# AN INVESTIGATION OF PROPOSALS TO IMPROVE THE UNITED NATIONS HUMAN RIGHTS COUNCIL: STRUCTURAL REFORM AND RECONCEPTUALIZING EFFORTS OF STATE AND NON-STATE ACTORS

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**FACULTY OF GRADUATE STUDIES**
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**2009**

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## ABSTRACT

While much has been said about the shortcomings of the UN Human Rights Council, improvement of the body's efficiency and efficacy has received few considerations. Recognition that there is considerable room for improvement at the Council inspired an investigation into proposals aimed at changing the structure and substance of the body. This thesis is based on extensive research which found that shifting trends in the international political landscape, the Obama Administration's renewed commitment to human rights and US Council membership, and the approaching mandated 2011 review of the Council's mechanisms and work combine to create a unique context conducive to producing positive change at the Council.

The research included over twenty interviews with international state and non-state actors working in or around the Council. The interviewees reflect various sectors of stakeholders, and different regional perspectives. The research recognized, and article discusses, the difficulties of creating change at the Council given the realities of international politics, and the lack of scholarly attention which the Council has received. While the Council receives significant criticism, the article reiterates that the Council is a unique space in which states, who are ultimately the implementation vehicles of rights standards, discuss serious human rights issues. The research concludes by noting that if stakeholders recognize the usefulness of the body, and utilize this unprecedented window of opportunity, significant change at the Council is plausible.

KEY WORDS: UNITED NATIONS HUMAN RIGHTS COUNCIL/ UNITED NATIONS REFORM/ CIVIL SOCIETY/ OBAMA ADMINISTRATION/ ORGANIZATION OF THE ISLAMIC CONFERENCE

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# LIST OF ABBREVIATIONS

| | |
|---|---|
| AU | African Union |
| CARICOM | Caribbean Community |
| CP | Civil and Political Rights |
| ECOSOC | United Nations Economic and Social Council |
| EU | European Union |
| ESCR | Economic Social and Cultural Rights |
| IHEU | International Humanist and Ethics Union |
| NAM | Non-Aligned Movement |
| NGO | Non-Governmental Organizations |
| NHRI | National Human Rights Institutions |
| OIC | Organization of the Islamic Conference |
| OHCHR | Office of the High Commissioner on Human Rights |
| UNCHR | United Nations Commission on Human Rights |
| UNCTAD | United Nations Conference on Trade and Development |
| UNDP | United Nations Development Programme |
| UNESCO | United Nations Educational, Scientific and Cultural Organizations |
| UNGA | United Nations General Assembly |
| UNHRC | United Nations Human Rights Council |
| UNIDO | United Nations Industrial Development Organization |
| UNRWA | United Nations Relief and Works Agency for Palestine Refugees in the Near East |
| UPR | Universal Periodic Review |

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# CHAPTER I
# INTRODUCTION

## 1.1 Context of the Research

The United Nations Human Rights Council (hereinafter; the Council) simultaneously exemplifies the strength and development of human rights and, the limitations of the practical implementation of human rights by states. In recent years the Council has been tasked with the promotion and protection of international human rights amidst the distrust and hostility between regional blocs and political alliances surrounding the “War on Terror”. Furthermore, debates regarding the very nature of human rights have ensued. The Council and preceding Commission on Human Rights (hereinafter; CHR or Commission) have acted as the only forum where states voice their positions on important international human rights issues.

Human Rights were mainstreamed at the UN in 1997 by the Secretary General Kofi Annan, at which time the questionable work of the Commission became a topic of public debate (Rajkumar Interview, June 3, 2009). By 2005, the CHR had become a body which appeared to be working towards a number of things, none of which included human rights (Terlingen, 2007: 169). The credibility deficit formed by its members, many of whom had atrocious human rights records, coupled with publicized scandals and a series of questionable resolutions led to reform. In the report “In Larger Freedom” former UN Secretary-General Kofi Annan stated, “States have sought to membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the UN system as a whole.” Secretary-General Annan went on to proclaim, “With the creation of the Human Rights Council, a new era in the human rights work of the United Nations has been proclaimed” (Terlingen, 2007).

The optimism and high expectations displayed in Secretary-General Annan’s speech was echoed throughout the UN and by members of civil society.

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Mexican President referred to the Council's creation as, "an historic achievement" which would "improve the life conditions for millions of people."(UN Watch, 2008a: 4). In a sense, the nostalgia surrounding the prospect of a new human rights body outweighed the reality that the new Council was only slightly structurally different from the Commission, and would likely face many of the same problems as its predecessor.

A panel of experts commissioned by Secretary General Annan, known as the "High-Level Panel on Threats, Challenges and Change" working on UN reform suggested a number of measures and models. One of the most noted proposals was a Council consisting of human rights experts representing every UN member state. This proposal was rejected by Secretary-General Annan who favored a model proposed by the United States which would consist of twenty to thirty members with a record of commitment to the promotion and protection of human rights (The Economist, 2008). After lengthy debate this proposed model expanded into a forty-seven member Council, only six less states than the failed Commission. During the reform process members of civil society recognized that the structural reform of the Council was a secondary focus. The primary focus was the attitude and behavior of member states, who would need to become enthusiastic human rights promoters in order for the Council to succeed.

The establishment of a new Human Rights Council was agreed upon by states at the September 2005 World Summit. The reform details were later discussed over a span of five months at the General Assembly. The final resolution declaring the specifics of the new Council contained a number of Secretary General Annan's recommendations. However, several recommendations deemed unacceptable by states were excluded(UNGA,A/59/2005/Add.1). The General Assembly succeeded in drafting a widely accepted Resolution which was overwhelmingly adopted on 15 March 2006, including only four against votes (Israel, Marshall Islands, Palau, and the United States of America) and three abstentions (Belarus, Iran, and Venezuela) (UN Watch, 2008a:2 ).

Critics of the Council claim that it has not only failed as a forum, it has become a body where states dismiss discussions of human rights violations, limit the

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freedoms needed to discuss human rights and disseminate political propaganda. Others point out that considering the complex task assigned to the Council and the dynamics of international politics, the Council has surpassed expectations. Those who provide a more positive perspective of the Council's efforts note that the negative image of the Council is the result of an ongoing negative campaign which overlooks the promising trends at the Council. One state politician interviewee noted, "…the constant Council criticism [from NGOs] is reflective of a larger obsession to demonize and discredit states in order to highlight the necessity of their existence and ongoing efforts"(Anonymous).

State, NGO and media reports have exposed the shortcomings of the Council and demonized its members. It can be empirically proven that 34 of the 47 Council members have negative voting records when deciding on UN Resolutions that protect or promote human rights (UN Watch:2008a:8). Further, According to Peggy Hicks, Global Advocacy Director of Human Right Watch,

"[the Human Rights Council] failed to take action regarding countries facing human rights crises such as Darfur, Burma, Colombia, Somalia, Turkmenistan, and Zimbabwe, ended the mandates of human rights experts on Belarus and Cuba, and rolled back its consideration of the deteriorating situations in Iran and Uzbekistan [in its first year]. At the same time, it focused disproportionately on Israel's human rights record and worse still, did so in a manner doomed to be ineffective because it failed to look comprehensively at the situation, including the responsibilities and roles of Palestinian authorities and armed groups" (Yeboah, 2008: 88)

The criticism of the Council reflects a divide between state and non-state actors, academics and NGOs, and regional, political, and religious alliances who all maintain a specific perception of what the Council could and should be. But, one thing that is universally agreed upon is the idea that there will always be room for improvement at the Council. However, the question of why the Council has failed in certain areas, even after "refining" efforts were made from the Commission, is often overlooked. For these reasons, this research will use the Council's structure as a framework to examine the nature of the Council and the chance for improved efficacy and efficiency through structural reform and revised approaches.

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Reformation of the UN's political human rights body has been constant since 1947. Structural reform proposals which were once considered impossible become possible with the shifting dynamics of universal human rights and international relations. The next review of the Council's structure is scheduled for 2011. States scheduled the review five years after the inception of the Council in order for all the body to develop. The international community will once again have the opportunity to publicly examine the nature of the Council and discuss reform proposals which seek to positively impact the body. The potential for useful discussions in 2011 is questionable given weaknesses of the CHR reform process. However, state, NGO and academic actors who were interviewed during this research were insistent that the international political context in which the Council is being reviewed is very different than that of 2005-2007.

## 1.2 Research Scope

This research is predicated on the belief that it is not enough to expect states to change their behavior. The structure is a means by which changes in the direction of the Council are created. In this regard, the research adopts a constructivist approach. Constructivism considers actors and structures to be mutually constituted, and thus mutually reinforcing. The structure (in this case, the rules and procedures of the Council) provides a "set of relatively unchangeable constraints" on the actor (in this case, the member states) (Hopf, 1998: 172). The structure is responsible for attempting to limit politicization and ensure that the body is working towards its designated task. It is true that states will also need to adapt and become willing to take on serious human rights issues in the face of adversity. However, it is imperative to create a proper framework which accounts for the nature and tendencies of international politics and guarantees rather than hopes that human rights are given priority at the Council. Throughout the research there will be references back to the constructivist theory framework to display how the Council's structure effects the behavior of member states or vice versa.

Using the structural framework as a foundation, the research investigates: the political dynamics of the Council, the anticipated direction of the Council, the

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perceived purpose of the Council, the potential and limitations of reform, and structural reform proposals presented by those working in, on and around the Council. When discussing the reform of the Council, viability, or chance for realistic implementation, of proposals is considered paramount. However, this research recognized that reform discussions will continue to take place long after the 2011 review. Henceforth, the research examines the strengths and weaknesses of various proposals regardless of whether or not such a reformation is viable in the current context. It is important to note that this research acknowledges that a perfect Council will never exist due to many different perspectives and interests. Further, the Council is not meant to be perfect, it is meant to be a forum where productive human rights dialogue takes place amongst states and violations, especially cases of gross and systematic situations, are addressed.

## 1.3 Purpose of the Research

The primary purposes of this research are twofold. Firstly, the research presents an examination of the current structure of the Council. An analysis of the structure provides an understanding of the relationship between the structure of the Council and work which the Council produces. The research reveals how weak points in the structure are utilized by states who are attempting to protect themselves or allies. The research identifies how the structure gives way to the political dynamics. Furthermore, an examination of the relationship between the structure of the Council and its ability to confront violating states details how the structure is the product of political negotiations between states who have very different perceptions what the Council is in place to do. As will be discussed in detail later in the text, cultural differences and disparities in objectives have resulted in a divide between regions which promote a Council based on promotion and regions which advocate for a Council based on supervision and enforcement. Secondly, the research addresses the concept of structural reformation of the Council.

Few efforts have been made to understand the proposed adjustments in terms of how each proposal may address the existing problems in the Council. This research compiles information to find how each proposal intends to reform the

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Council structure, namely its membership, mandate and position within the UN. The research identifies how each examined source would address the issues of:

- How to involve civil society and human rights victims
- How to minimize regional and political bloc politics
- How to ensure that the Council has the tools to hold states accountable
- How to improve the Council's ability to deal with grave and pressing situations
- How membership reforms address the election of states with atrocious human rights records and fail to take human rights seriously
- How procedures could be implemented to address the issue of member states acting in terms of self benefit rather than the promotion and protection of human rights internationally.

Reformation of the body has been an issue which has been continuously discussed since its inception. The research includes an examination of the history of reform, focusing specifically on the CHR reform process and lessons learned. Understanding the previous reform process will help the human rights community better prepare for the 2011 review. Ultimately, this research provides a cumulative tool for those states, organizations and persons preparing for the 2011 review as it provides both a compilation of perspectives and an investigation of the nature of the 2011 review.

The research also serves a number of secondary purposes. Not only does the research highlight what we do not know about the Council, it examines how the political nature and prevalence of diplomacy make objective evaluation of the Council's actions very difficult. The research also provides insight into how the nature of the Council could be altered without any structural reform focusing specifically on the efforts of non-state actors. The research analyzes how the Council's relationship with other UN and regional mechanisms, effect the ability to promote and protect human rights. The text looks at the ability of new members, namely the US, to positively impact the nature of the Council. Finally, the research provides insight into why having an intergovernmental human rights body at the UN is necessary.

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## 1.4 Research Methods

This research included a combination of interviews and documentary research which sought to provide the most cumulative and complete portrayal of the issues relating to the Council's structure. International human rights and the UN system both possess a highly political element. Thus, anything concerning the Council is politicized to some extent. This research attempted to balance politicization by obtaining a range of perspectives, in terms of state and non-state actors as well as persons from each region. Interviews were conducted with individuals from Western and Eastern Europe, South and South-East Asia, the Middle East, Africa, Latin and South America, Canada, China (Hong Kong), the United States, and many individuals working in Geneva. Maintaining a primary focus on the structure of the Council provided guidance, so as not to allow politicization to consume the focus. As is discussed in the research, the structure and the politics of the Council are inter-related and inter-dependent thus, the research will explain the political dynamics and examine how these dynamics may be addressed.

Interviews were conducted through email and over the telephone. The interviews were structured to ensure that interviewees owned the process. While questions were offered to provide direction, interviewees were urged to focus on whatever points they felt were important. This approach resulted in some unexpected and important findings. Documentary research was utilized to substantiate the information gathered from the interview. The documents which were utilized include official transcripts, resolutions, public statements and voting records, as well as corresponding academic and organizational reports on Council trends and specific efforts. The literature review also provided information about the history of the body and previous efforts to improve its work.

The research conducted interviews with key figures who represent different stakeholder groups of the Council. Interviewees included; Rudolf Knoblauch (state sector), Roy Brown (International Humanist and Ethics Union Main Representative, UN Geneva), Cecilia Jimenez (NGO sector), Ayca Ariyoruk (political advisor), R.J. Rajkumar (NGO and academic sector), Connie de la Vega (Professor University of San Francisco School of Law and Representative of Human Rights Advocates and the UN), Professor Douglas Sanders (NGO and academic sector),

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Juliette De Rivero (NGO sector) and Dr. James Gomez (NGO, academic and state sector). This list does not include eight additional interviewees, many of whom were state and regional actors, who did not want to be directly referenced at any point. Throughout the research, references will be made to anonymous sources. Such cases are references to the confidential interviewees. However, other instances may refer to interviewees who did not want to be cited directly in regards to specific topics.

## 1.5 Limitations of the Research

The limitations of the research are related to both the political nature of the Council, and the fact that this research has gathered proposals which can only be supported or refuted by hypothetical predictions. The politicization of the Council makes any evaluation inherently political. Even when evaluating resolutions or voting trends, there is a political element to how the information is interpreted. Further, the diplomacy that occurs at the Council makes it difficult to treat Council statements or actions as individual entities. That is behind every work produced by the Council there is a significant amount of closed door deliberations which must be considered.

This research does not try to avoid the politics of the Council, and as a result the research itself has political elements. Each interview presents a different political perspective. Interviewees spoke from a stakeholder perspective which reflected their regional and sector affiliations as well as their personal beliefs. The politics surrounding the Council resulted in many interviewees who requested confidentiality. Further, there were some discussions which took place under the condition that nothing from the interview would be directly included in the research. The presentation of the research is also political. The author recognizes that, despite efforts to objectively present the gathered information, the manner in which issues are presented and discussed is inevitably political.

Another limitation, which is the result of conducting research which gathers a range of political perspectives, is the lack of structure. Each interviewee provided new and different information. Addressing and organizing the different issues discussed required a “piecemeal” approach. The “piecemeal” nature of the research made it difficult to clearly and systematically present the information. Thus, the presentation of the research is structured that may appear random, as one issue

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may give way to a seemingly new and unrelated topic. Further, the research had a limited ability to present every perspective for every issue. Thus, while the research attempted to be comprehensive, the reality is that there are so many perspectives in relation to each topic only a portion of the information could be presented.

