule of Law*, 42 VAND. J. TRANSNAT'L L. 1509 (2009).

288. William J. Bivens et al., *Should the Laws of War Apply to United Nations Enforcement Action?*, 46 AM. SOC'Y INT'L L. PROC. 216, 217 (1952).

289. *See* ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ORGANIZATIONS (Jan Wouters, Eva Brems, Stefaan Smis, & Pierre Schmitt eds., 2010); SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL AND L'INSTITUT INTERNATIONAL DES DROITS DE L'HOMME, LA SOUMISSION DES ORGANISATIONS INTERNATIONALES AUX NORMS INTERNATIONALES RELATIVES AUX DROITS DE L'HOMME (2009).

290. *See* Frédéric Mégret & Florian Hoffmann, *The UN as a Human Rights Violator?*, 25 HUM. RTS. Q. 314 (2003).

it will be difficult to sustain the argument that the SRs should be immune to this trend.

A similar line of thinking has been used in relation to accountability in the humanitarian field more generally. Thus, Jeff Crisp has noted that, until the 1980s, "[h]umanitarian action was widely perceived as a charitable deed, motivated by compassion for the victims, and undertaken by well-meaning people who had made extensive personal sacrifices in order to assist the needy."[291] As a result, humanitarian relief operations were "considered too urgent in nature to warrant analysis or evaluation."[292]

Other commentators have gone beyond this somewhat pragmatic claim for exemption to invoke a normative justification for requiring relatively low levels of accountability for civil society organizations. One group of authors have supported different standards for such groups on the grounds that they "represent transcendental purposes," and are thus by definition "advancing democratic governance."[293] But if applied to human rights actors this argument would seem to suggest that they are unlikely ever to do harm or otherwise transgress, which is not a proposition with much empirical evidence to support it. Although it is true that entire books have been written about the importance of global accountability designed to enhance respect for human rights without considering the prospect that human rights actors might find themselves on the "dark side."[294] But other studies, which have examined the adequacy of normative legitimacy based arguments in response to NGO accountability challenges, have concluded that they are not, per se, sufficient. One recent study of the pressure, placed upon international NGOs involved in the humanitarian and developmental responses to the Asian tsunami of 2005, concluded that, in order to be able to demonstrate the legitimacy of their actions, the groups needed to show regulatory legitimacy (i.e., compliance with relevant rules and mandates), cognitive legitimacy (i.e., demonstrated intellectual knowledge and technical expertise), and output

291. Jeff Crisp, *Humanitarian Values, Accountability and Evaluation*, 21 REFUGEE SURV. Q. 226, 227 (2002).

292. *Id.*

293. David L. Brown, Sanjeev Khagram, Mark Moore & Peter Frumkin, *Globalization, NGOs, and Multisectoral Relations*, *in* GOVERNANCE IN A GLOBALIZING WORLD 271, 287 (Joseph S. Nye Jr. & John D. Donahue eds., 2000).

294. *See, e.g.*, VALERIE SPERLING, ALTERED STATES: THE GLOBALIZATION OF ACCOUNTABILITY (2009). While Sperling devotes considerable attention to problems such as U.N. peace-keepers' involvement in sexual trafficking, and human rights abuses by private military contractors and others, she finishes her book by concluding that "[t]o the extent that the community of people concerned about extending human rights . . . grows, pressure for accountability on governing institutions—states and supra-territorial alike—will intensify." *Id.* at 330. Her approach contrasts strongly with that of David Kennedy who warns that "[h]umanitarianism tempts us to hubris, to an idolatry about our intentions and routines, to the conviction that we know more than we do about what justice can be." He catalogs the "possible difficulties, unforeseen bad consequences, routine blind spots, and biases of humanitarian work." DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM, at xviii (2004).

legitimacy (i.e., achievement of results combined with transparency and responsiveness).[295]

Again, in light of recent trends towards accountability in most sectors of humanitarian activity, it seems difficult to argue that the nature of the work done by SPs per se entitles them to avoid significant scrutiny.

5. *Independence Must Be Absolute*

Both normative and empirical arguments may be invoked to assert that independence should be treated as a foundational principle for the Special Procedures system. Indeed the generic term often used to describe the SRs is "independent experts." However, the question remains as to whether independence can usefully be thought of in terms of being absolute or complete, as has sometimes been suggested.

The U.N. Secretary-General, for example, argued in a brief to the International Court of Justice in a case, which sought an Advisory Opinion on questions relating to the immunities of an SR in the exercise of his official functions, that, "in the absence of complete independence, human rights mandate-holders and special rapporteurs would hesitate to speak out against and report violations of international human rights standards."[296] In their own Manual of Operations the mandate-holders assert that their independent status "is crucial in order to enable them to fulfill their functions in all impartiality."[297]

For its part, the Code of Conduct goes even further by declaring that the "independence of mandate-holders . . . is absolute in nature."[298] While the terms "independent" or "independence" appear seven times in the Code, they are not specifically defined beyond the requirement that mandate-holders shall:

> Act in an independent capacity, and exercise their functions . . . free from any kind of extraneous influence, incitement, pressure, threat or interference, either direct or indirect, on the part of any party, whether stakeholder or not, for any reason whatsoever, the notion of independence being linked to the status of mandate-holders, and to their freedom to assess the human rights questions that they are called upon to examine under their mandate.[299]

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295. Ringo Ossewaarde, André Nijhof & Liesbet Heyse, *Dynamics of NGO Legitimacy: How Organising Betrays Core Missions of INGOs*, 28 PUB. ADMIN. & DEVT. 42, 51 (2008).

296. Written statement submitted to the International Court of Justice on behalf of the Secretary-General of the United Nations at ¶ 55, Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion (Oct. 2, 1998), http://www.icj-cij.org/docket/files/100/8640.pdf.

297. MANUAL OF OPERATIONS OF THE SPECIAL PROCEDURES OF THE HUMAN RIGHTS COUNCIL 7, ¶ 11 (August 2008), *available at* http://www2.ohchr.org/english/bodies/chr/special/docs/Manual_August_FINAL_2008.doc.

298. Human Rights Council Res. 5/2, *supra* note 9, pmbl. ¶ 13.

299. *Id.* art. 3 (a).

In addition, however, the Code also includes provisions that, while purporting to uphold the principle of independence, seem to run in the opposite direction. Thus for example, in "implementing their mandate," mandate-holders shall:

> show restraint, moderation and discretion so as not to undermine the recognition of the independent nature of their mandate or the environment necessary to properly discharge the said mandate.[300]

However, it is unclear how restraint and moderation are essential to avoid undermining independence. They may well be key variables in enhancing the prospect of governmental cooperation, but their elevation to the status of characteristics of independence serves to highlight the need for a better understanding of what is meant by independence and what the implications are.

In addition to these normative arguments, the humanitarian and development literature makes reference to two pragmatic arguments in favor of independence from demanding forms of accountability. The first is that such demands can stifle creativity and innovation,[301] and that they might even go so far as to pose a significant obstruction to the ability of NGOs to pursue their core objectives.[302] The second argument, which is especially pertinent to the SRs, is that intrusive accountability demands are often driven by political rather than efficiency or trust considerations and that they can very easily undermine the ability of mandate-holders to carry out their essential functions.

Thus, as Najam has argued, the real danger is not that the NGOs will abuse the trust placed in them, but that the patron will abuse its powers to sanction.[303] As illustrated by the reactions of civil society groups and others to the Code, this fear of political manipulation, designed to undermine independence, is almost certainly the strongest argument against moving towards a more substantive form of accountability for the SPs.

The recognition of a SR's independence must be understood as involving a significant grant of discretion as a result of the relative and deliberate open-endedness of the norms being applied, the novelty of much of the work, and the fact that states have widely diverging expectations as to the desired outcomes of the agent's work. Intentionally vested discretion of this

300. *Id.* art. 12(b).

301. Alnoor Ebrahim, *Making Sense of Accountability: Conceptual Perspectives for Northern and Southern Nonprofits*, 14 NONPROFIT MGMT. & LEADERSHIP 191, 192–93 (2003) (arguing that efforts to control inappropriate behavior in a relatively small number of organizations might inadvertently stifle experimentation and innovation in the nonprofit sector).