Beyond politically related limitations, this research is also limited because much of that which is discussed is predictive. That is, different proposals for creating change at the Council are can only be evaluated through historical evaluations and predictions. This research does not seek to propose that one proposal while the other may succeed because each proposal is hypothetical or theoretical. There is no way to truly determine whether or not a given proposal will succeed.

## 1.6 Structure of the Thesis

As mentioned in the above section, the presentation of the research is necessarily fragmented. This section will provide guidance to understand the relevancy and relation of the various sections. Chapter 2 is intended to provide an understanding of the Council as well as the potential for and limitations of reform. The chapter will begin by describing the history of the Commission on Human Rights from its founding days. The chapter then presents an in depth examination of the CHR reform process and the inception of the Council. Next, the research presents some details of the current Council structure. Details of the Council structure may be reiterated or expanded upon later in the text but, this structural overview provides a point of reference. Chapter 2 then examines the challenges of producing reform at the UN and finally, examines the political dynamics which exist at the current Council.

Chapter 3 shifts the focus from describing and analyzing the current Council, to examining proposals relating to the reform of the Council's structure. Chapter 3 begins with an investigation of various proposals which target the membership or composition of the Council. The chapter then looks at reform proposal which look at the Council's mandate and working procedures, and the Council's status or position within the UN system. It is important to note that, while there is an emphasis put on the viability of structural reforms, all proposals were examined and presented as such considerations may be useful in future reform discussions. Chapter 3 closes with an examination of the usefulness of the body. This

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section is included in the structural reform chapter because those who feel that an international human rights body composed of states will ultimately fail propose that the best thing to do to the structure of the Council is terminate it completely.

The content of Chapter 4 is the result of an issue which emerged during the research concerning inconsistent perceptions of what the Council is in place to do. When this research discusses the perceived purpose of the Council, it is referring to whether the primary purpose of the Council is state cooperation with an emphasis on standard setting, or supervising and addressing state violations, or a balanced cooperation of both. This is directly related to the structure of the Council and the body's history, because the desired purpose of the Council has historically defined the direction of Council efforts and the structure of the Council (in terms of both composition and mechanisms) has been shaped to fit the aspirations of those states which possess power. The chapter will describe the source of the disparity in perspectives concerning the purpose of the Council. Chapter 4 will also examine each perceived purpose of the Council and discuss structural facets of each position.

Chapter 5 focuses on the 2011 Council review and discusses some emerging issues relating to ways in which the Council can be changed without directly addressing the Council's structure. The chapter begins by providing an outlook of what to expect from the 2011 review given the limited information, in terms of details, which the international community possesses. The chapter then discusses what is needed to make 2011 a success. Chapter 5 then examines issues which may not be directly related to the reformation of the Council's structure, but may impact the future of the Council nonetheless. These issues include a re-evaluation and redirection of efforts from non-state actors and the importance of the US's newly acquired membership. The text will then conclude with Chapter 6 which will provide a review of the issues discussed in the paper, which gives way to a recommendation section.

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# CHAPTER II
# UNDERSTANDING THE COUNCIL: POTENTIAL FOR AND LIMITATIONS OF REFORM

## 2.1 From the Founding Days of the Commission to the Formation of the Council

In 1945 governments made a valiant decision to include “human rights” in the UN Charter. During drafting deliberations smaller states, paired with NGOs and other non-state actors, campaigned elite powers and successfully ensured that human rights be given a pronounced status in the Charter (Sanders, 2007: 2). The Charter does not however declare any authority to investigate or attempt to enforce human rights standards in states. The Charter established the Economic and Social Council which founded the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights, the Commission on the Status of Women and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

The composition of the Commission on Human Rights would be designed by a structure planning committee which consisted of numerous distinguished public figures, the most notable of which being the first Commission chair Eleanor Roosevelt. The committee recommended that the first project of the Commission be drafting a bill of human rights and that the Commission be composed of individual experts rather than state representatives (Sanders, 2007: 3). The committee’s first recommendation resulted in the drafting of the principal human rights text, the Universal Declaration of Human Rights. The decision to reject the second recommendation and opt for a Commission composed of state representatives remains a source of contention and controversy. It was believed that a Commission composed of states would have a level of assertion superior to that of a CHR consisting of

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individual experts. Thus human rights discussions at the CHR would take place in the context of compatibility with state interests (Forsythe and Park, 2008: 3).

For the first half of the Commission's tenure delegation heads were individuals who were qualified and experienced in the field of human rights (A/59/565. P 286). However, states have since sent individuals who are experts in diplomacy and intrastate activities rather than international human rights issues. From 1947 to 1967 the 18 member primarily Western CHR focused on standard setting and deliberately avoided oversight of state violations. The reason that state violations were largely overlooked during this period was partially because CHR member states recognized their own violations during the de-colonization period and Cold War politics made state criticism unfavorable in certain circumstances. But, the absence of oversight or supervision of state violations was also attributed to the lack of mechanisms. That is, the CHR simply lacked the ability to confront states for their violations. After the emergence of the third-world (which has no official date but, this research uses the official inception of NAM in 1961 as a point of reference) CHR membership gradually expanded until finally reaching 53; 15 from Africa, 12 from Asia, 5 from Eastern Europe, 11 from Latin America and the Caribbean, and 10 from the Western group. The allotment of regional seats was largely a political process as Africa was immensely over-represented in terms of population.

30 July 1959 marked an important date in the CHR's history. On this date Resolution 728 F was adopted marking the body's first steps towards state supervision. Resolution 728 F entailed a request to the UN Secretary General to prepare a non-confidential list which was to be distributed to CHR members. The Commission appointed an ad-hoc committee to review communications between CHR members and the state of concern. But, the 728F Resolution complied with the view that the CHR did not have the ability to take actions against states. The CHR still operated on the take no action doctrine until the late 1960's but, the 728F Resolution laid the groundwork for the public 1235 procedure and the private 1503 procedure (Nowak, 2003: 107).

In the 1960s the CHR procedures began to expand to include treaty bodies, special rapportuers and working groups. By adopting ECOSOC resolution 1235 in 1967 and later ECOSOC resolution 1503 in 1970, the CHR officially abandoned the

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Commission's commitment to non interference. Prior to the adoption of the 1235 procedure the CHR worked exclusively on promotion through standards setting and advocacy. Manfred Nowak noted that the adoption of the 1235 procedure was made possible by the international recognition of the need to deal with the South African Apartheid (Nowak, 2003: 107). The 1235 and 1503 procedures allowed the CHR to assert itself as a supervisory body in relation to country specific or thematic human rights violations (Yeboah, 2008: 79). The new procedures resulted in an influx of developing countries who sought membership and involvement as a means of confronting former colonial powers. One academic interviewed during the research noted that the 1235 and 1503 procedures have always been more effective when directed at powerful states who cannot dismiss accusations in the same fashion as underdeveloped states. Regardless of there efficiency, the 1503 and 1235 procedures altered the dynamics and capabilities of the CHR and so too would the nature of the Commission's work.

Cold War competition between the US and USSR resulted in exemption from scrutiny for most developing countries. Both powers sought to appeal to developing countries resulting in a relative stalemate in non superpower country issues outside of racial discrimination (Sanders, 2007: 7). The collapse of the USSR led to a rebirth of accountability and scrutinizing non-compliance of human rights. The authoritarian regimes ruling former Asian and African colonies were now in a compromised position to protect themselves from Western states and NGOs. Repressive regimes in Asia turned to a cultural argument to justify their non-compliance with human rights standards. One Asian academic interviewee stated, "The 'Asian Value' was a useful tool for governments like Singapore who utilized a cultural claim to maintain their stronghold on power and control over citizens. However, these kinds of claims by governments are now recognized to be a fraud, or at least we would like to think they are." Repressive regimes from developing countries reacted to this compromised position by seeking membership and investing significant resources into the CHR, effectively gaining control. While there are many examples of states seeking membership to direct the Council's efforts the most noted example is that of Sudan. The Sudanese government won membership to the CHR in 2004 in the midst of the "ethnic cleansing" in Darfur. The Sudanese government was

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able to keep Darfur off the Commission's agenda despite international accusations of Genocide.

After the collapse of the Soviet Union began to scrutinize the more independent Sub-Commission and forced the end of numerous country specific resolutions. The CHR then began to reduce the number of country specific special rapporteurs, claiming that the system was fundamentally flawed as no powerful Western states had been targeted by this mechanism (Sanders, 2007: 8). The expansion of CHR mechanisms and capabilities which had been continuous since inception, was being reversed. Accomplishments such as the UDHR and fundamental human rights treaties of the 1960's gave way to a CHR plagued by double standards (UNGA, A/59/2005). Fundamental flaws in the CHR structure had become evident. The political nature of the CHR was not new, it had simply changed. An alliance of the Western majority against the rest gave way to NAM (or the Non-Align Movement, an organization of 118 members founded in 1961 which define themselves as not aligned with any major Cold War power) versus the West. One NGO interviewee pointed out that NAM had existed for some time but, its presence at the CHR was not under scrutiny until the late 1990's. Additionally, a religious alliance of loyal Catholic countries gave way to the Organization of the Islamic Conference.

Human rights as a concept had developed to the point where political rhetoric was now supported by research, investigation and adjudication (Sanders, 2007: 4). Despite progressive developments in the human rights concept, perceived effectiveness of the CHR was dependent on political alignment. Most countries of the South viewed the CHR as simultaneously effective because it focused on the US and Israel, but ineffective because it criticized Sudan. Most countries from the North viewed the CHR as simultaneously effective because it examines the human rights violations in Sudan and various other Southern countries, but ineffective because it disproportionately focused on Israel (Yeboah, 2008: 79).

Exactly what went wrong at the CHR is still a point of contention amongst those who worked in, on and around the Commission. This is due in part to the lack of scholarly attention the Commission received. Only three books (Lempinen, 2005; Marie, 1975; Tolley, 1987) have been written on the CHR and very little empirical

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evidence of effectiveness exists (Forsythe and Park, 2008: 1). Individuals point to the membership of atrocious human rights states such as Sudan and Zimbabwe, and the CHR presidential election of Libya as symbolic of the idea that the CHR had become a body comprised of offenders working on behalf of offenders. However, the CHR was never a "club of the clean", recalling that China and Russia were original members. The major shift was the increased influence of NGOs and Western media gave unprecedented coverage to critiques of the Council (Forsythe and Park, 2008: 4).

The CHR's effectiveness and professionalism deteriorated to an unmanageable point that prompted then Secretary-General Kofi Annan to proclaim, "States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole" (A/59/2005). Reform of the UNs primary human rights body was now inevitable. Reform discussions would be founded upon one fundamental structural question: How could the composition of the CHR be altered to ensure a credible, functional membership? (Yeboah, 2008: 80).

## 2.2 Commission to Council Reform

US Ambassador to the UN John Bolton expressed his disappointment in the process by claiming, "the reform of the Human Rights Commission should have seen the birth of a butterfly but, instead, the process produced a caterpillar in lipstick" (Martinetti, 2006: 1). But, simply criticizing the reform process fails to address the complexities of the context in which this reform was attempted. The UNs decision to reform the CHR came at a time when relations between North and South were being intensely strained by the US led invasion of Iraq, while the war on terror was changing the face of international politics (Terlingen, 2007: 2). Reform of a complex and controversial UN body occurred in a hostile environment where labels of imperialism had a sense of legitimacy, making even basic discussion difficult.

Understanding the reform process by which the Council was founded is essential as it helps to contextualize the current Council and provides the best indicator of how the 2011 reform discussions will likely evolve. As this section will display, there is a great deal the international community can learn from the CHR to

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Council reform process. Evaluating the CHR to Council reform process reveals that the current Council model is a compromise which is impressive in terms of political negotiations but bad in terms of efficiency (Jimenez Interview, April 28, 2009). This section will critically analyze the reform process and examine insight provided by individuals involved in the process.

Reform of the Commission had been enthusiastically discussed for years, but the Council that emerged was only slightly different from its predecessor. Examining the reform discussions is difficult for a number of reasons. Everything related to the UN contains a considerable amount of political jargon. But, the reform discussions were especially difficult for non-state actors to follow largely because the majority of negotiations took place behind closed doors. Many things were not publicized during the process including, the voices of NGOs who were forced to lobby states as the only available avenue to be heard (Abraham, 2006: 15). The General Assembly's report summarizing the "open-ended informal consultations held by the Commission on Human Rights" dismissed critics of the designated rules and procedures established for the reform discussions and praised this process claiming such an approach was useful as it facilitated a wide range of proposals and discussions while maintaining order (UNGA, A/59/847-E/2005/73: 5). Thus, despite the formal forums, the discussions were quite ad-hoc and left space for a significant amount of uncertainty.

The ad-hoc nature of the reform process resulted in numerous unexpected setbacks. The most cited setback of the reform process was undoubtedly the highly political nature of negotiations. Brett Schaefer stated, "…this historic opportunity was squandered as the United Nations fell victim to the political infighting that all too often afflicts that body" (Schaefer, 2006). The massive politicization of the process combined with insufficient organization of the reform discussions and process was paralyzing for many individuals involved in the reform process. One of the most striking examples of incompetence was displayed when diplomats undertaking intense negotiation efforts were informed, at the closing stages of the process, that the new Council would have to adhere to the "customary UN lines of equitable geographical distribution" (Terlingen, 2007). It is not clear how or why individuals and organizations were not informed of this vital point but many suggest that knowledge

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of such information at the beginning stages of negotiations would have changed discussions completely.

The one indisputable agreement of the reform process was the assertion that membership was to be the primary concern of discussions. However, negotiations resulted in a Council composed of only six less seats and less proportional representation allotted to regions considered democratic. Critics claim that this should have resulted in outrage (Schriefer, 2008: 3). When states agreed on the composition of the new Council at the 2005 World Summit, those who proposed a new membership structure were silenced. When consensus was reached, any further discussion was futile even in cases where empirical evidence was available (Abraham,2006:12). Such a dismissal of useful perspectives revealed that the reform discussions were largely a formality. It was clear from the initial stages of reform that the Council would be something of a leap of faith that may miraculously avoid repeating many of the same mistakes of the Commission (Abraham, 2006: 24).

In preparation for the September 2005 World Summit in New York, states had struck a “grand bargain” in which developed states would pledge increased development aid. In return developing states would agree to reforms on human rights and anti-terrorism. However, US Ambassador John Bolton ruined the grand scheme and defeated attempts to present the new Council structure at the Summit (Sanders, 2007: 11). Bolton successfully pushed discussions concerning the definitive structure and membership details of the Council to the General Assembly for debate. When the General Assembly debate began it was obvious that states and individuals pre-emptively decided that reform would exist within a set of limitations. States had decided that the Council’s success would be determined by state’s ability to act in accordance with its mandate, an approach which had already drastically failed at the Commission (Abraham, 2006: 15).

At the outset of official reform discussions a sense of anxiety became evident from state and non-state stakeholders. This anxiety or uncertainty would have concealed ramifications on the reform process. Some sources claimed that the urgency began with Secretary General Kofi Annan’s decision to suggest a model for the Council using what he felt was plausible from the High Level Review Panel’s report (Yeboah, 2008: 88). States prepared themselves for reformation negotiations and the

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process began before any legitimate expert deliberations occurred. In fact, the CHR was officially terminated before negotiations on the structural details of the Council were completed. Unfortunately, the rushed process meant that only select structural and political problems were addressed (Yeboah, 2008: 79).

The series of events leading up to the Council formation produced a great deal of uncertainty about what would become of the Commission's existing work and many feared a "protection gap" (Abraham, 2006: 12). The concept of a "protection gap" refers to the belief that any span of time when the body is not operating, is a period during which international violations cannot be adequately addressed. One Western Ambassador involved in the process stated, "…you cannot throw away one institution without having anything to replace it with. We wanted a new Council, and most people wanted it the next day." The same Ambassador went on to point out that the process did however, provide states with the opportunity to skip the bureaucratic steps that often undermine the creation of new bodies (Yeboah, 2008: 89). The final decision was made to directly transfer the Commission work to the Council and begin work immediately rather than taking time for reflections and discussions.

In order to prepare for the 2011 review it is important to examine the political dynamics that surfaced during the CHR reform process. Because the reform process was largely owned and dominated by states, those states who were benefiting from the weak structure of the Commission were deliberately reluctant to change the body. Laura Trevelyan, a BBC United Nations correspondent who covered much of the reform process stated about the foundations of the reform process, "you've got to be blunt, plenty of governments don't have a natural human rights agenda and some simply don't really care" (Trevelyan, 2006: news.bbc.co.uk). Political alliances like NAM and the OIC who possessed great control of the Commissions workings, claimed that any change to the structure would only address the form and "not the substance" (UNGA, A/59/847-E/2005/73: 6). These organizations were willing to fight any substantial reform being proposed but, advocated an increase in resources and an abolishment of sub-commissions (UNGA, A/59/847-E/2005/73: 7). Countries were discretely capitalizing on the opportunity the reform process provided, to strengthen their already tight grip on the United Nations only political human rights body.

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During the reform discussion the first inclination of those states which feared change appeared to be to discredit any proposed reform by claiming that such a change would discredit the importance of other UN bodies (UNGA, A/59/847-E: 6). These states also continually pointed to the fact that changing the UN Charter was a "long and difficult process" immediately terminating any discussions of significant reform (UNGA, A/59/847-E/2005/73: 10). In such an environment, only the most conservative proposals have any chance for true consideration and discussion. One Western diplomat interviewee, who was part of a state delegation assigned to the reform discussions, said that the most successful approach was to "…tell others what they want to hear and sell your proposals in a manner that makes them seem irrelevant." This interviewee compared the negotiation process to attempting to "…sell a used car." The international community walked away from the reform discussions without any significant discourse of the strengths and weakness of existing proposals.

Not to be overlooked was the significant amount of state divisiveness that intensified and complicated the reform discussions. Individuals were aware that there was no uniformity of approaches and no consensus could be achieved through negotiations (Terlingen, 2007: 4). Delegates were forced to fight doggedly to push their model through any political channel available in order to be heard. This was done with full knowledge that unanimity would be impossible to acquire. Political horse trading had replaced open discourse. Many assumed that open-liberal discourse would result in embarrassment and apprehension.

A quick transition would allow the Commission to maintain some dignity and there would always be "ample opportunity for revision and reform in the near future" (Martinetti, 2006: 1). The theory presented by Irene Marinetti, director of programs for the World Federation of United Nations Association Geneva, portrays the fact that many felt this reform was as much a matter of public perception as it was based on the betterment of the UN's primary human rights body. When the decision was made to begin reform discussions and formulate a new Human Rights Council, relief and optimism flowed in and around the UN from those state and non-state actors who had become increasingly concerned with the direction of the Council. The feelings of nostalgia were evident before reform discussions had even begun. In a

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sense, the prospect of a new human rights body outweighed the reality that the new Council may be only slightly different than the Commission and would face many of the same problems as its predecessor. The extreme positivity was not displayed exclusively by UN officials who were well aware of the need to portray the new Council as a body which would undoubtedly be an upgrade from the Commission. Governments and NGOs displayed the same sense of "exuberant optimism"(UN Watch, 2008: 3). Mexican President Vincente Fox, a delegate involved in the reform discussions, stated that the Council would surely "…improve the life condition for millions of people" (UN Watch, 2008: 4). Optimism flourished despite the fact that the new Council was only slightly different from the Commission. Most of the excitement was based on the most significant change that was accepted: the Universal Periodic Review.

The one true source of change which occurred after months of deliberations was a review system conducted and controlled by states. States are often hesitant to criticize one another based on the fear of losing friendship or receiving criticism in return. Thus, the immense optimism surrounding the proposed Council was based on belief in a mechanism which many recognized as fundamentally weak (Martinetti, 2006: 2). However, most sources interviewed felt that the UPR is a mechanism that is truly filled with potential but the international community must be willing to give it time to develop.

An alarming and overlooked aspect of the CHR reform was the negative effect it had on concerned NGOs. The reform talks became so technical that NGOs became alienated. Institutional reform debates were based on progressive realization and NGOs lacked the time or resources to keep up with the learning curve. When it is said that the discussions were based on progressive realization, this refers to the length and complexity of discussions which would require those involved to devote a significant amount of time to fully understand and participate in the process. The CHR reform process really was detrimental to NGO participation because thematic or country specific debates which NGOs were working to promote were suspended and replaced by institutional debates of a very technical and increasingly consuming nature (Rivero Interview, 29 April 2009).

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## 2.3The Current Council Structure

The Council which emerged from the reform of the CHR has structural characteristics which are officially designated and factual, for example the total number of seats at the Council and the number of seats allotted to each region. However, there are elements relating to the structure of the Council which are not officially stated and remain undetermined, for instance the Council's relationship with other UN bodies like the Security Council. The purpose of this section is to give an overview of the Council's structure as it currently appears. The structural details presented will be elaborated upon and analyzed in later chapters.

### 2.3.1 Membership/Composition

General Assembly Resolution 60/251 which established the Council, designated that membership voting must be based on each potential member state's human rights performance record and commitment. The Council's 47 members require a majority vote (currently 97 states) to gain a seat. The Council's 47 seats are divided between five regional groups including; 13 African Group seats, 13 Asian Group seats, 6 Eastern European Group seats, 8 Latin American and Caribbean Group seats, and 7 seats for the Western Europe and Other States Group. The Commission was often scrutinized for its strong regional politics however, the decision to allot regional seats prevailed pending re-distribution (OHCHR, 2008a). The Council's regionally divided seats were also scrutinized due to the fact that two regions; Africa and Asia, hold over half of the Council's seats and could thus control the agenda. Not to be overlooked is the overwhelming influence given to political alliances namely NAM, the G-77 (a coalition of 130 states, which are primarily developing countries, often considered an economic alliance) and the OIC (UN Watch, 2008a: 1). The number of Council members who belong to these alliances fluctuates based on the yearly member rotation but, NAM and the G-77 will always have a considerable numerical majority and the OIC will maintain considerable influence based on its large number of Council members.

Prospective Council members face no tests or requirements outside of a "voluntary pledge" to human rights prior to appointment (OHCHR, 2008b). The UN

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General Assembly surprised the international human rights community when it refused to ban countries which were being sanctioned by the UN Security Council for human rights violations (Morse, 2007). The present check and balances in the election process appear post-appointment. These checks and balances include the ability of the General Assembly to suspend members who "commit gross and systematic violations of human rights" by means of a two-thirds majority vote, and the UPR which is required of each state regardless of membership status (UNHRC, 5/1). The General Assembly also dictated that members must "uphold the highest standards in the promotion and protection of human rights" however, in there is an absence of any mechanism to enforce this standard.

One aspect of the Council membership process that does receive praise is the idea of member rotation. Members receive their seats for three years and after two consecutive terms countries are forced to step down. This was an important aspect of reform because Security Council members had enjoyed "de facto perpetual membership," which was often met by criticism from states and civil society alike which felt that the Security Council states yielded more than enough power within the UN (Terlingen, 2007).

### 2.3.2 Mandate/Working Procedure

Much of the mandate and working procedures were directly carried over from the CHR. The Resolution 60/251 states, *"The Council will assume all the mandates, mechanisms, functions, and responsibilities of the Commission and is required to maintain a system of special procedures, expert advice and a complaint procedure."* The Resolution also designated that the practices relating to NGOs and NHRIs carry over from the commission.

However, the Council does have a number of mandate and working procedure characteristics which are either revisions of the CHR's mandate or completely new elements. The Council is to submit an annual report to the General Assembly. The Council also meets longer and more frequently, sitting for ten weeks a year and meeting at least three time per year, including a main session, and is enabled

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to call a special session pending a one-third vote and report directly to the General Assembly (UNHRC, 5/1).

As stated throughout the research, state, academic and NGO interviewees agree that the one mechanism that is considered to be a substantial structural reform and a potentially useful tool is the UPR. The responsibilities of Council members, in relation to the UPR, as set out in the Resolution 60/251 are to:

> *"Undertake a Universal Periodic Review (UPR), based on objective and reliable information, of the fulfillment by each state of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all states."*

Luis Alfonso de Alba, a Mexico representative and holder of the first Council presidency position which rotates annually, claimed that the Council would likely stand or fall based on the Universal Periodic Review as it is the defining tool that separates the Council from the Commission (The Economist, 2008). The UPR consist of three reports; one from the country being reviewed, one from the OHCHR which includes input from various UN organs, and one produced by international civil society. The reports are examined and a report, with recommendations, is drafted by three Council members and presented to the Council.

### 2.3.3 Status/Position within The UN System

Former Secretary-General Annan expressed a desire to have a Council with a more "authoritative position corresponding to the primacy of human rights in the Charter." Specifically, Secretary-General Annan sought a Human Rights Council that would be a "principle organ" the likes of the Security Council, the General Assembly and ECOSOC (UNGA, A/59/2005). States were given the task to decide whether to make the Human Rights Council a principle organ or a subsidiary body (Lauren, 2007: 332). What emerged from debates was a Human Rights Council that would be given the status of a charter based body classified as a subsidiary organ to the General Assembly.

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One Western academic interviewee proposed that a point of concern regarding the Council's structure is the body's relationship with other UN bodies. The academic went on to note that this could be considered a status and position issue, or a mandate issue. Regardless, this particular interviewee, as well as a number of other interviewees (both state and non-state) expressed concern about the body's position and relationship. Thus, it is useful to examine what is known about the Council's positioning and relationships with other UN bodies.

The following information was gathered during an interview with a state diplomat who has worked in Geneva. This particular interviewee requested confidentiality in relation to all that was discussed, thus the following is the author paraphrasing an experienced state official. The UNGA supervises and directs the Council. The Council also is also supervised by the OHCHR but, the extent of the supervision is debatable. The OHCHR does appoint Special Procedure Mandate Holders and produce reports about the Council's work. The Security Council holds a superior status to the Council but there is no apparent formal relationship between the two bodies. The Secretary General is the "Chief Administrative Officer" of the UN, and as such can address the Council at will, however the Secretary General's Office has remained largely distant and uninvolved in the Council. Both the ICJ and the ICC have addressed the Council but the relationship is limited. The CHR was a subsidiary of ECOSOC but, ECOSOC has not displayed any involvement in the Council's work. The Council has a formal working relationship with the General Assembly's Third Committee (Social, Humanitarian and Cultural) but, how these two bodies interact and effect the work of one another is contentious. Finally, the Council has no formal relationship with UN treaty bodies or regional human rights bodies (which are not UN bodies but are related) despite the apparent overlap in efforts.

When comparing the structure and various working relationships of the Council to the preceding CHR it becomes evident that the reform of the CHR did not include a significant change in the body's structure. One Western NGO representative operating in Geneva described the similarities between the Council and CHR as exemplary of "…the impossibility of producing reform when those doing the negotiations are states, which operate in a permanent state of paranoia."

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## 2.4 Political Dynamics of the Council

Every source interviewed reinforced the idea that in order to understand any potential structural reform of the Council one must first understand the complex political dynamics. The shortcomings of the Council are not necessarily structural but political. As one NGO representative noted, the structure of the Council is defined by its political dynamics, and the effectiveness of a structural reform effort is entirely dependent on its compatibility with the Council's political landscape. However, the constructivist theory framework denotes the existing relationship between the Council's structure and political dynamics to be mutually dependent and reinforcing.

The constructivist notion of mutual dependency is corroborated by examining the roles possessed by various states and alliances at different UN bodies. As will be discussed in this section, the dominant feature of the Council's political landscape is the Organization of the Islamic Conference's ability to control the direction and efforts of the Council. However, at the UNGA, which has universal representation, the OIC's voice is marginal compared to the 118 state strong Non-Aligned Movement. At the Security Council, the Permanent Five monopolize power while both the OIC and NAM have little to no involvement. Finally, the Economic and Social Council, which is composed of 54 states but allots eight more seats to the "Latin America and Caribbean States" and "Western Europe and other States," is not overtly controlled by any one group or groups. The absence of group control at ECOSOC despite the fact that regional distribution at the Council and ECOSOC are very similar reveals the importance of functions, mandates, mechanisms and procedures. ECOSOC is structured to act as a vehicle for dialogue and development of economic and social issues. Conversely, the Council's structure facilitates a body which was described by one interviewee as the "state battleground for human rights."

A constructivist approach to the political dynamics of the Council creates space to pursue both minor and major reforms which could directly affect the severity and type of politicization present at the body. Structural changes can work to control the influence of alliances and minimize the role of the world's worst offenders at the Council. Furthermore, the structure of the Council has served to challenge states. For example, the mandate of the Council requires states to adopt a behavior that is both new and uncharacteristic. Accordingly, the political dynamics are important to

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understand as future structural reform efforts, including the 2011 review, which will occur in a complex political dynamic.

In order to understand the political dynamic of the Council it is crucial to have an intricate knowledge of the Organization of the Islamic Conference's (hereinafter; OIC or Conference) presence. The OIC exemplifies the political dynamics of the Council as it provides a portrayal of regional, political and religious bloc behavior. This is by no means a criticism of the OICs beliefs or values. Rather, the purpose is to expose the fact that the structural flaws of the Council have enabled the OIC to use the Council as a political platform at which to push its own agenda. One Western diplomat interviewed described the OICs influence at the Council's proceedings as a display of, "unprecedented control and manipulation."

The OIC has 57 members which means that its representation at the UNGA is relatively minimal, compared to the representation it possesses at the Council. The OICs representation at the Council has resulted in a number of OIC sponsored resolutions which disproportionately target Israel, protect religion as opposed to individuals and mention Islam exclusively (OHCHR, 2008c Annual Reports). Furthermore, the OIC has gone outside the boundaries of international human rights law to pass a resolution (in response to the 2005 Dutch cartoon incident) which included possible limitations to the right to freedom of expression for the purpose of "respect for religions and beliefs". This resolution which put the Council on headlines around the world was a strong manifestation of the Council's OIC influence. The Council openly curbed the freedom of speech and re-shaped its mandate to include the role of monitoring "abuses" of the freedom of expression (IHEU, 2008). Understanding the OIC's influence is complicated by the fact that OIC members account for just one-third of the Council's membership.

A harsh reality of the current Council structure is that almost every facet of the Council's actions deteriorates into a numbers game. The Council is roughly divided into thirds. One group largely promote human rights initiatives, the second consists of states who have opposed human rights initiatives and a third which includes swing states (Roth, 2009: 23). Considering the regional distribution and regional solidarity, it is no surprise that swing states tend to vote with their African and Asian groups who have opposed human rights promoting initiatives. Gaining a

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majority vote on human rights promoting initiatives, even if only symbolic or diplomatic, has failed to date (Forsythe and Park, 2008: 4). While many depreciate the importance of structure, few could argue that with increased membership and reduced exclusionary criteria for membership eligibility, the nature of the CHR and Council has not undergone great changes.

The fact that African and Asian states have a comfortable majority in the Council suggests that regional redistribution may have resulted in intensified relative bloc politics considering that, under the Commission the African and Asian states had nearly the same amount of members as the Latin American and WEOG Groups. The redistribution has also led to a new dynamic where the European and American Groups are forced to play into the African and Asian blocs if they want any concrete action. The unofficial "democratic alliance", consisting of Canada, and the ten European democracies who have voted consistently within the human rights criteria, have failed to gain the vote of democracies from the Asian, African, and Latin American Groups who have showed a greater willingness to side with regional or special interest based solidarity (Human Rights Watch, 2008a: 9).