302. Ossewaarde et al., *supra* note 295, at 42 ("The more these stakeholders press for increased organisation of INGO work, the more the pursuit of the core objectives of INGOs is obstructed.").

303. Adil Najam, *NGO Accountability: A Conceptual Framework*, 14 DEVT. POL'Y REV. 339, 344 (1996).

sort is not to be confused with unwanted agency slack.[304] In many international organizational settings the discretion vested in agents will include "the scope of the issues the agent is authorized to handle, the policy instruments available to it, and the procedures an agent must follow to use its policy instruments."[305]

But, by the same token, it is a mistake to view independence as a passive or negative state of being left entirely to one's own devices. Rather it is a condition which must be established and nurtured. It is also heavily contextual in the sense that it depends on the ability of the individual SRs to actually conduct themselves with independence. This in turn hinges on the extent of their expertise and competence, on the resources made available to them, on the security of tenure which they enjoy both in terms of the length of the appointment and the possibility of abrupt termination, and on the extent to which they are treated as expert professionals capable of asserting independence in a meaningful and convincing manner. This analysis suggests the need for a holistic approach, which understands independence as being secured by means of an overall package of terms and conditions, rather than a state, which can be achieved merely by ensuring that a mandate-holder shows no obvious bias in favor of one party or another and receives no instructions from governments or human rights advocates.

This section of the Article has reviewed the arguments for and against the compliance mechanism. By way of summary, two conclusions emerge. The first is that there are powerful arguments favoring the establishment of some such arrangement. The second is that there are also authentic and compelling concerns that would need to be addressed before any such arrangement could be considered to be balanced and impartial. Before contemplating what those arrangements might be, we need to identify an appropriate analytical framework within which to examine the nature of the relationship between the Council and the SRs. We will achieve this goal by exploring the relevance of principal-agent theory, which is the framework that has been most widely used by political scientists seeking to understand and analyze relationships of the kind that exists between the SRs and the Council.

IV. Principal-Agent Theory

In this section consideration is given to whether principal-agent theory ("P-A theory") provides the most appropriate and helpful theoretical framework, within which to understand the issue of SR accountability. While being an essential starting point, the theory needs to be adjusted in order to accommodate the specific position in which the SRs are placed *vis-à-vis* their

304. For a very helpful discussion of the differences between agency slack, autonomy, and discretion, see *Hawkins et al.*, *supra* note 68, at 8.

305. Andrew P. Cortell & Susan Peterson, *Dutiful Agents, Rogue Actors, or Both? Staffing, Voting Rules, and Slack in the WHO and WTO*, *in* Hawkins et al, *supra* note 68, at 255, 258.

putative principals. For this purpose, principal-trustee theory proves to be a better fit.

A. *Utility in This Context*

Over the past decade or more, P-A theory has become the dominant paradigm in the political science literature for analyzing the nature of the relationship between principals, such as states (acting individually or collectively), which delegate powers or authority to an agent. It has also been widely used by international relations scholars, especially in relation to international organizations,[306] courts,[307] and the European Union.[308] But although international lawyers have recently begun to explore its utility in relation to a broad range of issues,[309] P-A theory has been surprisingly absent from the human rights literature.[310]

It seems attractive in the present context as it provides a widely accepted lens, through which could be understood the relationship between the actors, who are linked to one another by virtue of a principal's decision to delegate particular tasks to an agent on the basis of certain conditions. In political science terms, P-A theory serves essentially to highlight "issues of hierarchical control in the context of information asymmetry and conflict of interest."[311]

It is assumed that the interests of the principal and those of the agent are never going to correspond perfectly, and there is a likelihood of self-interested behavior on the part of the agent. Since control by the principal is almost always incomplete, there will be a degree of agency "slack" or losses, defined as behavior which was not or would not be approved of by the principal. Such agency problems are especially acute in a situation, such as the special procedures system, in which the agents are highly specialized and the principals are not easily able to know and observe everything the agent does.[312]

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306. *Hawkins et al.*, *supra* note 68; Roland Vaubel, *Principal-Agent Problems in International Organizations*, 1 Rev. Int'l Orgs. 125 (2006).

307. *See* Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 Eur. J. Int'l Rel. 33 (2008).

308. *See* Deirdre Curtin, Executive Power in the European Union: Law, Practice, and Constitutionalism (2009); Carol Harlow, Accountability in the European Union (2002).

309. See the contributions in 71 L. & Contemp. Probs. (special issue on The Law and Politics of International Delegation, Curtis A. Bradley & Judith G. Kelley, special eds. 2008); Joel P. Trachtman, The Economic Structure of International Law (2008); Andrew Guzman, How International Law Works: A Rational Choice Theory (2008).

310. Notable exceptions include Posner, *supra* note 42, and Darren Hawkins & Wade Jacoby, *Agent Permeability, Principal Delegation and the European Court of Human Rights*, 3 Rev. Int'l Orgs. 1 (2008).

311. Terry Moe, *The New Economics of Organization*, 28 Am. J. Pol. Sci. 739, 757 (1984).

312. Specialization "typically inhibits the principal's ability to threaten contracting with other agents as a disciplining device to control the first agent. The greater the specialization, therefore, the greater the opportunity for agency slack." *Hawkins et al.*, *supra* note 68, at 3, 25.

Therefore, the challenge for the principal is to implement measures designed to limit agency losses. The literature typically focuses on such measures taken in advance (ex ante) or subsequently (ex post), with some authors also adding a dimension of ongoing control measures.[313]

One of the most frequently cited studies, by Kiewiet and McCubbins, looks at how parliaments can seek to rein in agency losses in situations in which they have delegated powers to other bodies. The authors identify four types of measures, which help to illustrate the potential relevance of P-A theory to the issue concerned.[314] The first set of measures relates to contract design, which translates as the definition of the mandate given to a special procedure mandate-holder in the resolution creating the post, and subsequent updating resolutions. The second set of measures relates to screening and selection, which implies that an effort will be made to appoint individuals, who are professionally qualified, competent, and likely to share with the principal at least a basic understanding of the functions to be performed. The third set of measures consists of monitoring and reporting, which in the context of the Special Procedures system translates into reporting by the mandate-holders and monitoring of their activities by the various stakeholders in the process. And the fourth concerns additional institutional checks, which may or may not include sanctions.[315]

At first glance, the P-A theory certainly seems to have considerable traction in terms of conceptualizing the nature of the relationship between the Council and the SRs and, thus, shedding light on the issue of accountability. The Council established the system and empowered the SRs to monitor human rights abuses within and by states, as well as defining their mandates and tasks in the appropriate resolutions. There is nothing in the account given so far to suggest that we cannot deduce relevant principles from the P-A theory to help in designing an appropriate mechanism for the SR accountability.

Given the correspondence between the P-A theory and the task at hand, it is all the more surprising that the human rights literature is almost entirely devoid of any sustained treatment of its relevance. The question that follows is whether there is any reason to think that it might not be an appropriate

313. Madalina Busuioc, *Accountability, Control and Independence: The Case of European Agencies*, 15 EUR. L.J. 599, 606–07 (2009).

314. *See generally* DELEGATION AND ACCOUNTABILITY IN PARLIAMENTARY DEMOCRACIES (Kaare Strøm, Wolfgang C. Müller & Torbjörn Bergman eds., 2004). *See also* D. RODERICK KIEWIET & MATTHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATION PROCESS (1991).

315. The focus of this Article is essentially on the ex post dimensions (monitoring and reporting, and institutional checks). This is not to say that the ex ante dimensions such as contract design and screening and selection are not important. Indeed they are clearly crucial in relation to the quality of the special procedures system, but they give rise to rather different issues that go beyond the scope of the present analysis. This is illustrated by the extent to which disagreements as to the scope or reach of the mandate and the functions that might legitimately be performed invariably characterize the Council's resolutions, and the continuing controversies over the means used to identify appropriately qualified appointees.

framework. In other words, might human rights scholars be assuming that it is an inappropriate or unhelpful framework in this particular field?

B. General Critiques of P-A Theory

The most general argument for such a proposition would be that it is inappropriate to transpose assumptions from economics into a setting, which seems very different in key respects.[316] It might be claimed that notions of efficiency, control, and incentives need to be seen in a very different light in the international human rights monitoring context. Even authors, who are strongly committed to delegation theory, acknowledge that its applicability in relation to human rights agents is not straightforward. Eric Posner has highlighted the questionable consensus over the human rights norms, the shifting preferences of states, and the practical difficulties of evaluating performance given the absence of "independent and objective" performance indicators.[317] He also draws attention to the difficulty of applying economic assumptions to the behavior of human rights agents both because they are not paid and, thus, cannot be rewarded or sanctioned in the usual way, and because the principal can neither observe "whether the agent works hard or not," nor "observe the revenues that flow in."[318] But many of these characteristics are shared by other actors to whom the P-A theory has long been applied without difficulty, such as international courts and tribunals. And while the classical forms of incentives are, indeed, not readily transposable to actors who are unpaid and whose productivity is hard to assess, there is little difficulty in pointing to professional and reputational incentives that apply in the case of the SRs.[319]

A related general argument would be that the application of the P-A theory in this context tends to limit the focus to rational choice assumptions and largely exclude other lenses through which conduct in the human rights domain could be viewed. Thus, some accounts of the sources of authority, upon which international organizations rely and which would seem especially relevant to the SRs, generally include rational legal and moral sources that according to some authors cannot be effectively addressed within the P-A framework.[320]

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316. *See* Philp, *supra* note 137, at 31–32.

317. Posner, *supra* note 42, at 18. Curiously, Posner omits one of the key problems which is that the states, acting as principals, will often want anything but a robust implementation of the human rights mandate given to the agents. But Posner simply notes without comment that the principal's goal will be "the enforcement of the provisions of the human rights treaties." *Id.* at 17.

318. *Id.*

319. *See supra* text accompanying notes 273–76.

320. Rational-legal authority is said to derive from the ability of international organizations to present themselves as neutral and objective creators of impersonal rules, while their moral authority derives from their claim to represent objectively the values and interests of the international community as opposed to the interests of specific states. Michael Barnett & Martha Finnemore, Rules For The World: International Organizations In Global Politics 20-25 (2004).

In addition, the SRs, like international organizations, can also play a constitutive role through which they "define new categories of problems . . . and create new norms, interests, actors and shared social tasks."[321] Given that the P-A theory also tends to neglect these dimensions, those who attach importance to them might argue that competing theoretical approaches, such as constructivism, offer greater explanatory power in relation to the behavior of human rights agents. Pollack has argued, however, that more work needs to be done to demonstrate the empirical significance of moral authority, persuasion, and constitutive processes before the P-A approaches can be shown to be inadequate to the task.[322]

C. Human-Rights-Specific Critiques of P-A Theory

Moving beyond these general critiques of the P-A theory, it is possible to identify from the general human rights literature a number of characteristics which might arguably distinguish the human rights domain from others and, thus, render it less appropriate to be analyzed in terms of delegation theory. They are: (i) the open-endedness of the standards, (ii) the heterogeneous nature of the agents and mandates involved, (iii) the role of non-state stakeholders, (iv) the degree of influence of third parties, and (v) the unusually strong assumption of autonomy.

In terms of the first of these distinctive characteristics, human rights lawyers and the SRs are by no means unique in working at the international level with open-ended or inadequately defined standards. But it is true that the field is characterized by a significantly higher than usual degree of normative uncertainty. This inevitably has consequences for the role to be played by an actor charged with interpreting and applying the relevant standards, and makes it very likely that significant slippage from the principal's assumptions will occur. This is, however, a situation which also applies in relation to a good many other agents to whom delegation theory has long been thought to apply unproblematically.

The second characteristic is the heterogeneity of the subject-matters being dealt with by the group of the SRs as a whole. They range from torture, disappearances and killings, to food security, access to health care, and the impact of cultural standards upon the rights of women, with a great deal more in between.[323] The difficulty of applying a single procedural framework to the resulting activities of diverse individual experts is reflected in the fact that the standards governing the conduct of the SRs cannot be so precise as to provide clear cut answers in many situations. While the SRs themselves have sought to systematize their working methods in a lengthy

321. *Id.*

322. Mark Pollack, *Principal-Agent Analysis and International Delegation: Red Herrings, Theoretical Clarifications, and Empirical Disputes* 21 (College of Eur., Bruges Political Research Papers No. 2, February 2007), *available at* http://aei.pitt.edu/7344/.

323. See the complete list of mandates, *supra* note 22.

Manual, both the Manual and the Code of Conduct are necessarily formulated in relatively general terms. Therefore, it is hardly surprising that many of the incidents, having led to governmental claims of misconduct, have, in fact, involved actions, which are not prohibited by the applicable standards, but which the governments in question believe should have been prohibited. But while the heterogeneity of the group cannot be denied, the P-A theory has long been applied to an even more diffuse range of actors in different fields, confirming that heterogeneity poses no obstacle to the utility of delegation theory in this context.

The third characteristic is the central role of non-state stakeholders. In addition to civil society groups and other actors, who participate actively within the Council, account needs to be taken of the ultimate beneficiaries of the enterprise—those individuals whose human rights have been violated or are at risk. The argument would be that the P-A theory excludes this crucial dimension. Along these lines, it has been argued that "[f]raming accountability of public governance in terms of a contractual principal-agent relationship facilitates the dissolution of the conceptual nexus between citizens and political decisionmaking."[324] This would lead to the conclusion that the Council-SRs relationship should not be reduced to an equation, in which there is a single collective principal. Instead, we should think of the situation as one in which there are several constituencies or stakeholders which should be seen to occupy a status equivalent to that of a principal.

But commentators have raised objections to this more open-ended approach. Koppell, for example, has highlighted the empirical difficulties that flow from "multiple accountabilities disorder," a situation in which an actor seeks in vain to please multiple principals, each with different concerns.[325] While this concern highlights some of the limitations of the P-A theory, it does not render it inapposite. Tierney has objected at a theoretical level by insisting that the only valid principals are those who have the ultimate authority in a hierarchical relationship.[326] For him, any other actors must be accommodated on a different basis, and cope with the inferior status that follows from the principles of delegation theory properly understood. His approach would clearly marginalize the role of the most vulnerable whose rights are consistently at risk of being violated. But Tierney's relative rigidity is not reflected in most approaches to the P-A theory, many of which

324. Steffek, *supra* note 276, at 51.

325. "The contention is that the organization suffering from MAD [multiple accountabilities disorder] oscillates between behaviors that are consistent with conflicting notions of accountability. The organization will sometimes emphasize the directives of principals, while at other times try to focus on customers. In the long run, overseers and constituents are displeased and the organization struggles." Koppell, *supra* note 207, at 95.

326. Michael J. Tierney, *Delegation Success and Policy Failure: Collective Delegation and the Search for Iraqi Weapons of Mass Destruction*, 71 Law & Contemp. Probs. 283, 292 (2008).

would be entirely open to identifying a range of different P-A relationships in a situation, such as that of the SRs. We return to this point below.[327]

The fourth characteristic is the degree of influence over agents enjoyed by third parties. For example, "national human rights institutions" have been given privileged access to the processes of the Council, and domestic and international NGOs play a role of enormous importance, especially in relation to the SRs. In some respects, they constitute natural allies, and indispensable sources of information and analytical insights for the latter.[328] Governments regularly express deep unhappiness at the perceived influence of these stakeholders.