The OIC does not currently, and will likely never, possess a numerical majority however, to understand the OIC influence it is important to examine its member's roles within the Council. For instance, as one academic interviewee pointed out, "…when the Council began its first session the African, Asian and Eastern European Groups were all chaired by OIC members giving them considerable power to dictate regional voting trends." Also, the consistently seventeen plus seats have proved to be a crucial number as only sixteen seats are needed to call a special session. The OIC capitalized on this opportunity immediately conducting three special sessions on Israel within the first five months of the Council's inception. Following the Council's First Special Session, UN commissioned independent experts which were sent to Lebanon and Israel, were denounced by every OIC member for looking past Israel and daring to discuss Hezbollah violations(Hicks, 2006).

As the Council members are determined by the General Assembly it is important to note that these organizational alliances also dominate the UNGA which is crucial for determining new membership. For example, the G-77 has 130 members equal to 67 percent of the UNGA, NAM has 118 members equal to 61 percent of the

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UNGA and the OIC has 57 members equal to 29 percent of the UNGA (Schaefer, 2007). The number of Council members who belong to these alliances fluctuates based on the yearly member rotation but it is safe to assume that NAM and the G-77 will always have a considerable numerical majority and the OIC will maintain considerable influence based on its large number of Council members. Upon recognizing the numerical and influential majority that these alliances possess it becomes obvious that almost any country can be praised or demonized, regardless of their actions based on where they stand in an alliance. This is manifested in the UPR reviews of many OIC member states which have received strong praise for their human rights records despite recognition of the gross human rights violations which occur in countries like Algeria, Bahrain, Tunisia, Pakistan and Uzbekistan (UN Watch, UPR, 3).

To understand how the OIC benefits from the current numbers game one must examine the role of the Non Aligned Movement. NAM has an interesting impact on the Council because, despite having a clear majority in terms of numerical influence, the Council's agenda is clearly dictated by the OIC. Reviewing the stated agendas of each organization reveals why the NAM voice is not more pronounced. NAM states that its political stance heavily favors the principles of non-intervention and non-interference (NAM). Thus, NAM's behavior at the Council is rather fragmented and distorted. Conversely, the OIC operates under the ideal of action by "strongly advocating elimination of discrimination against the Muslims in all forms and manifestations" (OIC, 2008). As a result of this clear and consistent mission the OIC states act in strict consistency and unison. Furthermore, a covert but prevalent alliance exists between the OIC and NAM which share the same desire to demonize the West and more specifically the US.

Those who are proponents of the power distribution at the Council provide compelling insight as to why the UNs human rights body is used as a political platform by organizations like the OIC. Representatives from these organizations will claim that the "blinkered view" at the Council is not the result of an agenda to undercut human rights. Rather, they will suggest that the Council and the preceding Commission are the only official forum at which discussions concerning agenda items

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for many developing countries, specifically those in NAM and the OIC, take place (Trevelyan, 2006).

At the Security Council, veto power used by the US limits any action on a number of issues of concern for NAM and the OIC, namely Israel. Pakistan's Ambassador to the UN, Munir Akram portrayed the realistic use of the Council as a political platform when he stated: "Those countries who feel that they do not have a voice in the Security Council, who feel that their views cannot pass muster in a situation of domination by the P5…will seek other avenues to express themselves" (Trevelyan, 2006). If efforts to reform the Security Council continue to fail it is likely that the Human Rights Council will further develop the role of a counterweight. As the HRC potentially adopts a more impact in the UN system, it is necessary to address claims that the Council should be a forum where countries outside of the Security Council are able to take up their own issues of concern. Such claims should be taken in the context that developing countries have a majority at; ECOSOC,UNESCO and the UNGA. There are a number of UN forums dedicated specifically to issues of concern for countries making claims of under-representation at the UN and rightful ownership of the Council, such as UNDP, UNIDO, UNRWA, and UNCTAD.

Powerful alliances at the Council have displayed an ability to dictate not only the actions of their fellow member states but also, non-state entities which operate at the Council who are forced into conformity and compliance. The Office of the High Commission on Human Rights is considered a credible UN human rights agency by activists and experts as it is comprised of individual experts. The OHCHR maintains authority and autonomy in relation to the Council but, the working relationship between the Council and the Office is complex. The OHCHR is often able to avoid the political limitations of the Council. However, the Council has been accused of using its power to limit the capabilities of the OHCHR in order to protect the Council members potentially facing scrutiny. The Council passed Resolution 7/2 in March 2008, which was a joint effort by the OIC and NAM ultimately sponsored by Cuba, which limited the independence of the OHCHR (UN Watch, 2008b).

A portion of the Council's commitment to the OHCHR is to ensure that members of civil society are mobilized and given a voice within the Council. In the Council's latest, highly criticized, decision to limit free speech came after David

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Littman, on behalf of the Association for World Education and International Humanist and Ethical Union, was meant by sixteen points of order (or objections by member states) after discussing stoning of women and girls aged younger than ten years old being married in countries where Sharia law applies. Egypt, speaking as the chair of the OIC, stated “Islam will not be crucified in this Council.” After a break Council President Doru Romulus Costea of Romania stated in his ruling: “I promise that next time a speaker judges a religion or a religious law or document, I will interrupt him and pass on to the next speaker” (International Humanists and Ethics Union, 2008)10-11.

At the June 2008 session the Council agreed to impose restrictions on free expression and speech, specifically limiting what NGOs could say about Islamic Sharia law. The decision stems from the 2005 Danish cartoon controversy which Blaise Godet, who served as Vice President to the Council from its inception to the summer of 2007, described as a debate where “a middle ground can only be found if we continue an open and transparent dialogue taking into account the sensitivities of both sides” (Godet, 2008). Commissioner Arbour responded to this by stating, “It is difficult for to accept that a Council that is the guarding of legality and the freedom of expression, prevents the presentation of serious analysis or discussion on questions of the evolution of the concept of non-discrimination” (International Humanists and Ethics Union, 2008). Mashood Bederin captured the importance of maintaining debate over the nature of Human Rights and Sharia law when he stated: “Due to the fact, inter alia, that human rights are best protected by states within their different cultures and domestic laws, the relevance of Islamic law to the affective application of international human rights law in the Muslim world cannot be overemphasized” (Baderin, 2008: 3).

High Commissioner Arbour was forced to navigate a Council entrenched with political pressure that constantly accused her of not focusing on Israel enough. Commissioner Arbour had to overcome massive criticism from the IOC, Arab and African Groups to denounce Khartoum’s crimes in Sudan. UN Watch concluded that, upon reviewing Arbour’s time at the Council, the repressive regimes of the Council were able to silence criticism from her office, undermine her independence, and force her to direct criticism to other situations (UN Watch, 2008b).

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Commissioner Louise Arbour admitted that she deliberately took a soft approach to countries like the OIC and unofficial allies who yield massive amounts of power in the Council. This was due to strong relationships often coined “like-minded group” diplomacy, with many developing states which have the numerical majority rather than official organizational memberships. She stated that she opted for private engagement because it is more “likely to yield some positive results” while approaches that “would make me and a lot of other feel good” would likely be counterproductive (UN Watch, 2008b: 12). Arbour admitted that she considered the political landscape of the Council when making decisions. A *Washington Post* writer who interviewed Commissioner Arbour wrote, “As a UN official [Arbour] was constrained by the reality of the organization’s power center…[where]naming and shaming is a loser’s game” (UN Watch, 2008b: 12). The insufficient structure of the Council has enabled powerful alliances to dictate the actions of the OHCHR resulting in a forum where the success of discussions is dependent on approval from NAM, the OIC and “like minded” states.

The combined forces of the OIC and NAM, have created an environment where members are forced into a choice of compliance with the Conference or face ostracism. The European Union states have been tasked with acting as a counterweight to the other regions who, despite having a number of decent human rights regimes, are dominated by repressive regimes from the OIC and NAM who dictate voting directions. The US and European states have, historically, been responsible for initiating country specific action. However, in the absence of the US, European states have avoided country specific resolutions which is necessary to maintain diplomatic relations with the OIC and NAM (UN Watch, 2008a: 7). Furthermore, The European Union has been paralyzed by their desire to reach consensus between member states.

Peggy Hicks, Human Rights Watch Global Advocacy Director, captured the essence of the lack of responsibility present at the Council when she stated: “The Council is foundering for two reasons: first, the role played by the OIC, which has fought doggedly within the Council to shield states from criticism, and second, the failure of states that ordinarily support human rights to act as an effective counterweight to the OIC.” She went on to state that what is being displayed at the

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Council is the “willingness of moderate states to side with regimes that have notoriously bad human rights records and nefarious agendas” (Hicks, 2006). States which have historically been at the forefront of human rights promotion have recently been consumed by the limitations presented by a Council dominated by the OIC and NAM. Experts pointed to the US disengagement as definitive of the absence of leadership. However, as will be covered in Chapter 5, the new Obama Administration has pledged to take on a leadership role at the Council and after a May 12 election they will have the opportunity to do so.

The absence of leadership at the Council is partially due to the fact that the US led global war on terror which led states to abandon their human rights commitments. In order to become a leader at the Council Western states must acknowledge and address the legitimate grievances about the actions of Western governments. In order to increase the number of Southern governments willing to accept human rights initiatives, Western governments must admit their faults. The EU has sought to protect the US at the Council by refusing to endorse a criticism of Guantanamo and ending criticism of Iraq and Afghanistan after US invasion. The EU member states and US independently has then attempted to criticize the Southern alliances for ending scrutiny on Uzbekistan, Iran and the Democratic Republic of Congo (Roth, 2009: 1). Many state, NGO and academic interviewees stressed that if the EU, US and others seek a leadership role at the Council, they must take the initiative to end such double standards.

The manifestation of political dynamics at the Council normally comes in the form of in-action. However, in the case of Israel the disproportionate number of special sessions and resolutions has served to deteriorate the credibility of the Council. Kristen Silverberg, the US assistant secretary of state responsible for US policy at the UN stated about the OIC controlled Council, "This is a council that devoted eight different actions to bashing and criticizing Israel before it lifted a finger to help people in any other part of the world, including the long-suffering people of Burma, or North Korea, or Zimbabwe"(Trevelyan, 2006). Upon examining an investigatory mission to Israel it becomes evident that politicization undermines the usefulness of Council actions. The missions were fundamentally flawed due to the fact that they were mandated to analyze Israeli action which completely disregarded

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the behavior of all members involved, namely Hamas and Hezbollah (UNHRC, Council Decides to Urgently Dispatch A High-Level Fact-Finding Mission to Beit Hanoun: 2006). It is important to note that the special sessions and investigation mechanisms were specifically intended to examine situations rather than condemn a certain state (UNGA, A/RES/60/251).

Each Council action, or decision to limit action, attributable to the diplomatic horse trading which underscores the Council's complex political environment. These political negotiations have resulted in decisions which have concerned human rights advocates and intensified concerns about the fate of human rights at the Council. Special rapporteurs for both Belarus and Cuba were dropped as a trade off to continue rapporteur efforts in Burma, Burundi, the Democratic Republic of the Congo, Haiti, Liberia, North Korea (Forsythe and Park, 2008: 4). The continuation of country and thematic specific procedures are considered diplomatic victories but, included concerns about what may have been sacrificed in the process.

The strength of fraternal behavior of regional, religious and political alliances cannot be underestimated. One Western diplomat interviewed expressed, "what is more concerning than the demonization of Israel at the Council is the impunity granted to states in situations like Darfur. It is one thing if the Council is being used to push political agendas. It is another much more concerning thing if the Council is actively enabling violators." Even in situations of pressing human rights violations, including cases of Genocide, intra-alliance solidarity has proved to be no match for the voices of advocates and experts. The Darfur investigatory mission, led by Nobel Peace Laureate Jody Williams, entering Sudan did produce a report designating the Sudanese government as the perpetrator of "large-scale international crimes in Darfur." The "High Level Mission Report" produced by Williams and backed by more than 60 INGOs was referred to by many individuals in Civil Society as the Genocide test because it was said to be that Darfur would be the test to show how the HRC would deal with genocide (UN Watch, 2008a). The report was immediately deemed invalid by the OIC, Arab League and various allies, based on the fact that the mission never made it to Darfur after being denied entrance into the country by the Sudanese government. The outcome from the mission was a resolution

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that did acknowledge violations occurring in Darfur but failed to distinguish who was responsible for the violations.

The Netherlands representative portrayed the European Groups perspective which called for concrete action based on "overwhelming evidence" that the government actively supports and continues to provide increasing resources for the Janjaweed, a Sudanese militia (UN Watch, 2008a). Conversely, the OIC and African and Arab Groups failed to acknowledge the evidence presented and went on to commend the Sudanese government for their efforts. Pakistan, speaking on behalf of the OIC, praised the government for its cooperation with the international community and "giving unprecedented access to NGOs and civil society organizations" (UN Watch, 2008). Algeria, on behalf of the African Group, stated, "The alleged links, and I say *alleged* links, between the government of Sudan and militias…have yet to be objectively documented" (UN Watch, 2008a). Behrain, spoke on behalf of the Arab Group and proclaimed, "The Sudanese government is fighting for peace and stability in Darfur"( UN Watch, 2008a).

## 2.5 UN Reform Challenges

Reformation of the body has been ongoing since 1947, and reformation of the body has been in response to changes in the international political landscape rather than a recognition that reform could improve the body's effectiveness. Historically, legitimate UN reform has proven to be difficult if not impossible, especially in relation to human rights. The similarities between the Council and the CHR exemplify the difficulties of reform at the UN. This is in part due to the fact that previous reform efforts have not adequately addressed the prospective challenges. Western states and NGOs pushed for reform of the CHR but failed to acknowledge the full extent of challenges that lie ahead (Forsythe and Park, 2008: 33). All individuals interviewed emphasized the interdependency of the Council's structure and political dynamics. Accordingly, examining certain political aspects of the Council reveals potential challenges of structural reform. Analyzing these projected challenges is a necessary preparation measure for future reform discussions.

The primary obstacle for producing any reform of the Council remains the nature of state delegations. The Council has become a venue where state

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representatives continuously work to outmaneuver one another. The Council is unique in that ambassadors from states which traditionally display average to marginal capabilities, in terms of economic resources and political experience, like Egypt, South Africa and Pakistan are able to outmaneuver great powers form Europe and elsewhere (McDonald, 2009). This is a result of the great deal of resources dedicated by these states and strong regional alliances. As one NGO representative working in Geneva noted, "…the violators who possess membership approach the Council as if it were a battle, and spare no amount of time or money to ensure victory." Certain states recognize that they must labor to conceal their atrocious human rights record. Dr. James Gomez designated that state representatives are government official seeking to advance their career, rather than rights experts.

The fact that state delegations consist of trained diplomats, results in statements which are filled with political jargon and undetermined motives behind state actions. An instance of this was the OICs adamant support of special sessions on country specific issues pending a two-thirds vote, a vote that the OIC was more than capable of ensuring considering the membership distribution (UNGA, A/59/847-E/2005/73: 16).The OIC was criticized for deliberately focusing on Israel while simultaneously denouncing country specific scrutiny. The OIC responded by claiming, "…foreign occupation and the denial of the right of peoples to self determination were considered grave violations of human rights and not country specific"(UNGA, A/59/847-E/2005/73: 17). Such diplomatic savvy is displayed by nearly every Council state member and alliance.

Article 2 of the UN Charter discusses the principle of state sovereignty which is the foundation of the UN. The ideal of state sovereignty has an interesting usage and context at the Council. The Council is a UN body and thus, is mandated to adhere to Article 2 but, the Council has the mechanisms and is mandated to address country specific human rights violations. As one Western state actor interviewed proclaimed, "…Article 2 is used as a tool of convenience rather than a guiding ideal. China will allow and often promote scrutiny against Israel but at the first reference to Tibet, China is calling a point of order (which is an objection made by states, this ability was provided by the "Rules of Procedures for all Functional ECOSOC Commissions" and was carried over to the Council) and objecting based on Article 2

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paragraph 7." Article 2 paragraph 7 states that, "*Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll."*

Recognizing state actions as savvy and self interested is an important step in evaluating state positions on reform. In an effort to progressively realize the actions of states it is necessary to acknowledge that states often have alternative agendas. Peter Maurer acting Swiss Ambassador openly criticized the US push for negative membership criteria during the CHR reform. Maurer stated " …some who try to make us believe that they are the only ones fighting for ambitious human rights machinery. All too often, high ambitions are cover-ups for less noble aims and are oriented not at improving the UN but at weakening it. This cannot be our objective" (A/60/PV.72). US Ambassador John Bolton confirmed these feelings claiming that the US wanted a Council "that downplayed the US policy on human rights at the international human rights review," one UN official noted (Yeboah, 2008: 81).

Reform discussions are complicated by the fact that state priorities and agendas displayed at the Council are rarely based around the promotion and protection of human rights. This reality led many individuals to question why so many states were supporting ongoing institution building efforts. Amnesty International's William Spindler told the Associated Press, "There are still too many delegations that want to drag out this institution building and avoid the council getting down to its real work" (Spindler, 2007).The recognition that states have deliberately prolonged institutional reform discussions as a means of avoiding legitimate human rights discussions has made individuals hesitant to support future reform discussions and Council reviews.

Regional and political divides similarly define structural reform efforts and the Council's day to day workload. States maintain an exclusive, non-negotiable position in relation to the working and structure of the Council. Western states have recently sought significant reform of the Council while countries of the Non Aligned Movement feel that any further reform will make the Council unworkable (Yeboah, 2008: 88). When the General Assembly or Council attempt to negotiate issues states

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and regions display fixed positions and attempt to discredit rather than address voices of decent. In the case of structural reform, negotiations have not been discussions examining the pros and cons of proposed reforms. One interviewee from both the NGO and academic sector described regional solidarity in relation to reform proposal as “unwavering.” The interviewee went on to state that the solidarity displayed is strong to the point where discussions and any chance for compromise and adaptation are simply not an option. Thus, the body structure which emerges is a testimony to creative bargaining tactics rather than a joint effort to create the most efficient and effective Council structure.

Lack of political will from leading human rights states led to a structural reform process which was owned by states who feared a body that may hold them accountable. EU countries have denied requests from Brazil to take a leading rule on various actions for fear that the moves will be labeled as “Western” (Sanders, 2007: 9). Similar fears of labeling and perceptions disabled a strong position from states with positive and moderate human rights records. Some democratic governments like India and South Africa have little to lose politically from a weak Council and opt for neutrality. The governments with the clearest reform vision and most persistent voices have been governments who have the most to lose from an efficient and effective human rights body (Roth, 2009: 1).

Reforming the UN’s human rights body is especially difficult because it remains impossible to consistently determine effectiveness. Many of those interviewed warned against using statistics, namely special sessions or resolutions, as indicators of effectiveness. North-South disparity in the perceived purpose of the Council has resulted in an inability to objectively determine effectiveness. Furthermore, states rarely make generalizations about Council effectiveness. State responses regarding Council performance in the context of Darfur will completely contradict that state’s position on effectiveness in the case of Israel (Yeboah, 2008: 79). When a body is considered simultaneously ideal and disgraceful, creating a platform which is conducive to open and useful discussions about structural strengths and weakness is itself a challenge.

Despite the complex nature of international human rights and the challenging dynamics that exist in an intergovernmental human rights body, many

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individuals, most of which operate in the NGO sector, have retained immense expectations for the Council and preceding CHR. The Council is far from perfect, however the overwhelming focus on the failures of the bodies has tarnished public perception to the point where reform is considered futile. According to one Western Ambassador, while the Council's reputation is not an accurate portrayal of its performance, structural aspects which could and should be examined are taking a back seat to attempts at rectifying the Council's reputation. The pattern has been to under-appreciate the promising trends of the Council and CHR, which is a symptom of a lack of scholarly attention (Forsythe, 2008: 17).

The great expectations and pessimistic approach applied to the Council has had negative implications on reformation efforts. This research and research on the previous reform process has found an overall feeling that structural reform is an insurmountable task. Many share the belief that the potential of structural reform will always be limited to the willingness of states to genuinely commit to international human rights standards. The notion of international human rights has powerful appeal for states, but states are firstly concerned with issues of strict sovereignty, maintenance of reputation and freedom of national policy making (Forsythe, 2008: 13). Structural reform discussions have become a secondary issue to efforts focused on lobbying states to increase their commitment to international human rights.

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# CHAPTER III
# STRUCTURAL REFORM CONCEPTS FROM THOSE WORKING IN, ON AND AROUND THE COUNCIL

A purpose of this research is to identify various structural reform proposals which amongst those working in, on and around the Council. The research sought to gain perspectives from numerous organizations, states, experts and other stakeholders in order to present a pluralistic compilation of perspectives. This chapter will present and briefly examine the strengths and weaknesses of each gathered reform proposal. For the purpose of organization this research has divided the Council's structure into membership/composition, status/position of the Council, and mandate/working procedure. While examining the structural components the research will make references to the constructivist framework to reiterate the importance of the relationship between the Council's structure and the behavior of its member states. Furthermore, this chapter will examine the debate surrounding the concept that an international human rights body composed of states inevitably has an adverse effect on universal human rights and ought to be terminated all together.

## 3.1 Membership/Composition

The most difficult and controversial issue relating to the Council and the preceding CHR is that of composition. The repetitive election of states possessing human rights records which receive much scrutiny and criticism, ultimately led to the termination of the CHR. Since its inception, the Council has displayed an inability to prevent the inclusion of repressive governments. One Western Ambassador claimed that the current membership system "has set up a perverse incentive for the worst human rights abusers to focus all their influence to get on the Council." A number of interviewees and research argued that the composition of the Council is the only structural component that needs to be addressed. This section addresses the questions:

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what changes should be made to the membership system of the Council, and what composition reforms are viable given the political environment of the Council.

In order to gain a seat on the Council a state must gain a single majority, secret ballot vote, at the UNGA and make a verbal or written pledge to promote human rights. The single majority vote is based on the number of states present and voting at the General Assembly. Competition is theoretically promoted by the limited allotment of regional seats but, as will be discussed below little to no regional competition is present. Regional groups are only required to provide enough candidates to fill the allotted regional seats which are open. The only voting criteria designated by Resolution 60/251 is a suggestion for states to "take into account the contribution of candidates to the promotion and protection of human rights. As of 2008-2009, 32 of the 47 members have a negative voting record on UN resolutions that promote human rights and 35 of the 47 members have voted to restrict the independence of the OHCHR(UN WATCH, 2008c: 2). Most concerning to those who emphasize the interdependency of democracy and human rights, is the idea that Western style democracies had greater proportional representation at the CHR than in the Council. However, as many interviewees noted, creating an effective Council composition is not dependent the number of democracies. As one academic interviewee working in Geneva stated, "No one should be concerned about the number of democracies, the concern is in regards to the number of states which we all know have no intentions of advancing human rights, they are there to do the contrary and everyone watches in disbelief as it happens time and time again." As this section will display, the challenge to create a membership system which works to advance universal human rights is a formidable one.

As will be displayed, the structure-agent interplay described in the constructivist theory is obviously manifested when considering reform to the Council's membership structure. For example, those who support decreasing the number of seats at the Council believe that such a reform would give states incentive to better their performance at the Council as a means of retaining membership in the future. Another example of the interplay are proposals to implement greater criteria and commitments for members. It is believed that if members are faced with the prospect of expulsion, they will be less likely to undertake actions or make statements

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at the Council which may jeopardize their seat. Thus, the membership structure could utilize both incentive and the prospect of punishment to direct the actions or behavior of member states.

### 3.1.1 Universal

The universality of human rights and the conception of a fully democratic Council has resulted in the proposition of universal membership. Though universal membership had been discussed in New York and Geneva for some time, it was the report of the Secretary General's High Level Panel that made universal membership a focus of reform discussions. The Panel proposed that designating specific criteria for membership risks increasing politicization and negatively impacting the Council dynamics. Therefore, universal membership would be the only means of changing the direction of the Council and decreasing politicization. Furthermore, universal membership would underscore that all members are committed by the Charter to the promotion of human rights, and might help to focus attention back on to substantive issues rather than who is debating and voting on them (UN Secretary General's High Level Panel: 2004).

The Panel's enthusiastic proposal of universal membership provoked a variety of responses from interviewees. The research identified that the most avid supporters of universal membership were developing states. For example, Cuban Ambassador Rodrigo Malmierca Diaz criticized the membership suspension clause included in the final draft resolution, saying, "If human rights are universal and are everybody's responsibility, why should the decision-making mechanism on these issues be limited? In fact, did not the High-level Panel recommend that, on these grounds, the new body should be one of universal membership? We peoples of the South, besides continuing to be the target of unjust condemnatory resolutions, will in the future be subjected to the latent danger of being deprived of our access – won by election – to that body" (A/60/PV.72).

Most interviewees, from all sectors, warned that the idea of universal membership as a means of decreasing politicization or creating an environment which is more conducive to the promotion and protection of human rights, is presumptuous

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and ignores the basic behavior of states. Interviewees held the position that universal membership would terminate any chance for accountability and responsibility. Professor Connie de la Vega expressed the skepticism held by many, stating, "[universal membership] would remove the incentive for serious violators to improve their human rights record in order to be eligible to be considered Council membership. Because this process necessarily is a political process, it is good to keep as many options available for the mobilization of shame" (Vega Interview, 15 May 2009). State and regional actors interviewed shared the same pessimism presented by academics and other members of civil society. One Western Ambassador interviewed rejected the idea of universal membership and proclaimed, "the Council must, at the very least, be limited to those states which pledge to uphold international human rights norms in their national legislation."

Sources addressed the claim that universal membership would reduce politicization by proposing that politicization would actually increase and the dynamics, in terms of divisions between regions as well as political and religious alliances would be unmanageable. While claims that universal membership would increase or decrease politicization are presumptuous, it is useful consider the UNGA's composition. The G-77 has 130 members equal to 67 percent of the UNGA, NAM has 118 members equal to 61 percent of the UNGA and the OIC has 57 members equal to 29 percent of the UNGA. Henceforth, in terms of numerical makeup, a Council with universal membership would be reflective of the current Council's alliance representation.

### 3.1.2 Elite Membership

Prior to the formation of the Council former Secretary General Kofi Annan called for a smaller Council with more rigorous voting criteria. This proposal was an attempt to create "a society of the committed," on the assumption that the world's worst violators would be unable to gain membership (Forsythe and Park, 2008: 7). The United States and most western democracies expanded on the idea of consolidating the composition of the Council and proposed a "club of the clean". The US model consisted of 20 elected states which met the criteria of being a "real democracy" and free from Security Council sanctions relating to human rights

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violations. Similarly, Human Rights Watch proposed an elite model with election criteria being ratification and met obligations of the seven major human rights conventions (Forsythe and Park, 2008: 7). To date, the concept of elite membership has not generated a large following however interviewees discussed the merit and benefits of an elite membership model.

Sources noted that an elite membership model would do three things that would fundamentally change the nature of the Council. Firstly, if done properly, election criteria would ensure that those states which have not displayed a commitment to international human rights standards are not able to gain membership. Secondly, while the election process would be recognizably political, regional, political and religious alliances would have a minimal presence. Thirdly, state to state competition would become a reality rather than a cosmetic concept. Cecilia Jimenez provided a useful summation of the potential benefits of elite membership by stating, "The model which promotes the greatest efficiency is one with less members, ideally between 18-30 would promote better state performance and create an intense movement towards competition" (Jimenez Interview, 28 April 2009).

Individuals opposed to the concept of elite membership do not attempt to dispute claims that a smaller Council would increase competition. Rather, interviewees pointed to an inability to credibly and acceptably designate which states were realistically the best of the best. A Western Ambassador interviewed acknowledged what he referred to as a frustrating reality stating, "I am not sure how you could credibly identify the worst of the worst human rights abusers, despite the fact that everyone knows who they are." Other sources pointed to concerns that elite membership would only serve to alienate countries which would have a negative impact on the implementation of human rights standards globally.

The strongest source of opposition to elite membership proposals have been from members of the G-77. The G-77, which is often referred to as developing states and China, joined with Russia to adamantly work to discredit the US-led proposal. This group of states, many of which are authoritarian and semi-authoritarian states who would fail to meet the set criteria for membership, claimed that the proposition was another form of neo-colonialism if not neo-imperialism (Forsythe, 2008: 8). In a relevant report an anonymous state ambassador argued that the Council

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was not a human rights court. Rather, it is a political body that could have members such as Cuba. The ambassador pointed to the Security Council as exemplary of the credibility deficit that is created by adopting the theme of exclusivity (Yeboah, 2008: 90).

### 3.1.3 State Representation

A concept that has been proposed as an additional component of a Council with universal membership is that of credible and experienced human rights figures as state representatives. As noted in the High Panel's report, during the first half of the Commission's tenure delegation heads consisted of key players in the human rights arena. The Panel proposed, "that all members of the Commission on Human Rights designate prominent and experienced human rights figures as the heads of their delegations" (UN Secretary General High Level Panel, 2004). Currently, there is a general lack of support for expert representatives because it is not considered a viable option. However, as reform discussions continue, perceptions of what composition reformations are necessary, or viable, will continue to evolve. Henceforth, it is beneficial to examine the concept of expert representation as many sources felt that this may be the only means to a Council which genuinely promoted and protected human rights.

Numerous interviews claimed that the proposition of expert state representative operating in a semi-independent status was not a viable reform, but noted the only way to create a Council genuinely promoting human rights. This concept of independent experts as state representatives at human rights bodies is not an altogether new to the international community. The Council of Europe, Organization of American States, and African Union and various international criminal courts are all comprised of expert representatives sitting in a personal capacity. State resistance to the notion of a Council composed of independent expert state representatives is a testimony to the perceived importance of the Council and the recognized potential of expert state representatives to actively address human rights issues which may embarrass the state (Forsythe and Park, 2008: 3).

Many academics and other non-state sources interviewed opposed the concept of semi- independent expert state representatives. Interviewees were

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concerned that if representatives were not operating in an official diplomatic capacity, the body would lose a level of authority. One political consultant said, “Membership should be limited to government representatives for the simple reason that only governments hold power, are in a position to legislate and to enforce legislation.” Numerous academics were adamant that there was a level of virtue in having political members. Professor Douglas Sanders highlighted this point by stating: They represent the reality of state politics at this point in time (while usually reflecting a more internationalized or liberal version of home state politics - for states are regularly more liberal in external relations than at home and diplomats are often educated elites)” (Sanders Interview, 29 March 2009).

### 3.1.4 Reforming Criteria

Many sources emphasized that any significant membership reform would be a lengthy and cumbersome process. As a result, minor membership reforms which were considered more plausible received the greatest support. The membership requirements presented in the final resolution were suspected to be too weak and with seats gained by China, Cuba, Russia and Saudi Arabia, all examples of countries who experts felt would automatically discredit the Council, there is evidence that the election and appointment process has failed (The Economist, 2008).This section will examine membership criteria reform proposals which attempt to change the specifics of membership while maintaining the current composition structure. Many sources felt that only minor membership criteria, procedural and distribution reforms are needed and could drastically change the work of the Council. The aim of these efforts is not to identify and separate the bad states from the good, rather these proposals attempt to ensure that those states which systematically violate human rights are unable to gain membership.