Hawkins and Jacoby have emphasized the importance of recognizing this dimension in the P-A analysis, described as "agent permeability." They argue that the higher the level of permeability, or in other words the greater influence that third parties have over agents, the greater the scope of agent autonomy, consequently leading principals to delegate more cautiously.[329] Their case study of the European Court of Human Rights is especially pertinent in this context. But unless it were to be argued that the role of these third parties is so central that they have assumed a role equivalent to that of a "mini-principal" or "mini-agent" there seems to be no reason why the P-A theory cannot readily accommodate this dimension. Tierney is especially dismissive of approaches that seek to adjust the P-A models to give greater weight to either an agent's responsiveness to global norms or to third parties, claiming that they lead to "flawed theory and concept-stretching."[330]

The fifth characteristic is the inevitability of a significant degree of autonomy. It might even be argued that the Special Procedures system is predicated upon such autonomy. This is not because the principle of reciprocity is not applicable in relation to human rights, as Posner claims, but because there is a different version of reciprocity. It is a reverse reciprocity, which functions to discourage any state from taking formal measures to condemn another, in the knowledge that any such action will be reciprocated. Thus, in order to enable the Council to maintain credibility, the relevant authority has been outsourced, or delegated, to individual experts. The argument would need to be that the SRs are, as a result, given a degree of autonomy, which is so high as to effectively break the link with the principal. As a result, they can pursue their own political preferences without worrying about the latter's response. But in practice there are many agents who are granted extensive autonomy, including courts. Pollack is right in dismissing such criticisms on the grounds that they "simply misunderstand the definition of 'agent' in principal-agent analysis . . . . Far from presupposing that

327. *See infra* text accompanying notes 360–67.

328. *See generally* Jessica F. Green, *Delegation and Accountability in the Clean Development Mechanism: The New Authority of Non-State Actors*, 4 J. INT'L L. & INT'L REL. 21 (2008).

329. Hawkins & Jacoby, *supra* note 310, at 2.

330. Tierney, *supra* note 326, at 287.

agents slavishly follow the preferences of their principals, P-A analyses give us a theoretical language for problematizing and generating testable hypotheses about the sources and the extent of agents' autonomy and influence."[331]

D. Reservations About P-A Theory

There remains a particular question, arising from the special nature of the role played by the SRs, that would seem to challenge the applicability of the P-A theory. It results from the paradox that the SRs are accountable to an intergovernmental organ (the Council), while at the same time their task is to hold to account those very same governments that make up the Council.[332] The problem goes beyond a simple challenge to the basic premise of the theory, according to which the agents "ought to act as the principal himself would if he held the position."[333] It is not simply asserting the obvious point that SRs are appointed to monitor, critique and pressure governments in ways that governments themselves rarely ever do, and would certainly not do if they themselves were to carry out the task directly. This is a common goal sought in the P-A delegation contexts. Rather, the paradox is that the underlying assumption that the agents have been appointed to carry out their responsibilities effectively and independently is potentially entirely negated, if the very same governments that are being monitored and criticized can then sit in judgment on those agents and dismiss them if they do not like the results achieved. The problematic nature of the situation is illustrated by a question posed by the United States Ambassador to the Human Rights Council in 2010, when after noting the importance of maintaining the "integrity" of the Office of the High Commissioner for Human Rights, she asked the High Commissioner how she envisioned "retaining [her] Office's independence from the UN's political bodies, which serve fundamentally different purposes?"[334]

In such situations, the principal is by definition an unreliable one given the task for which the agency relationship was established, which is to monitor the principal for possible human rights abuses. Miller has sought to accommodate this problem within the context of the P-A theory by suggesting the concept of the "principal's moral hazard," to cover situations in which the principal's pursuit of her own self-interest can be self-destructive, with the result that it is "the moral hazard of the collective principal . . . that is the problem to be solved, not the moral hazard on the part of the

331. Pollack, *supra* note 322, at 5–6.

332. It might be objected that there is no perfect correlation here since only 47 states can be members of the Council, while SRs can hold any of the nearly 200 states in the world to account. But all of these states are eligible for membership and the rotation requirements mean that there will be significant turnover.

333. Grant & Keohane, *supra* note 5, at 32.

334. Betty E. King, U.S. Amb. to the U.N. in Genev., Interactive Dialogue Following the Report of the United Nations High Commissioner for Human Rights, Statement Before the Human Rights Council (March 4, 2010), *available at* http://geneva.usmission.gov/2010/03/04/king-hrc.

agent."[335] But because the P-A theory generally is premised on the assumption that agents rather than principals are susceptible to moral hazard, this idea has not been taken up in the literature.

V. Moving to a Principal-Trustee Approach

A more promising way of getting at the same idea has been suggested by Giandomenico Majone. He suggested an alternative to the P-A theory which offers a different way of approaching situations, in which the principal might otherwise be considered essentially unreliable for the purposes of the task at hand.

Majone discerned two different logics underlying decisions to delegate. In the first, principals seek to promote efficiency by delegating to experts, but give them a relatively narrow brief. In the second the aim is to enhance the principals' credibility and the quality of political decision-making, and principals seek to achieve these goals by intentionally insulating their agents, thereby enabling them to implement policies to which the principals themselves could not credibly commit. He characterizes the latter agents "trustees" and emphasizes the essentially fiduciary nature of their responsibilities.[336] This principal-trustee approach has been developed further by Karen Alter for whom a trustee is:

> (1) selected because of their personal and/or professional reputation; (2) given authority to make meaningful decisions according to the Trustee's best judgment or the Trustee's professional criteria; and (3) is making these decisions on behalf of a beneficiary.[337]

This approach would seem to provide a neat fit with the situation of the SRs. It highlights the expertise and professional independence of the SRs; it insulates them from the political preferences of the principal, and it introduces the notion of a beneficiary, which sits very easily with the concern that the SRs are acting not only on behalf of states, but also of the victims of human rights violations. It also fits neatly with the aspirations of the SRs, since it leads to a sort of politics "where internationally negotiated compromises can be unseated through legal interpretation, where states can come to find themselves constrained by principles they never agreed to, and where non-state actors have influence and can effectively use international law against states."[338] In brief, Alter's approach aims to move beyond the narrow confines of the P-A theory and manifests a presumption in favor of

335. Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 Ann. Rev. Pol. Sci. 203, 220-23 (2005).

336. Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 Eur. Union Pol. 103, 113 (2001).

337. Alter, *supra* note 307, at 39.

338. *Id.* at 55.

the trustee's independence, thereby rejecting "the idea that states are the hidden puppet-masters" of the trustees.[339] She insists, however, that this does not render the trustee unaccountable because it leaves open the option of removing the trustee, eliminating the office altogether, or employing political responses to circumvent the role of the trustee.[340]

Despite the inherent appeal of this approach for characterizing the role of the SRs *vis-à-vis* the Council, two key questions arise. The first is empirical and the second theoretical. The empirical question is whether there is a valid analogy to be drawn between SRs and courts, which are the subject of Alter's analysis. The very act of establishing a court signals that governments are prepared to vest substantial autonomy and to significantly constrain their options for choosing outcomes different to those judicially determined. While the principals who appoint the SRs probably do not envisage them enjoying judicial-levels of autonomy, it can certainly be argued that the main justification for appointing the SRs is to demonstrate a credible commitment to monitoring, and that such a commitment can only be credible if it is linked to a significant degree of autonomy.

But Alter might be interpreted as suggesting that the SRs might fall within a different category for the purposes of principal-trustee theory because, after considering the roles of diplomatic negotiators, arbitrators, and mediators, she concludes that "[d]elegation to courts is different."[341] For his part, Majone extends his analysis beyond the European Court of Justice, to include the Commission of the EU in relation to a limited range of regulatory and enforcement functions. More recently, however, Alec Stone Sweet has justified the application of the trustee model to characterize the role of the SRs. He bases his case primarily on the importance of a process of judicialization, as a result of which "arbitrators are becoming—if with some hand-wringing and reluctance—more like courts."[342] Given the diversity of approaches reflected in the literature, the determinative characteristic would seem to be whether the SRs meet Alter's criteria, as noted above. As they clearly do so, there would seem to be no reason not to use the principal-trustee approach, since it provides a much better fit for analyzing the work of the SRs than does the P-A theory in its traditional form.[343]

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339. *Id.*

340. *Id.* at 44.

341. *Id.* at 45.

342. Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier,* at 10 (Yale L. Sch. Faculty Scholarship Series, Paper No. 69, 2010), *available at* http://digitalcommons.law.yale.edu/fss_papers/69.

343. Pogge has used this framework to characterize international non-governmental organizations as trustees acting on behalf of those who donate funds. He argues that this position of trust imposes both affirmative and negative responsibilities upon the agent. He sums these up by concluding that "they must not let their contributors down by setting the wrong moral priorities, by funding infeasible or counterproductive projects, or by frittering money away through carelessness and corruption." Thomas Pogge, *Moral Priorities for International Human Rights NGOs*, *in* Ethics in Action: The Ethical Challenges of International Human Rights Nongovernmental Organizations 218, 221 (Daniel A. Bell & Jean-Marc Coicaud eds., 2007).

The theoretical question, which also follows from this conclusion, is whether the principal-trustee theory succeeds in definitively transcending the constraints of the P-A theory, or is just another iteration of the same thing. Pollack argues strongly in favor of the latter proposition. In his view it "needlessly dichotomizes a continuous range of principals' motivations for delegation as well as a continuous range of agents' discretion."[344] Tierney is even more dogmatic in rejecting the utility of this distinction. He argues that scholars gain neither conceptual clarity nor empirical leverage by using alternative terms such as "trustees" to describe agents. Instead, he insists, "[i]f some other actor has conditionally granted these actors any authority, then they are agents by definition. . . . If they do nothing that the principal wants them to do with their delegated authority, they are still agents."[345] My view, however, is that while it may be possible in theoretical terms to sustain the argument that the P-A theory is broad enough to accommodate all types of actors, including judges, SRs and others, who operate on the basis of notions of fiduciary responsibility, it seems almost self-defeating to resist the considerable conceptual refinement that the principal-trustee approach offers in such settings.

Where then does this review of the relevant theory leave us? Clearly the P-A theory remains the starting point because of its heuristic value in terms of identifying an analytical framework for the Council-SRs relationship. But the unreliable principal problem underscores the need to develop a somewhat different theoretical approach. For this purpose, the image of the SRs as trustees rather than agents seems to provide a much better fit. It also leads to the conclusion that an appropriate control mechanism for such trustees cannot be one which vests unlimited discretion in the principal in terms of harshly penalizing the agent for unwelcome findings. Thus, a mechanism, which is independent of the principal, must be established for resolving contested disputes between the principal and the agent.

The question then becomes how an appropriate accountability mechanism for the SRs should be devised. For that purpose, the concept of accountability needs to be unpacked further. The following section outlines how the notion of accountability has been approached both in the human rights context and more generally. Drawing on this literature, the concept is broken down into a series of more specific analytical questions, with a view to providing a framework for evaluating the strong competing positions at present as to the desirability of creating a compliance mechanism in the Special Procedures context.

344. Pollack, *supra* note 322, at 12.
345. Tierney, *supra* note 326, at 293.

VI. Unpacking the Notion of Accountability

Despite its centrality to the overall endeavor, the Code of Conduct contains only a single reference to "accountability," which appears at the end in Article 15 which states that "[i]n the fulfillment of their mission, mandate-holders are accountable to the Council."[346] The word and the phrasing are taken, as acknowledged by the Code's principal sponsor,[347] from the 2002 Regulations adopted by the U.N. Secretary-General to cover non-staff members of the U.N. doing work for the organization.[348] The relevant regulation states that "[o]fficials and experts on mission are accountable to the United Nations for the proper discharge of their functions."[349] The official Commentary on that provision is instructive:

> The method of accountability may vary. For officials appointed by the General Assembly, that accountability would be a matter for the Assembly. For experts on mission, it would be the Secretary-General or the appointing authority who could terminate an assignment or otherwise admonish the expert.[350]

Thus, the forms of accountability envisaged are both quite limited and relatively crude, with an emphasis upon sanctions for misconduct rather than any broader notion of being required to account for decisions or actions. But this is quite appropriate to the extent that the reference point is an official or a consultant employed by the U.N. and directly answerable to a 'boss.' In other words, where there is a superior-subordinate relationship. It is much less obviously appropriate in relation to a mandate-holder whose independence is said to be "absolute"[351] and in whom extensive discretion is vested.

Nevertheless, despite the Code's single reference to accountability, it is clear from the drafting and the subsequent debates, as well as from the overall text of the Code, that the thrust of the enterprise is to ensure that the SRs are able to be held to account for the fulfillment of their wide-ranging mandate, rather than simply for an act of disobedience or defiance. The question, however, is what exactly this entails. To whom, for what, when and how, and with what consequences should they account? Or in other words, how do we define the notion of accountability?

It is now almost mandatory to begin any scholarly discussion of accountability by noting that the concept has too often been used in a profligate and often wholly imprecise manner across a huge range of contexts and for

346. Human Rights Council Res. 5/2, Annex, art. 15, *supra* note 9.
347. *Open-ended consultations*, *supra* note 147.
348. *See Regulations Governing the Status*, *supra* note 94.
349. *Id.* Regulation 3, at 5.
350. *Id.* Commentary on Regulation 3, at 15.
351. Human Rights Council Res. 5/2, *supra* note 9, pmbl. ¶ 13.

widely varying purposes.[352] Bovens has expressed this view most graphically by suggesting that the concept "today resembles a dustbin filled with good intentions, loosely defined concepts and vague images of good governance."[353]

The challenge, therefore, is to identify a notion, which is both sufficiently broad as to capture the range of considerations against which mandate-holders should reasonably be held to account, while avoiding one which seeks to encompass a wide range of concerns that might be relevant and desirable, but are not central to accountability as such. At one end of the spectrum, some proposed definitions seem to be limited. They tend to equate accountability with transparency.[354] But while transparency is an essential component of accountability, the latter terms go well beyond openness.

At the other end of the spectrum, a good example of a wide-ranging and extremely inclusive definition is that proposed by Koppell who defines accountability to include: transparency (did the organization reveal the facts of its performance?); liability (did it face consequences for its performance?); controllability (did it do what the principal desired?); responsibility (did it follow the rules?); and responsiveness (did it fulfill substantive expectations?).[355] A different, but also potentially very wide-ranging definition is offered by a major civil society project—the Global Accountability Project—which assesses and rates a wide range of international actors in terms of four criteria: transparency, participation, evaluation, and complaint and response mechanisms.[356] It aims to identify what it terms accountability gaps, defined as "fissures between those that govern and those that are governed that prevent the latter from having a say in, and influence over, decisions that significantly impact upon their lives." Such gaps exist wherever "a group affected by some set of actions has a valid claim on the acting entity, but cannot effectively demand the accountability that it deserves."[357] While the general principle that there should be such wide-ranging accountability of international actors, including NGOs, corporations, and inter-governmental organizations might not be contested by many, it is not difficult to see that such a standard provides rather little guidance as to what exactly is required in relation to actors such as the SRs whose activities can have a significant impact upon diverse groups and individuals.

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352. *See generally* Richard Mulgan, *'Accountability': An Ever Expanding Concept?*, 78 PUB. ADMIN. 555 (2000).

353. Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 447, 449 (2007).

354. "[O]rganizational accountability [refers to] the readiness or preparedness of an organization to give an explanation and a justification to relevant stakeholders for its judgments, intentions, acts, and omissions." Andreas Rasche & Daniel E. Esser, *From Stakeholder Management to Stakeholder Accountability—Applying Habermasian Discourse Ethics to Accountability Research*, 65 J. BUS. ETHICS 251, 252 (2006).

355. Koppell, *supra* note 207, at 95-99.

356. *See* ONE WORLD TRUST, *supra* note 210.

357. MONICA BLAGESCU, LUCY DE LAS CASAS & ROBERT LLOYD, ONE WORLD TRUST, PATHWAYS TO ACCOUNTABILITY: THE GAP FRAMEWORK 13 (2005).