During the CHR reform process a number of proposals varying in intensity attempted to make the election process more rigorous. One of the most conservative of such approaches was presented by former Secretary-General Kofi Annan, who called for a minimum two-thirds majority vote at the UNGA. This proposal was supported by many states from both the North and South but failed to be included in the final resolution. The decision to maintain a simple majority voting criteria was the

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result of developing countries which campaigned for less rigid voting criteria “as a means of facilitating the participation of smaller countries” (UNGA, A/59/847-E/2005/73: 19). When investigating the voting records of the UNGA for current Council members it is revealed that nearly every current member received well over the proposed two-thirds votes. This brings into question the ability of such a proposal to realistically keep states with atrocious human rights records out of the Council.

Another conservative approach to reforming membership criteria addresses the issue of member state pledges. Prospective Council members face no tests or requirements outside of a “voluntary pledge” to human rights prior to appointment (OHCHR, 2008b). Various state actors interviewees noted that pledges, though largely cosmetic, have an impact on state discourse and accountability. As one state representative stated, “The most important single reform would be to reinstitute the rule proposed by Kofi Annan that membership should be open only to those states that pledge to uphold the international bill of rights (the Universal Declaration, the ICCPR and the ICESCR). This single step would do more to bring the Human Rights Council back on track that any other one can envisage.” During the reform process NGO representatives proposed another pledge requirement which may have a positive impact on state behavior at the Council. The organization representatives proposed, “[states] should put forward a platform that describes what they seek to accomplish during their term of membership” (Eliasson, 2005).

More ambitious efforts to effect the composition of the Council without changing the structure itself deals with the implementation of negative or positive membership criteria. The General Assembly surprised the international human rights community when it refused to ban countries which were being sanctioned by the UN Security Council for human rights violations (Morse, 2007). The proposal, which was supported by states from each region, stipulated that those states which “… the UN Security Council had adopted measures under Chapter VII of the UN Charter should be excluded from Council membership” (A/60/PV.72). The proposed negative criteria was paired with a set of positive criteria for membership, specifically included a positive record of cooperation with the Commission’s special procedures, the ratification of relevant international human rights treaties and being a donor to voluntary UN funds, which received only minimal support (Yeboah, 2008: 81).

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### 3.1.5 Regional Appointment Process

State and non-state sources expressed concerns about the current regional election process and the resulting practices. The initial elections of 2006 were marked by strong regional competition. However, in the elections that followed only two regions (Western Europe and Other States, and Eastern European States) offered more candidates than the number of available regional seats. The recent decision of New Zealand to withdraw its candidacy to ensure the appointment of the US displays how regions are able to determine their representatives. Critics of this practice note that it is a return to practices of the CHR, where elections became something of a formality (Yeboah, 2008: 90).

Interviewees described the regional practices of determining their own representatives as very concerning, but noted that systemic changes may work to discourage this trend. Those working in and around the Council recognized the need for a deliberately worded procedure which promoted more democratic and transparent process for regional election (Rajkumar Interview, 3 June 2009). Interviewees agreed that, at a minimum, regional groups must be required to offer more candidates than the number of states allocated for the region.

### 3.1.6 Regional Distribution

The regional distribution of states at the Council and the preceding CHR is a point of contention and confusion. It is recognized that the current allocation of seats is a product of UN history and the Cold War (Jimenez Interview, 28 April 2009). Thus, many understand that the majority of states are comfortable in the current system and feel that reform of the system is not realistic. This did not prevent a number of interviewees from addressing the notion of re-evaluating the current distribution and doing so reveals some interesting findings.

State representatives which wanted to maintain the membership structure of the CHR agreed to a minor reduction in members as long as changes were based upon “equitable regional representation” (UNGA, A/59/847-E/2005/73: 17).This claim of equitable distribution however, is misleading. The UN Charter declared that the preceding of the UN would be based on the principle of sovereign equality. Henceforth, the distribution at the Council adheres to “one country one vote”,

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however, critics of this system note that it is not necessarily democratic. Upon examining the current distribution, it is obvious that the current system is not reflective of a true geographical balance in terms of population. According to the UN Population Division, the current world population is estimated to be 6.788 billion, the current population of the African states group is approximately 921 million. Thus, despite possessing only 13.5% of the world's population, African states hold 28% of the Council's seats. This disparity in representation brings the legitimacy of the current distribution into question.

In the case of Africa, one scholar suggested that it would help to reduce the African representation as a means of ensuring that Council composition is reflective of population. The scholar said that this would prompt greater representation from Asia which is not very active at the UN. Furthermore, this proposal may serve to challenge the current trend of African regional solidarity resulting in impunity granted to African states. A UN Watch report which investigated the first UPR process found that, of the 30 states which had a detrimental impact on the reviews, 15 were from the African group (UN Watch UPR, 3). Recognition of the negative impact the over-represented African group suggests that regional distribution is a structural reform which must receive further consideration.

## 3.2 Mandate/Working Procedures

When investigating reform proposals relating to the mandate and working procedures of the Council a division is evident between those who feel that mandate and working procedure reform would have a great impact on the effectiveness of the Council and those who claim that such reform is of minimal importance. It is important to note the difference between the Council's mandate and working procedures. Despite often being referred to as one entity, the mandate refers to what the Council has the ability to do, while the working procedures refers to how the Council functions. During the first session of the Council, members agreed to decision 1/104 which called for an international working group which would "…formulate concrete recommendations on the issue of reviewing and, where necessary, improving and rationalizing all mandates, mechanisms, functions and responsibilities in order to maintain a system of special procedures, expert advice and

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a complain procedure, in conformity with General Assembly resolution 60/251." What emerged from the review was described by some sources as a collection of individual mandates. This section will examine various reform proposals, areas of concern and differing views on the importance of the Council's mandate and working procedures.

Nearly every interviewee agreed that the mandate and working procedures of the Council is too state centric and puts too much emphasis on the code of conduct. The jargon and room for interpretation in mandate texts has led to a situation where states have attempted to translate the text to limit the authority and autonomy of special repportuers and other independent bodies (Rajkumar Interview, 3 June 2009). All sources interviewed recognized and expressed concern about the current situation in which the OHCHR is battling to retain independence and jurisdiction. Many sources designate that the most urgent mandate reform is that which would limit the ability of states to block efforts of other state and non-state actors.

The scope of what needs to be addressed in terms of state blocking efforts to protect and promote human rights is vast and in order to cover the range of issues each will be discussed vaguely. Sources point to two basic problematic practices which persist at the Council because states interpret the mandate to allocate them such capabilities. Firstly, members of non state actors pointed to the ability to call a point of order (an objection by a member state reviewed by the Council Chair) at will as very problematic. As one NGO executive based in Geneva stated, "There is really no legitimate reason to allow this behavior, if states disagree with what is said they have the ability to address the issue when they have the podium. We can see that objections are not just a formality, the OIC has successfully limited the freedom of expression at the Council based on an 'objection'." Whether or not the stakeholders of the Council would ever consider completely terminating the state's ability to object needs further investigation but, this research found that many were concerned with the usage of this capability. Secondly, is the issue of state oversight of independent entities at the Council. States have worked to influence the independent voices of the Council, which serve as the main antidote to the politicized state discourse which has a questionable influence on the promotion of international human rights (Roth, 2009: 11). The question which emerges is, what could be done to terminate these practices

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which persist within the context of the Council's mandate and working procedures? The answer may be quite simple. Get rid of the technical verbiage and make the mandate and procedures very simple. R.J. Rajkumar declared, "If states seek to take actions which they know are questionable, they will have to publicly justify their actions rather than citing a specific paragraph from the mandate."

The one issue discussed above which receive extensive focus from interviewees, is that of improving that mandate for special procedure mandate holders. Both state and non-state sector interviewees recognized that states utilize the technicalities present in the Special Procedures Code of Conduct to discredit individuals and deter efforts to confront states. At the Council's latest session (11 Regular Session 2-19 June 2009) the Special Rapporteurs on freedom of expression and on extrajudicial, summary or arbitrary executions faced significant state scrutiny which limited their ability to discuss the issues at hand. The only attempt to deter such state behavior is found in the UNGA resolution 60/251 which states that governments are "to cooperate fully" with the Council's special procedures. A number of non-state interviewees proposed a "more drastic measure" be implemented to control the behavior of states, namely a "code of conduct for states."

Interviewees who promoted the creation of a deliberate, plainly worded code of conduct for member states admitted that such a proposal was not viable. Furthermore, advocates of a state code of conduct admitted that it was an underdeveloped proposal and the specifics would require great attention. It must be noted that proponent of the code of conduct for states acknowledged that the proposal was underdeveloped and would be difficult to implement, but claimed that the concept was worth pursuing as it would provide a counter balance to state endowment.

Increasing the involvement and capabilities of NGOs at the Council is a proposal which divides state and non-state actors. NGO and scholarly interviewees felt that NGO involvement was paramount, however state actors felt that NGO involvement was of minimal importance. Sources who felt that NGO involvement was imperative claimed that NGOs were not only the voice of human rights victims they promoted transparency and accountability. Furthermore, NGOs also possess expertise which could assist in the process of drafting resolutions and provide states

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with a better understanding of complex human rights issues. Professor Connie de la Vega also noted that "other bodies such as the Commission on the Status of Women have closed their drafting voting meetings making them less accountable as well as less relevant."

Interviewees who discussed the intricacies of NGO involvement at the Council, noted that reform was necessary. One NGO representative noted that there was no consistency in rules regarding participation by NGOs. There are inconsistencies in the inclusion of NGOs during drafting deliberations. One academic noted that there were reasonable and workeable procedures developed during the first three years of the Council but because they were not put in writing, major problems arose when staff and member state changes occur. A UN Watch report called for an end to the exclusion of NGOs from the oral debate of review sessions. The report also proclaimed a need to reevaluate the time allotted to NGOs during UPR plenary sessions and warned against submissions from GONGO's "government controlled NGOs that seek to subvert the system" (UN WATCH, 2008c: 4). However, submissions from GONGOs were not the only point of concern for interviewees in relation to the UPR process.

As was discussed earlier in the text, individuals involved in the CHR reform process recognized that much of the success of the new Council was dependent upon the newly created Universal Periodic Review. All interviewees agreed that the formation of the UPR was a step in the right direction. The first two years of UPRs has resulted in a steady flow of reports from NGOs and academics expressing concern and occasionally outrage in relation to the reviews which had been produced. But, interviewees noted that the process was too new to determine whether or not it will be a useful mechanism or another formality. The one structural issue which emerged in relation to the UPR is the unknown relationship between the UPR, the treaty monitoring bodies and country-specific rapporteurs which all logically overlap (Forsythe and Park, 2008: 34).

NGO interviewees called for more involvement in the UPR process and the Council's proceedings at large. However state actors interviewed suggested that NGO involvement at the Council does little more than further complicate and politicize an already complex body. One state representative pointed out that NGOs

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have become as, if not more, political than states, thus motivations behind their actions should not be considered any more genuine or credible than that of states. A Western Ambassador went one step further to state, "I am troubled by NGOs penchant for reporting rumors (which often turn out to be false) as facts, and would be troubled if that fed an already compromised Council."

Some state sector interviewees expressed apprehension about the involvement of non-state agents but, acknowledged "the support role [non-state actors] play in mobilizing shame when states are paralyzed by politics." However, many interviewees from civil society expressed aspirations to expand criticism to those states who enable violators. Numerous academic interviewees called for an additional mechanism needed to confront states which support or protect violating states. Such a mechanism would address the persistence of regional, political and religious alliances. At the very least, this mechanism could make public the states which vote to protect the violators as well as who is trading with them and providing them with aid (Vega Interview, 15 May 2009).

A point of concern relating to the working procedures and mandate of the Council is the body's relationship with other mechanisms. Currently, the Council operates in isolation of other principal UN mechanisms (outside of the UNGA). Integration of other mechanisms into the Council's efforts is seen by many academics as something that ought to be pursued. The African countries display a practice that ensues when the Council and regional mechanisms are isolated from one another. Regional bodies have on occasion used their mechanisms to prevent more international action on serious human rights violations. The international bodies are needed when the regional ones are not able to take action to prevent or stop serious human rights violations (Vega Interview, 15 May 2009). In terms of relationships within the UN system, interviewees supported greater deliberation with the Security Council, and the Secretary General. One interviewee felt that Secretary General Ban Ki Moon could have played a crucial leadership role during the session discussing Sri Lanka but, failed to become involved in the session.

Secret ballot voting at the Council is a working procedure issue which divides members of civil society and state actors alike. While some viewed secret ballot voting as detrimental to accountability and granting states virtual impunity,

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others felt that secret ballot voting was the only means of defeating regional bloc voting. The introduction of secret balloting deserves further examination as it potentially "allows countries to vote their conscience rather than as pressured by others in their region" (McDonald, 2009).

Discussing the concept of reforming the mandate of the Council with various sources revealed the idea that many stakeholders were quite satisfied with the current system. Cecilia Jimenez proclaims: "…the Council has a stronger toolbox than the CHR. The Council can investigate both thematic and country specific issues, the UPR is a fantastic tool in theory. Thus, the key is to address that which makes these mechanisms futile." Many interviewees agreed that the mandate as such needs no change, its use however does. One Western politician interviewed, who warned against becoming too ambitious, stated that "the problem with the Council is not necessarily its basic mandate, but the lack of mechanisms for ensuring the mandate is fulfilled." The rules that have been established are not being respected so, rather than further complicating the system efforts should be focused on ensuring that the rules are enforced (Vega Interview, 15 May 2009).

The recognition of the Council's mandate and procedures as a work in progress is crucial. Efforts to ensure that the mandate is robust and relevant to the field should be continuous (Jimenez Interview, 28 April 2009). Only through constant re-evaluation will the mandate of the Council reflect the reality of current human rights issues. Those interested in improving the Council should constantly seeking influence from relevant bodies. An example of this is recognizing the usefulness of working procedures at organizations like the ILO whose tripartied system (which implements the state, the organization, and the person of interest) could be considered in future reform discussions (Rajkumar Interview, 3 June 2009).

In reviewing mandate and working procedure reform proposals the presence of an interplay between the structure and agent is obvious. When it comes to the mandate and working procedures of the Council, the constructivist interplay suggests that if the Council possessed sufficient functions and procedures the body would fulfill its purpose regardless of which states made up its members. The mandate is the structural component which could dictate the behavior of states by enabling and limiting what issues may be pursued. The working procedure could

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provide the structure which would determine how states behave by deliberating permitting only specified actions. Adopting a constructivist approach in relation to the Council's mandate and working procedures supports the notion that state behavior can be dictated and control if the proper structure is in place.

## 3.3 Status

The question of whether or not the Council ought to be promoted to become a principal organ of the UN is a highly divisive. If the Council were promoted to the status of principal organ, it would become the sixth principal organ of the UN. When the 2011 review was scheduled, many felt that this would be the platform at which the Council's promotion would be announced. Others refuted these claims made during the CHR reform discussions stating that the Council will not become a principal organ in 2011 for the same reason that it did not do so in 2006. During the 2006 reform discussions an ambassador stated, "You can create the council but then you have to have the Charter amended and this needs two-thirds vote of the membership [which will] take you years, at least two to five…[moreover]the last thing on people's mind is [to] make it a principal organ of the UN…the five year review might be used for other discussions"(Yeboah, 2008, 94).

This research found that the status of the Council will likely be a principal point of discussions at the review. During the 2006 reform Chile, members of the EU, Japan and Iceland supported the idea of launching the Council as a principal organ because it would elevate the importance of human rights within the UN system. Sources which plan to promote the elevation of the Council at the 2011 review, will do so for reasons that are both symbolic and practical.