A comparably overbroad approach is also reflected in the report of the International Law Association's Committee on Accountability of International Organizations, which was set up in 1996. At the time, the Committee's work was path-breaking and its report represented probably the first occasion on which a major professional group of international lawyers had acknowledged the applicability to all international governance institutions of the principle that "[p]ower entails accountability, that is the duty to account for its exercise."[358] The Committee concluded that this is to be achieved through compliance with a body of rules and practices which apply to both the institutional and operational activities of the relevant body.[359]

In reacting against such broad definitions, commentators such as Philp have argued that we need to distinguish between the core elements of accountability on the one hand and, on the other, "the contingent circumstances or additional requirements that might influence whether a certain form of accountability will bring about a certain set of results."[360]

Bovens has also stressed the need to avoid open-ended, evaluative approaches to accountability, which will inevitably remain deeply contested, and has instead urged the adoption of a narrower, more sociologically grounded conception. His approach defines accountability as "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences."[361] Bovens definition has been widely used in the literature and offers an appropriate framework within which to consider the challenges of accountability for Special Procedures mandate-holders.

Building on this approach, we can identify five main questions that need to be addressed in the present context: (i) who is responsible; (ii) to whom; (iii) for what; (iv) through what means; and (v) with what consequences.

The first of these questions is *who* is required to account. Initially, the onus is on the Council to ensure that the persons appointed possess the requisite expertise, which has not always been the case. But the question becomes more complicated if we were to consider issues such as the possibility of collective responsibility either on the part of the group of SRs working together or of the collectivity of SRs as a whole, and the possibility that the Secretariat, given its extensive role, should be held responsible in certain

358. International Law Association, Committee on Accountability of International Organizations, Third Report Consolidated, Revised and Enlarged Version of Recommended Rules and Practices ("RRP-S") 2 (2002), *available at* http://www.ila-hq.org/download.cfm/docid/D585222D-6DBB-429B-A3CF98463CC63979.

359. While the full list of principles is even longer, the most important of those espoused by the Committee are: good governance, good faith, constitutionality and institutional balance, supervision and control, stating the reasons for decisions or particular course of action, procedural regularity, objectivity and impartiality, due diligence, and promoting justice. *Id.* at 2–7.

360. Philp, *supra* note 137, at 32.

361. Bovens, *supra* note 353, at 450.

cases for actions attributed to a mandate-holder. A consideration of these questions would take us too far afield. For present purposes, the most salient but also controversial issue concerns the accountability of states. The contractual connotations associated with delegation theory underscore the fact that principals who are concerned with holding their agents to account have a strong obligation to abide by their own part of the bargain, and to adhere to the terms of the agency relationship. In this respect, the Council should take steps to uphold its members' commitment, reiterated in the resolution adopting the Code,[362] to cooperate with the Special Procedures.

The second question is *to whom* accountability is owed. It generates a complex response that does not sit easily with classic principal-agent theory. There are multiple stakeholders in the human rights monitoring context, and even if they cannot all plausibly be conceptualized as principals, there is a need to devise structures of accountability, which take adequate account of the views and interests of affected and interested parties other than governments. In addition to the Council itself, other possible principals would include governments in general, the states represented on the Council, and the government affected by the mandate-holder's actions.[363] Moreover, the Code of Conduct introduces the notion of "stakeholders," referred to seven times in the text, who are specifically identified in the Council's resolution as "including States, national human rights institutions, non-governmental organizations and individuals."[364] Individuals and groups whose human rights have been violated or are at risk, and those who represent the interests of the victims and their families and communities might thus also be considered as possible principals.[365] An additional group to whom account might be owed is the peer group of SRs, whose reputations and potential scope for action may well be affected by the approach of an individual miscreant or maverick.

Both the scholarly literature and civil society commentators attach particular importance to this notion. The problem is said to be not that interna-

362. Human Rights Council Res. 5/2, *supra* note 9, pmbl. ¶ 1. In their joint statement to the Council in June 2009, the NGO coalition argued that in order to "bring a proper balance back to the Council's relations with its Special Procedures, the Council must urgently commit to, develop and adopt a Code of Conduct for States to guide them in their cooperation with the Special Procedures." *See* BUILDING ON A CORNERSTONE, *supra* note 39, at 2.

363. For a discussion of the competing claims of three different constituencies—a particular group of states, the community of states, and the global public, see Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247, 255 (2006) 247 and compare Tierney, *supra* note 326, at 292 (arguing that only the actor with whom the direct hierarchical relationship of authority exists can be considered the principal).

364. Human Rights Council Res. 5/2, *supra* note 9, pmbl. ¶ 6. The Code itself states that mandate-holders should conduct themselves so as to "maintain and reinforce the trust they enjoy of all stakeholders," art. 3(h), and characterizes the "the promotion of dialogue and cooperation" as "a shared obligation of the mandate-holders, the concerned State and the said stakeholders," art. 11(e).

365. Steffek, *supra* note 276, at 50-51, has argued that the term "stakeholder" is increasingly popular in the literature of global governance in part because it limits the extent of public accountability to those with a clear stake rather than citizens in general. Such a critique would not seem to have little traction in the context of the Special Procedures.

tional actors are not accountable, but that they are accountable to the wrong constituencies.[366] The principal objection is that accountability is rendered to the most powerful stakeholders, rather than to those most directly affected by the power-wielder's actions. Some authors express this in terms of the need for external as well as internal accountability,[367] while others talk of downward as well as upward accountability.[368] When external or downward accountability is absent, the result is that "the legitimacy and accountability of INGOs [international non-governmental organizations] becomes disconnected; legitimacy is based on speaking for disadvantaged people, but INGOs focus on being accountable to donors."[369] The applicability of this analysis to the activities of the mandate-holders is evident. The argument would be that they are currently required to account only to governments, but not to those whose human rights are being violated.

The third question is *for what* types of conduct mandate-holders should be held to account. Bovens distinguishes financial, procedural, and programmatic accountability,[370] but the first of these is of marginal relevance to the SRs who have very few resources at their disposal and whose financial arrangements are, in any event, managed almost entirely by the Office of the High Commissioner for Human Rights. Procedural and programmatic accountability are clearly of major importance, but the key question is not whether the SRs should be held to account in these regards, but how. This is best answered in conjunction with the next issue.

The fourth question is: *through what means* should mandate-holders be held to account? The Council can apply formal accountability by censuring an SR for actions such as failures to report, respond to questions, or carry out the other responsibilities of the position. For Philp, political accountability concerns the "answerability of those in public office to partisan elements within the political system."[371] By way of illustration, he notes that judges are formally, but not politically, accountable.[372] In the context of the Special Procedures the challenge is to reflect the fact that while mandate-holders cannot reasonably claim judicial-type immunity from political accountability, they equally cannot be subject to unlimited political accountability without destroying their capacity to carry out their essential functions. But determining the means by which this type of political accountability is to be achieved is complex. At one level, the acts of providing information and

366. Krisch, *supra* note 363, at 250.
367. Grant & Keohane, *supra* note 5, at 38–39.
368. BLAGESCU ET AL., *supra* note 357, at 16.
369. *Id.* at 17.
370. Bovens, *supra* note 353, at 454.
371. Philp, *supra* note 137, at 38.
372. *Id.* at 39 (noting that in countries where judges are accountable politically "the independence of their judgment from the pressures of the political system becomes questionable").

participating in the processes of public debate and deliberation are a vital part of political accountability.[373]

However, in practice, this form of give-and-take political accountability functions poorly within the Council, primarily because of states' reluctance to engage in it seriously. When a mandate-holder produces a detailed report describing specific allegations and the information on which they are based, it is not sufficient for a government simply to reject the report as biased, unfounded, distorted, or defamatory, and then claim that the Code of Conduct has been breached. A procedure needs to be devised, which enables a government and a rapporteur to engage in a meaningful exchange. At present, this all too rarely happens and the arrangements currently in place encourage government representatives to avoid engaging in a substantive debate and instead to focus almost exclusively on the Code's procedural requirements. In addition to developing a more meaningful dialogue, an important element of political accountability could be enhanced if the resolutions adopted by the Council were to be more focused in terms of accepting or rejecting specific proposals put forward by an SR.

Nevertheless, the debate over the need for a compliance mechanism assumes that a further element of political accountability is required in cases in which these other forms of accountability, even if functioning well, can be considered inadequate to deal with certain forms of perceived misconduct. In other words, a serious breach is alleged for which regular political sanctioning is considered insufficient, thus requiring a more reasoned and considered response. The assumption is that such allegations should be dealt with by a compliance body possessing both legal expertise and demonstrable objectivity.