The concept of promotion was streamlined by the Secretary General's High Level Panel's report which supported a Council which was a "…Charter body standing alongside it and the Security Council, and reflecting in the process the weight given to human rights, alongside security and economic issues, in the Preamble of the Charter" (UN Secretary General High Level Panel, 2005). As one interviewed state actor stated "…the inertia of the UN-system will make it difficult to change the present status of the Council but, that should not deter efforts because the Council should doubtlessly be a principle organ." The above section briefly discussed

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the emerging trend of states to favor the authority of regional bodies. For this reason, various interviewees supported the promotion of the Council's status, even if only symbolic, is a necessary step to reposition the Council amongst the international human rights regime.

As mentioned above, a number of interviewees which supported the promotion of the Council did so for practical reasons. Cecilia Jimenez highlighted this concept by stating, "The Council ought to be a principal organ primarily because subsidiary status means that independence is limited to some degree. Making the Council a Charter body is necessary for symbolic, authoritative and independent reasons." Many interviewees pointed to the failures of the Security Council to properly deal with human rights as reason enough to promote the Council. States of the Security Council have avoided addressing human rights violations for the reason that they had nothing to do with international peace and security (Forsythe and Park, 2008: 32). Henceforth, principal status given to the Council would ensure that human rights are being discussed at the highest levels of the UN.

During the 2006 reform, Egyptian Ambassador Maged Abdelaziz made a statement which reflects the adamancy of some objections to the proposition of status promotion "…the Human Rights Council is a subsidiary body of the GA, and that institutional link must not be jeopardized. Hence, our interpretation is that the Human Rights Council should submit all its recommendations and resolutions to the General Assembly for consideration, in accordance with the rules of procedure applicable to that universal body" (A/60/PV.72). A number of interviewees expanded on the reasons why the Council should not be promoted to the status of principal organ. Roy Brown IHEU Main Representative at Geneva, decried that discussions relating to the status of the Council deflects attention from the real issue of ensuring that membership rules reflect the need to protect and promote human rights. Interviewees which opposed the promotion of the Council pointed to the importance of recognizing that attempting to revise the Charter at this point would result in greater restrictions and limitations on human rights (Vega Interview, 15 May 2009).

The relevance of the constructivist theory framework in relation to the status of the Council may not be explicit but the relationship between the structural position of the Council and the behavior of member states is present. Both state and

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non-state interviewees alleged that various states at the Council are willing to behave audaciously because they recognize that the Council is a subsidiary body which has limited capabilities and receives only limited publicity when compared to the UNGA, the Security Council, the Secretary General and ECOSOC. Henceforth, if the Council were to have a promoted status states may adjust their behavior. In addition to reconceptualizing the manner in which states approach the Council, regional groups may be unable to dismiss discussions which will allegedly be pursued at regional bodies as a means of avoiding an international discussion.

## 3.4 Usefulness of the Body: Addressing the Concept of Termination

When discussing the structure of the Council the question that emerges is: could a body composed of states ever genuinely and effectively police fellow governments and if not, what is the point to having a political human rights body at the UN? More than one Interviewee who was involved in the reform discussions acknowledged that there were discussions occurring around the CHR regarding the full termination of the body.

The fear of termination, however unlikely, does have an effect on reform discussions. UN officials, states, organizations and experts shared the same fear that discussions that were too critical of the CHR and were too radical would lead to proposals considering termination (Trevelyan, 2006). As a result, only the most conservative proposals were actually given consideration.

This research asked interviewees one brief question about the concept of termination which prompted passionate responses. Sources repeatedly pointed to the fact that it was states which decided that they wanted and needed a political human rights body thus, termination is simply not viable (Rivero Interview, 29 April 2009). A Western Ambassador noted that such a proposal should not receive any consideration as it would only satisfy those who seek to hide their own human rights record. The Ambassador went on to say, “Double standards are unfortunately very often preventing an objective discussion, but this is no reason to do away with an institution which ensures that human rights are consistently under consideration at the UN.”

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In order to understand the usefulness of the Council one has to understand the UN space. The UN is not a national setting, it is extra-territorial, thus only at the Council can sensitive issues be discussed without grave consequences. Furthermore, there is a sense that resolutions, regardless of their questionable content, symbolize the idea that the international community recognizes the magnitude of the situation which ensures that it will not be dismissed. An example of this is the hope displayed by Burmese political prisoners when resolutions are passed on the situation (Rajkumar Interview, 3 June 2009).

Some sources focused less on the positive aspects of the existence of the body and more on considerations of what would ensue in the absence of the Council. Not only would there be no global forum founded on a common understanding of human rights "…fragmentation would result in horrors such as the proposed Islamic Commission on Human Rights holding the primary mandate for the protection of human rights in one-sixth of the world's population, based exclusively on Sharia law" (Brown Interview, 16 May 2009). Professor Douglas Sanders noted, "If states were to lose their Council they would likely want to control the UN High Commissioners office." Interviewees warned that leaving the task of human rights protection to the UNGA and Security Council would slow, or potentially reverse, the development of human rights at the UN.

Many interviewees pointed to the political nature of the Council, which is usually the main source of criticism, as the very feature which makes the body so important. Professor David Forsythe presented this dichotomy by writing, " It seems that UN member states cannot help but develop human rights norms, even as they continue to violate many of them" (Forsythe and Park, 2008: 33). One individual pointed to the idea that there is some virtue in an inter-governmental body which, if nothing else, exposes the weaknesses of international human rights (Gomez Interview, 20 April 2009). Other interviewees emphasized that states are capable of things which no other actors are. The Council has the ability to mobilize shame in a way which treaty bodies cannot. Further, a Council focused on human rights is needed to address issues in all countries, regardless of what treaties they have become party to (Vega, 15 May 2009).

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Interviewees agreed that the political voices of states must be heard. When elite bodies at the UN operate against politically representative bodies, then the debates at the UN are real (Sanders Interview, 29 March 2009). As one interviewed state representative proclaimed, “We need a Council and we need an effective one. The very fact that the worst human rights abusers work so hard to paralyze the Council and avoid Council condemnation is a testament to how effective it could be.” Considering the recognized usefulness of the Council, considering ways in which to improve the structure of the body is a useful undertaking which needs to receive greater focus.

This chapter has discussed numerous issues relating to the structure of the Council. The chapter examined reform proposals to the membership or composition system, the Council status and position with the UN system, and the working procedures and mandate of the Council. This chapter did not aim to identify and separate proposals which are considered strong or weak. Rather, this chapter has presented various proposals and provided relevant material when if it was available. What can be concluded is that there are currently numerous pragmatic structural reform proposals, each of which has its own strengths and weaknesses, which deserve further examination and consideration.

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# CHAPTER IV
# THE PURPOSE OF THE COUNCIL

## 4.1 Disparity in Perspectives

When examining various structural reform proposals, a disparity of perspectives concerning the purpose of the UN's primary human rights body becomes evident. Attempts to address structural reform without first addressing inconsistencies in the perceived purpose of the body will undoubtedly fail. As Cecilia Jimenez stated in her report, which far preceded the actual CHR reform process, "Lack of consensus about the primary function of the Commission underlies many of the battles on technical aspects of the reform and makes it difficult to agree on even small steps towards real reform" (Jimenez and Kalin, 2003: 3). The apparent disparity in perspectives reveals an overt link to the constructivist theory framework because the states and stakeholders at the Council are behaving in a manner that is reflective of their interpretation of the Council's structure. Thus, obtaining an understanding of the various perspectives on the body's purpose is a vital preparation measure for structural reformation negotiations.

Shifts in the perceived purpose of the body can be seen in the evolution of the CHR and the Council. The body has served three purposes to date. Initially, the CHR was a standard setting body which was more concerned with cooperation and assisting states in their efforts to better their human rights record. The CHR then began to take on a supervision purpose. This shift in the perceived purpose of the body was marked by the 1235 and 1503 procedures, at the end of the 1960's. While the body was never completely confrontational in nature, the CHR became a body defined by supervision of state violations. The third perceived purpose of the Council, which was the most commonly held position in this research, entails a combination of supervision and cooperation.

The 1235 and 1503 ECOSOC resolutions were an ambitious attempt to protect international human rights standards at the UN. Some consider the 1235 and

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1503 procedures the definitive mandate shift which politicized the CHR's work and stalled the momentum international human rights had generated. Others believe that the procedures marked the dawn of a new era of human rights applicability and enforcement, ending the days when human rights was merely a symbolic concept (Yeboah, 2008: 80). For better or worse, the CHR and Council have not abandoned the role of supervising country specific situations, nor has the body deserted the role of country support and assistance.

Distinct differences in the perceived purpose of the body became evident during CHR reform negotiations. The stance which individuals maintained during negotiations was reflective of a desired vision of the role of the Council. Stances on the role of the CHR ,which was manifested by the position taken on membership composition and criteria, represented a larger North/South division (Yeboah, 2008: 82). The one consistency that did appear was regional solidarity in which approach states favored. This can be attributed to the idea that the spectrum of stances on the purpose of the Council is the result of cultural differences (Jimenez Interview, 28 April 2009). During discussions, the North tended to support increased state supervision while the South emphasized the need to remain supportive and conduct cooperative dialogue.

During reform negotiations, states from the North advocated for an exclusive-elite membership system combined with increased Special Procedures and country specific resolutions (Yeboah, 2008: 84). Such a supervision based structure would promote accountability and oversight of states with atrocious human rights records. Conversely, regions which advocated for more inclusive membership during the CHR reform, envisioned a Council that would be based on supportive dialogue and cooperation. Margaret Ferrari, who spoke on behalf of CARICOM, explained that her region envisioned an all inclusive Council which ought to serve as "a vehicle for the promotion of genuine cooperation for capacity-building and for mutual assistance" (A/60/PV.72). Delegations which supported a Council based on support and cooperation, adamantly campaigned to discredit confrontation and state supervision.

Many state representatives argued that the ability to confront and criticize specific states was the very characteristic that was undermining the work of the CHR. The Asian group was particularly opposed to the confrontation being attempted by

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Western states, which had not promoted consensus building (Jimenez Interview, 28 April 2009) Chinese Ambassador Zhang Yishan, pushed for the termination of country specific resolutions as they were the source of political confrontation, " which was a chronic disease of the CHR" (A/60/PV.72). Pakistani Ambassador Munir Akram, spoke broadly about the problematic environment at the CHR by stating, " the actual problem of the CHR was not its flawed membership composition but rather the confrontational atmosphere that characterized its work" (A/60/PV.72).

During structural reform discussions, many things are up for debate and can be negotiated to some extent. However, the purpose of the Council has been non-negotiable. The perceived purpose of the UN's human rights body is a highly divisive issue that will continue to accentuate regional divides and cultural differences. Furthermore, the position held on "supervision or cooperation" determines the structure that particular delegation will advocate for. For this reason, it is necessary to examine the strengths and weaknesses of each approach and provide insight into what structure compliments each perceived purpose.

## 4.2 Supervision

Most interviewed sources felt that a truly effective UN human rights body is one which can effectively respond to pressing human rights crises. Unfortunately, the one are where the Council is absolutely failing is in its response to emergency violations which should be urgently addressed (Rivero Interview, 29 April 2009). Those who promote supervision capabilities do not feel that the Council should be exclusively based on supervision. Rather, those who emphasize supervision, feel that the usefulness of the Council is limited to its ability to address real world human rights situations. This section presents the case of delegations which seek to create a Council whose primary purpose is supervision and condemnation.

To date, the Council has confronted and condemned three countries, North Korea, Myanmar and Israel. The resolution which was originally intended to confront Sudan actually praised the Sudanese government for its cooperation. The declining human rights situation in Somalia was determined to be a matter of "technical

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consideration"(UN Watch Eleanor, 2008c: 3). More concerning, is the large number of states which received complete impunity. The history of confronting states based on human rights violations is recent but, the opposition is quick to point out marginal record of supervision efforts. One empirical study by Emilie M. Hafner-Burton who conducted an analysis of the relationship between global naming and shaming efforts and governments' human rights practices for 145 countries from 1975 to 2000, found that "governments put in the spotlight for abuses continue or ramp up some violations afterward, while reducing others" (Haffner-Burton, 2008: 689).

Supervision antagonists point to the failure of confrontational measures to produce any legitimate results to date, as reason enough to abandon such an approach. Providing empirical evidence to support the idea that country-specific resolutions have affected the number or severity of violations in given situations is difficult. However, the behavior displayed by states under scrutiny suggests that governments feel threatened by potential condemnation. Council appointed country experts have come under attack by states which possess marginal human rights records (Yeboah, 2008: 84).The amount of time and effort that was invested by states to end the mandates of Permanent Experts for Cuba and Belarus demonstrates the idea that states are threatened by these experts. Though these independent experts are only able to condemn these countries, it is obvious that these efforts to expose state violations do impact the thoughts and behaviors of governments.

Supervision has, thus far, not produced noticeable results in terms of human rights situations on the ground. However, supervision proponents believe that the shortcomings heretofore are not reason enough to abandon the approach. Adversity is to be expected in the process of creating a Council founded on state to state supervision. The struggle to expand supervision capabilities is a worthy one, as supervision is the only avenue to accountability (Roth, 2009: 10). Advocates of supervision believe that the Council could one day criticize governments, who will accept and respond to the criticism as legitimate discourse.

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Credibility is paramount when confronting governments about their human rights record. One Western Ambassador believed that condemnation from a credible Council would be an enormous tool to hold countries accountable for their actions, but that situation does not exist today. The January 12, 2009 resolution investigating Gaza provides an example of a potentially useful effort which became highly politicized and ultimately useless. The resolution accuses Israel of violations and requests further investigation but fails to provide legitimate evidence. The investigation also focused exclusively on violations committed by Israel and dismissed other violations in Gaza. A thorough investigation into the events in Gaza would be beneficial for all those involved by separating facts from propaganda. However, the well-respected lead investigator received a mandate that made producing a credible report impossible.

If the Council is able to overcome its credibility deficiency, Council members must then determine the most effective supervision style. State, and non-state sector interviewees who supported supervision felt that foreign policy ought to be focus of scrutiny. Foreign policies focus on state interaction with the international community while simultaneously protecting domestic interests. Because member states are not deliberately addressing issues considered “domestic”, the Council is able to confront state behavior without directly imposing on state sovereignty. This tactic makes supervision a viable practice as it caters to the realities of international relations. Given the imperviousness of state sovereignty, even “diplomatic” initiatives to address domestic issues are impractical.

A Council which seeks to confront and promote accountability must possess a specific structure. As the CHR and Council’s record has displayed, the effectiveness of supervision initiatives will be limited if the body has an emphasis on inclusive membership and includes states with poor human rights records. A structure conducive to supervision is one that has elite membership, including only states that have exceptional human rights performance records (Jimenez Interview, 28 April 2009). A body composed of a minimal number of dedicated states reduces politicization and increases the ability to reach consensus. Members of the Council

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must display a great amount of political will. States must be willing to address their own domestic human rights issues and must provide unprecedented transparency. Furthermore, as credibility is vital for a supervision based body, members must be reviewed and scrutinized to ensure that states are criticizing friends, neighbors and opposing governments proportionately.

## 4.3 Cooperation: Emphasis on Standard Setting and Capacity Building

Those who campaign for a Council that is strictly non-confrontational do so for two basic reasons. Firstly, cooperation advocates feel that supervision is not a plausible practice, and ultimately has a harmful effect, given the international political environment and the lack of global consensus on various human rights records. Secondly, supervision has never been the role of the Council in the UN system and, because the Council lacks any short term protection mechanisms, assistance is the only viable way to promote human rights at the Council.