The problem, however, is that if the Council adopts a formal sanctioning procedure without making any other adjustments to the existing approach, it will have put in place each of the two extremes on the accountability spectrum, but will have put little or nothing in between those extremes.[374] There would be a reporting process and a sanctioning process, but no focused exchange between the experts and states representatives between those two options.

The fifth and final question concerns the *consequences* that might flow from non-compliance. Here the literature reflects differing perspectives. Some authors contend that sanctions are an essential or constitutive element of accountability.[375] Schedler, for example, characterizes accountability without consequences as "weak, toothless, 'diminished' forms of accountability" which "will be regarded as acts of window dressing rather than real re-

373. *See* CURTIN, *supra* note 308, at 255–60.

374. As Mégret has noted in relation to international prosecutors, there needs to be "a sophisticated scale of responses to different accountability needs." Mégret, *supra* note 191, at 72.

375. RICHARD MULGAN, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES 9 (2003).

straints on power."[376] Others argue that sanctions are not essential, based in part on the grounds that they are often illusory in the sense of never really being applied, and that they might actually deter actors from acknowledging responsibility.[377]

Many of those writing on international actors seem to adopt something of a middle path by insisting that there must be "consequences" although not necessarily sanctions, and then defining those consequences in relatively soft terms.[378] Most commentators, however, tend to assume that concrete sanctions, such as financial rewards or penalties, involving the increase or reduction in the relevant budgetary allocations, are a necessary element.[379] For our purposes, however, this form of sanction holds limited promise since the SRs are unpaid and the budgets allocated to them are miniscule. Nonetheless, it would seem that Council-SR accountability arrangements will suffer a loss of credibility if the Council regularly manifests its dissatisfaction but is never able to impose sanctions. This inability may readily be explained by the political costliness of sanctions for the principals,[380] but that fact only underscores the importance of devising a sensitive and graduated approach to sanctions rather than one grounded in dismissal.

These five questions provide a useful framework within which to explore the central issue of how the SRs should be held to account if a compliance mechanism is established.

VII. What Should a Compliance Mechanism Look Like?

Existing forms of accountability on the part of the SRs are not strong and both principal-agent theory and the broad trend in practice towards effective accountability for international actors point to the need for reform. By the same token, the track record of the proponents of a new compliance mechanism, and the nature of the proposal currently on the table, give substance to widely held fears that the initiative will undermine the SRs' independence and effectiveness.

It is clear from the above review that the Code of Conduct has so far been implemented in an uneven, haphazard, and somewhat dysfunctional way. In the absence of a mechanism designed to sort, structure, and address com-

376. Andreas Schedler, *Conceptualizing Accountability*, *in* The Self-Restraining State: Power and Accountability in New Democracies 16–17 (Andreas Schedler, Larry Diamond & Marc F. Plattner eds., 1999).

377. Carol Harlow & Richard Rawlings, *Promoting Accountability in Multilevel Governance: A Network Approach*, 13 Eur. L. J. 542, 545 (2007).

378. Thus Bovens insists that the possibility as opposed to the actual imposition of sanctions is what distinguishes accountability from "non-committal provision of information." For him, it may suffice even if the consequences are only implicit or informal. Bovens, *supra* note 353, at 451–52.

379. *Hawkins et al.*, *supra* note 68, at 30.

380. Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. Law, Econ. & Org. 243, at 252–53 (1987).

plaints, ill-founded accusations will continue to proliferate, the SRs will feel increasingly intimidated, and civil society will see the Code as nothing more than a ploy for intimidating the SRs. For their part, governments will be frustrated at the lack of any outcome in relation to what they regard as genuine violations of the Code and at their perceived inability to limit the actions of their own agents. There is thus a strong case to be made for the establishment of a compliance mechanism. But as the foregoing analysis indicates, the most important question of all is what form it should take.

A. Current Proposals

Various proposals have been put forward, starting in 2007. In that year, the second draft of the Code provided for the setting up of an "Ethics Committee" to oversee its implementation. But the provision was strongly opposed by many governments and the mandate-holders, and was subsequently omitted. Nonetheless, key states continued to promote the idea, and it had become an important part of the informal debate by the end of 2009. A proposal in January 2010 to set up "a professional legal, not political, body"[381] was soon transformed by Algeria into a proposed "Advisory Committee of Magistrates," consisting of five members, presumably with one from each of the UN's five geopolitical regions.[382] South Africa then suggested that the group would consist of independent judges, who would "consider all issues related to breaches of the Code . . . and make recommendations to the Council as appropriate."[383] But by October 2010, a uniform position had emerged among a powerful group of governments to create a "Legal Committee on Compliance with the Code of Conduct," the composition and working methods of which would be determined solely by governments.[384] This approach immediately calls into question the legitimacy of the process envisaged.

All of the indications are that the committee would consist of government representatives, which is especially ironic in view of the earlier debate in which the governments concerned rejected a peer accountability mechanism (the Internal Advisory Procedure), set up by the SRs themselves on the grounds that, being composed solely of representatives of the SRs, it could not be considered impartial.[385] But the same governments are now propos-

381. Wilton Park Conference, *Reviewing the Work and Functioning of the Human Rights Council: What are the Priority Issues?* 4, ¶ 7 (Report on Wilton Park Conference 1013) (Feb. 2010).

382. Idriss Jazaïry, Outcome of The Retreat of Algiers on The Review of The Work and Functioning of The Human Rights Council 25 (2010), *available at* http://clients.boldeverything.com/UNHRC/docs/INST_2010_AlgiersRetreat_FinalReport_EN.pdf.

383. Ambassador Baso Sangqu, Statement delivered by the Permanent Representative of the Republic of South Africa during the interactive debate following the presentation of the annual report of the United Nations High Commissioner for Human Rights, at 2 (Mar. 4, 2010).

384. *See supra* text accompanying notes 10–13.

385. *See supra* text accompanying notes 281–83.

ing a committee, which would be every bit as partial and lacking in objectivity.

The competing approaches neatly illustrate the fact that an answer to the questions as to whether and how U.N. human rights monitors should be made more accountable cannot be reduced to a binary choice between accountability and independence. Nor can the content of those two variables be reduced to simple propositions that identify accountability with control, and independence with limitless discretion. What is needed is a series of related measures designed to unpack and address in a sophisticated way the concerns prioritized by each side. The debate so far has often been wooden and antagonistic, with little attention given on either side to confidence-building measures or the need to develop an authentic dialogue.

As a way of avoiding the binary trap, it is often said that the key variables of independence and accountability are two sides of the same coin in the context of human rights monitoring.[386] In essence, this is an accurate description, but it assumes that each side of the coin is equally strong and capable of balancing the other. That will generally be the case in relation to international judges, for example, whose independence is usually assured by law, who enjoy a fixed tenure, draw a regular salary, and serve under terms governed by treaty or contract. The SRs, by contrast, are unpaid, effectively serve at will, have no formal contract of employment, and have access to very few resources.

In short, their independence is largely at the mercy of the turbulent and unreliable political currents in the Human Rights Council. When the fragility or vulnerability of that independence is juxtaposed against an insistence on strong forms of accountability, the type of equilibrium suggested by the coin metaphor is lacking. In reality, independence and accountability can only co-exist meaningfully in a dialectical relationship of tension with one another.

B. From Theory to Practice

How then can we move from the theoretical analyses above to the identification of an approach which would preserve meaningful independence while assuring necessary accountability? We saw that while the principal-agent theory provides a useful starting point for understanding the relationship between the Council and the SPs, it needs to be modified to take account of the problem that the principals in this case are unreliable. This is best done by conceiving of the SRs as trustees rather than as agents. The article then put forward a normative argument that accountability is necessary even in the human rights context, and that principal-trustee theory leads to the conclusion that SRs should be accountable to the Council, pro-

386. *See, e.g.*, Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 Law & Prac. Int'l Courts & Tribunals 27 (2003).

vided that sufficient autonomy can be assured in order to give substance to the principals' credible commitment to enable the system to operate independently of self-serving political interference.

However, the principal-trustee theory does not lead directly to the identification of particular institutional arrangements by which this balance can be achieved. By reviewing the abundant literature on accountability, we identified the key elements of such a framework and we turn now to a brief review of the main features that should be included in proposals to promote respect for the independence of the monitors while ensuring that they are adequately accountable.

The basic challenge is to achieve an outcome in which "[n]o one controls" the independent agent or agency, "yet it is clearly under control."[387] The relevant arrangements must, nevertheless, be premised on the assumption that the basic independence of the agent is to be maintained and protected. This in turn means that accountability must be conceived of in more nuanced terms than suggested by the rhetoric of the most critical governments. The objectives should be: (i) to maintain and enhance the legitimacy of the system as a whole; (ii) to facilitate appropriate oversight by the Council; (iii) to respond to legitimate concerns of other stakeholders, including civil society; and (iv) to improve efficiency and performance.[388] Since the purpose of holding the SRs to account is to prevent or remedy any illegitimate exercises of power on their part, it should go without saying that the process itself must manifest legitimacy.

The question then is what an appropriate accountability mechanism might look like in practice. The remainder of the Article seeks to identify the broad outline of a Legal Committee that could be established on terms, which are consistent with the considerations, highlighted in the foregoing analysis.

It warrants repeating, however, that simply superimposing a compliance mechanism on top of the relatively dysfunctional existing arrangements, without addressing the latter at all, would call into question the motivation of any such reform. As already noted, the committee's principal task would be to deliberate on complaints lodged by governments. But if the committee is to reflect an even-handed approach, motivated by a concern to improve the overall functioning of the system rather than to hobble the monitors, it should also be mandated to consider complaints directed against governments for breaches of their commitments to the individual SRs or to the system as a whole. Consideration should also be given as to ways in which other stakeholders might participate.

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387. Terry Moe, *Interests, Institutions, and Positive Theory: The Politics of the NLRB*, 2 STUDIES IN AM. POL. DEV. 236, 291 (1987).

388. *See generally* Mark Bovens, *Public Accountability, in* THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT 182 (E. Ferlie, L. Lynne, & C. Pollitt eds., 2005).

The committee's composition is vital if it is to achieve legitimacy and acceptance. Membership should be based on competence and integrity, rather than on political considerations. An ability to act in a judicious if not also a judicial manner would be important given the functions envisaged for the committee. This would highlight the need for members to have experience in human rights, legal, and perhaps also ethical matters.

The size of the committee would need to reflect the relative lack of resources in the U.N.'s human rights system. By the same token, the cheapest option—the appointment of a single arbiter—would vest too much power in one individual and would make the entire system hostage to the appointments process, which would unavoidably be controlled by governments. Those governments would then be in the position of determining who would sit in judgment on the merits of their own complaints. To avoid this problem, the committee should consist of at least three persons, a number which would facilitate the representation of key interests, and provide an uneven number to avoid evenly divided voting. Such a committee could consist of three persons, one appointed by the Council (to be named by the President, after consultation), one appointed by the mandate-holders (to be named by the Chairperson of the Coordinating Committee, after consultation), and a presiding member to be chosen by consensus by the other two members. This would reflect a model commonly used in the arbitration context and, assuming that the president would be someone with judicial qualifications, she could be elected from a list of judges with human rights experience, which would be drawn up by the U.N. High Commissioner for Human Rights.

The term of office for committee members is an open question. A degree of consistency would be desirable, as would the possibility for the members to gain experience over time. This would seem to point to a minimum of three years, which could reasonably be extended to five years. Members would, both for financial reasons and because the number of cases would be small, serve only on a part-time basis. Considerations of legitimacy and trust would require that the committee's working methods be transparent and quasi-judicial in nature. Complaints would thus need to be fully documented and be presented in terms of the relevant provisions of the Code. The respondent should then be required to respond and, if necessary, a hearing of the parties should be convened. While this would entail some financial costs, there would be little point in establishing such a committee, unless it was adequately resourced and able to work in a manner which would inspire confidence on the part of SRs and states.

While many other issues would need to be resolved, it will suffice for present purposes to draw attention to two. First, the lodging of a complaint should not lead to a delay in the presentation of any report to the Council. The absence of such a provision would provide an enormous incentive for Governments to lodge complaints simply for the sake of delaying reports

and rendering them irrelevant. Second, given the seriousness of the process envisaged, it would also be desirable to establish certain filtering systems both to eliminate clearly unfounded complaints and also to endeavor to settle complaints amicably whenever possible. The most important filter would be to require that a reasoned legal complaint be submitted. This would deter frivolous complaints by governments and would enable the secretariat of the Council to reject complaints that did not satisfy certain criteria in terms of information provided. There could then be a requirement that all complaints would first be examined by the Coordination Committee of Special Procedures, which is equipped and has expressed the desire to play such a role. This group could seek to achieve a negotiated settlement, and only if such an agreement becomes impossible would the complaint be forwarded on to the Legal Committee.

In terms of outcome, the committee's role would be to provide the Council with a detailed report on the allegations made, the responses received, and its own assessment of the merits of the case, as well as its recommendations for action or otherwise by the Council. While this report would formally be only recommendatory, there would be a presumption that the Council would act in accordance with it. Where the Council determined to adopt a different outcome, the President would provide a reasoned statement of the relevant factors taken into account.

Finally, it would be important for the committee to be empowered to recommend a range of different responses, ranging from inaction to dismissal of the SR. But in between these extremes, it might recommend that a warning be given, that remedial steps be taken, that an apology be issued, that procedures be changed, that there be increased transparency, and so on. In other words, the objective would not be disciplinary per se, but instead would aim to improve the effectiveness and fairness of the system and to enhance its credibility and legitimacy. At the end of the day, even in the absence of any formal sanction, the mere fact of a careful review of the validity of an SR's actions can act as a salutary reminder to mandate-holders of their responsibilities and, equally important, to states as a reminder of their obligations to act in good faith and to permit monitors to act in conformity with their mandates.

VIII. Conclusion

As is so often the case in matters of deep contention, the views of the principal protagonists in the debate over a compliance mechanism for the SRs are a mirror-image of the other. The most vocal governments have insisted on the need for enhanced accountability on the part of SRs, while ignoring questions of governmental accountability and paying lip-service to the need to uphold the independence of SRs. On the other side, the SRs have elevated the value of independence above all other considerations and have

barely acknowledged the importance of meaningful accountability. Neither perspective is convincing in itself, but each serves to highlight some of the concerns that need to be balanced in devising an effective and constructive strategy.

This Article has argued that the way in which the Code of Conduct has been formulated and presented are such as to make it a rule-based rather than an integrity- or virtue-based approach. Some form of implementation mechanism is therefore required. In the absence of any such arrangement states are left free to make frivolous and unfounded allegations that the Code has been violated and that a mandate-holder's analysis or critique should accordingly be dismissed or ignored. The mandate-holders are not compelled to provide a reasoned response either to broad, but apparently legitimate concerns expressed or to specific allegations that appear, *prima facie*, to be well-founded. To overcome these problems the Article calls for the creation of a compliance body which would examine complaints by stakeholders in relation to the overall functioning of the Special Procedures system. While it argues that the rejection of such a mechanism by the SRs is difficult to justify, it emphasizes that the shape of the compliance mechanism proposed by the dominant group of states is far more problematic. If adopted in its present form, the proposal to create a committee consisting solely of government representatives or nominees to sit in judgment on the SRs, with no assurances as to balanced composition or procedural probity, would go far towards fundamentally undermining the Special Procedures system. In order to avoid such an outcome, this Article seeks to provide a theoretical framework within which to identify the key features that such a body should have in order to respond to the concerns on each side while providing an essential element of legitimacy for the system as a whole.

The issues addressed by the Article are also of major significance within the broader context of the international human rights legal regime. In particular, the Article seeks to demonstrate the utility of principal-agent theory as a lens through which to examine these issues, and to highlight the need to view accountability in a nuanced and context-specific way. By the same token, it emphasizes that careful account should be taken of the insight that the principal in the relationship must, in certain circumstances, be treated as being unreliable.