The OIC adamantly supported the abolishment of all country specific initiatives during the CHR reform process. The OIC's focus on Israel does reveal a double standard in their stance. However, the OIC has openly declared that its member states will continue to resist all initiatives that are not purely thematic (UNGA, A/59/847-E/2005/73: 6,7). OIC and NAM's resistance to supervision has created a Council *modus operandi* of cooperation and assistance for repressive governments. Collective action is given priority at the Council, as a result the EU and other state pushing supervision based agendas are forced to conform and focus on cooperation. The trend to favor cooperation over supervision also reflects the fear possessed by states which, believe that aggressive behavior will result in the focus being redirected towards them and thus, remain silent.

Many interviewed sources agreed that the most viable way to improve the work of the Council is to improve on cooperation based initiatives which have produced results. Thematic resolutions assist in the development of human rights standards which can then be applied to national bodies. Furthermore, through thematic procedures states can advise one another on how to amend national

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legislature and court decisions without being received as confrontational (Vega Interview, 15 May 2009). Cooperation based initiatives can be advanced through simplifying and facilitating the ability to raise new issues. Further developing thematic procedures will allow member states to assist one another. However, this is not the only avenue by which states can promote and protect human rights while remaining non-confrontational.

The most effective form of human rights advocacy and promotion is that of leading by example (Roth, 2009: 3). Governments who want to address the human rights records of other states can do so by improving their own domestic human rights performance. The most important entities like the US, Japan, China and the EU can change the face of international human rights by displaying a genuine commitment to standards in their own territories and foreign policies (Knoblauch Interview, 29 March 2009). Effective national systems provide a framework by which regional and later universal human rights bodies can be structured and guided by. States and regions can also maximize efforts to display the security, economic and social benefits that result from a commitment to domestic and international human rights.

One academic from Asia said "…[beyond adherence to human rights in their own states] states should be aware of the context which they are navigating and apply either friendly or confrontational diplomacy based on their surroundings." Members of the international community have recognized the increased importance of cooperation in the effort to recover from the ongoing international war on terror. The CHR Review Panel cited in their official report, a need for mutual support and assistance, "especially in countries emerging from conflict and in the fight against terrorism" (UN Secretary General High Level Panel, 2004). States have recently began to address the North / South divide that was amplified by the US led offensive which, resulted in gross human rights violations in the name of national security. The Obama Administration has recognized the counter-productiveness of the Bush Administration's confrontational policy of disengaging and condemning the Council, and its members. The Obama Administration has since sought membership as a means of altering the behavior of states using cooperation with other Council members.

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The concept of friendly diplomacy and supporting states as a means of improving their human rights records is considered by some to be the best approach but, others go further, designating that it is the only viable option. A number of independent individuals and delegations support an exclusively cooperation based Council because the body is not capable of providing short term protection and, supervision is not the purpose of the Council in the UN system. The Council does have standard setting, promotional, educational and symbolic importance. However, only the UN Security Council is capable of providing short term human rights protection (Forsythe, 2008: 2). The UN Security Council can provide legally binding decisions and sanctions, without these capabilities condemnation is nugatory.

Many academic interviewees supported cooperation, because it has historically produced results at the body and it adheres to some of the fundamental principles of international relations. The CHR was primarily engaging in "long term education/socialization of states concerning the importance of human rights" (Forsythe, 2008: 32). The discourse that takes place at the Council and preceding CHR may have a significant impact over time. As one western academic interviewee provided, "Nearly every government in existence has expressed a rhetorical commitment to human rights and humanitarian principles. The fact that this commitment is often only rhetorical should not lead us to believe this is not a significant advancement." The increase in human rights and humanitarian law language being adjudicated pays testimony to the usefulness of non-confrontational deliberations at the CHR and Council. Only through cooperation can the Council gain an understanding of where states and regions stand on various human rights issues. Member states can then begin to work to develop human rights standards within the context of global politics. The constructivist theory of international relations is founded upon the notion that the ideas and values developed during cooperative discourse at the Council effect the national interest and political views of states (Forsythe, 2008: 5). The positive impact that cooperative discourse has had on the development of international human rights prompts an examination of structures and practices which may maximize cooperation based efforts.

The structural benefit of a purely cooperative body is that essentially any composition can succeed. If the body's mandate dictates that only thematic issues can

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be discussed, politicization will likely be minimal. This is due to the fact that states will no longer be on the defensive as offensive state human rights record cannot be scrutinized. As the purpose of a purely cooperative discussion based body is to draft resolutions that reflect an international governmental perspective, a more diplomatic composition will likely be considered more credible. Elite membership may be the weakest composition option as the body's work may be coined undemocratic and elitist. Conversely, more universal membership, namely universal membership, will reflect a wider demographic of states possessing various levels of capabilities. Thus, a cooperation and assistance based body will be most credible if each country is involved and given an equal voice.

One interviewed NGO representative from Geneva felt that the continued development of human rights standards mechanisms at the Council requires "…an environment where every state has an unfiltered voice. The filter refers to both literal points of order, and implicit fear that there may be repercussions if state's take up controversial issues." Civil society interviewees agreed that the key to successful discourse is a mandate which is all inclusive in terms of what thematic subjects may be discussed. If the mandate excludes thematic issues regional and political alliances will continue to work to exclude issues which are not consistent with their own interests and agendas. The Council has recently tried to limit the scope of discussions of religion however, without absolute open and frank discourse the development of new human rights issues will be restricted.

Individuals who are opponents of a strictly non-supervisory Council provide formidable insight as to why some states and alliances are strong proponents of pure cooperation. States oppose supervision because it creates a pressure filled environment which makes productive dialogue difficult, if not impossible. Kenneth Roth, executive director of Human Rights Watch, captured the position of most interviewees who felt that accepting anti-supervision proclamations from states, "…falsely assumes that all governments have a good-faith desire to respect human rights, and commit abuses only because of a lack of technical capacity which cooperative assistance might remedy" (Roth,2009:24). Interviewees agreed that in most cases governments deliberately and systematically violate human rights. Thus, abandoning all supervision capabilities does not properly address the majority of state

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abuses. The range and reasons of state violations suggest that the most appropriate approach may be a combination of supervision and cooperation.

## 4.4 Combination: Balancing Supervision and Cooperation

The Council and its predecessor possess capabilities that allow the body to promote respect for human rights globally, foster international cooperation, respond to specific state violations and assist countries in capacity building in relation to human rights (UN Secretary General High Level Panel, 2004). Such an ambitious list of tasks reflects the development of human rights as an authoritative concept at the UN and, the ability of states who advocate supervisory mechanisms to negotiate with states which oppose supervision. Former Secretary General Kofi Annan equally praised the CHR for its standard setting accomplishments and its development of a system which observed and analyzed human rights compliance by states (A/59/2005). Thus, despite the questionable effectiveness of supervisory efforts to date, the ability to both assist and supervise states is seen by many as a victory for international human rights.

Interestingly, very few academic efforts have focused on why a body that is evenly cooperative and supervision may be the best approach. This may be attributed to the "take it or leave it" approach adopted by most stakeholders, whether they be state or non-state actors. Supervision and cooperation are often discussed individually suggesting that the current approach appeases advocates of both sides. That is, the current structure enables states to confront one another without violating state sovereignty. However, a number of interviewees suggested that the current distribution of supervision and cooperation is not only a compromise, if utilized properly it is an ideal allocation.

Those interviewed agreed that there is no correct equation for the distribution of supervision and cooperation capabilities. R.J. Rajkumar stated that "…we know that there is no elusive equation which can be used to form the perfect Council." Instead the Council ought to be looked at as a tool and, in terms of approaching each situation individually to fit the circumstances the current structure is paradigm (Jimenez Interview, 28 April 2009). An effective body is able to; cooperate in situations where countries are overwhelmed and display genuine knowledge and

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resource issues, confront governments in cases of systematic repression, and apply a combination of both in certain situations. One NGO representative from Geneva pointed out that the Democratic Republic of the Congo is an example of a country where a combination of supervision and support needs to be implemented to properly address the situation.

Examining the perspectives of most interviewees leads one to conclude that the current distribution of cooperation and supervisory capabilities creates opportunities and in no way inhibits efforts. Hence, any limitations at the Council results from poor implementation of the body's mechanisms. That is, the Council possesses the tools needed to address situations of concerns but, member states have failed to collectively utilize the tools. However, examining the literature reviewing the CHR reform process reveals a different perspective. When states and independent experts were asked about the prospect of expanding country specific procedures, many warned that too much focus on addressing country violations would diminish the thematic efforts (Yeboah, 2008: 90). Protecting thematic procedures has been given priority because these efforts have provided substantive results.

Determining which structure is hypothetically most conducive to a balance of cooperation and supervision is disputable. While many believe that supervision and cooperation are both needed to properly address human rights international, many possess concerns over the plausibility of such an approach in any structure. The mandate must be structured to ensure that thematic procedures do not take a back seat to efforts confronting specific state violations. In terms of composition, the most appropriate membership system may be one similar to the current structure of the Council. Theoretically, the current member distribution and election system should exclude states with weak human rights records as the voting promotes seat competition within regions. Furthermore, the number and regional distribution of seats is semi democratic, as it somewhat reflects global demographics.

The Council's performance to date suggests that there is significant room for improvement in terms of being effectively cooperative and supervisory. As discussed above, an elite membership may be conducive to more efficient and effective state supervision but, may struggle with thematic initiatives because of undemocratic representation. Conversely, universal membership harbors credible

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standard setting discourse and capacity building efforts while, supervision efforts will fall subject to politicization. One may conclude that the best structure may be one that is similar to the current structure with increased exclusive qualifications to ensure that the spoilers cannot obtain membership.

When examining the perceived purpose of the Council, two things become apparent. Issues relating to the desired purpose of the Council have not received ample academic attention and, the international community would benefit from an open-liberal discussion in a formal setting where both state and non-state stakeholders are included. To date, states and alliances have taken rigid stances on the desired approach which the Council should maintain. Consequently, reform discussions have remained highly divisive as cultural divides in perceived approach have not been approached.

One Western academic interview felt that unless the international community addresses and discusses the disparity in notions of what the Council is in, or should be in, place to do, future structural reform discussions will be futile. If Western NGOs and states, which advocate supervision initiatives, publicly express concerns that a purely cooperative Council would grant violating states virtual impunity and rollback the progress of universal human rights at the UN, then the foundation for discussions is provided. This may prompt states and individuals who feel that strict cooperation leads to more efficient consensus building and, is more conducive to the realities of international politics, to present their case. The groundwork is laid where a cumulative discussion can emerge. This encourages states and organizations who want to see a certain distribution of cooperation and supervision to provide insight, and in some cases empirical support, into why a given approach is appropriate. Through discourse, stakeholder in and around the Council could properly prepare for structural reform and, gain an understanding of the direction of human rights within the UN and, in specific regional and cultural contexts.

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# CHAPTER V
# TOWARDS THE 2011 REVIEW

A primary purpose of this research is to act as a useful tool for those preparing for the 2011 Council review, and future structural reform considerations. As such, the research gathered information on the specifics of the 2011 review and deliberated with interviewees to provide suggestions on what things could be done to make the 2011 review a success. This chapter will also present a number of gathered proposals which seek to change the nature of the Council without reforming its current structure. Looking forward to 2011 and other future reform discussions is a way to display how the knowledge gathered from the body's history and recent performance can be utilized.

## 5.1 Looking Forward to the 2011 Council Review

The UNGA Resolution 60/251 designates in paragraphs one and sixteen that the body shall undergo a review within five years of its inception. In the resolution few details were provided outside of the fact that the review will be conducted by the General Assembly. In reviewing the CHR reform process it becomes obvious that many actors involved in the process were underprepared. The research found that the questionable nature of the 2006 reform process has made state representatives and members of civil society alike apprehensive the upcoming review. Thus, understanding what will likely take place in 2011, as well as what is needed to make the review a success, assists NGOs and states alike to sufficiently prepare.

### 5.1.1 2011 Process Outlook

The General Assembly recognized that the Council which was to be created represented the best possible compromise given the circumstances which surrounded the formation of the body (Yeboah, 2008: 79). Thus, the 2011 review serves two purposes. Firstly, the review will allow states and regions to resume

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debates regarding the details and nature of the Council. As discussed earlier, these discussions were limited due to the fact that the CHR had been terminated before the Council had been created. Secondly, the five years allotted would give new mechanisms, namely the UPR, and other minor reforms a chance to develop. The idea that states announced a scheduled review before the Council had begun its work affirms the recognition of fundamental weaknesses in the Council's structure. As many interviewees noted, the preemptive nature of the review is promising as it indicates that the review will be substantive. As one foreign policy expert stated in an interview, "reviews are often formalities which are undertaken to appease critics, this scheduled review is obviously something more."

One detail of the 2011 review which has been established is the location of discussions. The review will take place in New York as this is where the General Assembly is located. State and non state actors shared concerns about this scheduled venue. Not only is Geneva the home of the Council, it is the de facto human rights capital of the world. Holding the review in New York eliminates the human rights element and ensures limited involvement from NGOs and other non-state stakeholders. Furthermore, interviewees from all sectors expressed fear what will begin as ambitious reviews and reform discussions will quickly become divisive political negotiations.

Interviewees who will themselves be involved in the reform discussions predict a lengthy process. This is necessary information to possess in order to properly prepare for the scheduled review. The sources pointed to historical references and current events as justification for their belief that the review will be long and complex. In terms of historical lessons, institution building efforts dominated the Council's docket for the entire first year. The first year was indicative of member states' willingness to dedicate the whole of their resources to building the system in which they will operate.

Historically, institution-building work at the UN has been exhaustive. The political environment leads to extremely complex deliberations. One source noted that member states have proved that they favor protracted drafting and structuring efforts as they want to ensure that all potential ramifications have been evaluated. The same source went on to point out the conviction of states whose political positioning is in

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jeopardy. Additionally, the CHR reform process displays the way in which states prolong institution building efforts as a means of avoiding more pervasive work.

Interviewees agreed that the current international political environment is such that the only discussions which succeed are those which address pressing issues. One source designated that while this is a review of the Council's structure of mechanisms, the body itself will likely be the last thing discussed. "States will want to talk about the War on Terror, the economic crisis, North Korea, Israel, religion and Iraq before they address things like the regional appointment process." Thus, the review must be structured in a manner which allows for these discussions or strictly prohibits discussions which are not related to the structure of the Council.

State actor interviewees provided useful insight into what structural elements will be focused on by states. A number of Western state representatives focused specifically on the UPR. They felt that the UPR has proven to be a useful tool but, it has also revealed fundamental flaws which need to be fixed. Western state representatives went on to reiterate the importance of taking steps to ensure that the Council is not hijacked by the worst human rights abusers, as is currently the case. The one thing that became very clear during the research is that states are taking this review opportunity very seriously. US Ambassador to the UN Susan Rice highlighted this in her remarks:

> "Obviously there will always be some countries whose respect and record on human rights is sub-par; we have not been perfect ourselves. But we intend to lead based on the strong, principled vision that the American people have about respecting human rights, supporting democracy. We look forward to the review that is coming up in 2011 as an important opportunity to strengthen and reform the Council" (Rice, 2009).

Involvement of civil society in the review process is uncertain and a source of concern. The General Assembly resolution gave no specifics in terms of the review process. This effectively warranted states the ability to determine the specifics of the process, including which actors are included. In the past, NGOs have been completely left out of policy decision making process at the CHR and Council. Interviewees from NGOs noted that, "Civil society has not began to put the blocks in place and this will probably begin following the 2010 elections." Further complicating

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the involvement of NGOs is the recognition that organizations are not a united front, they face the same difficulties in reaching consensuses as states do (Jimenez Interview, 28 April 2009).

### 5.1.2. Making 2011 A Success

Speculation regarding the nature of the 2011 review exposes the recognition that very little about the process is fixed. Thus, there is ample opportunity to advocate for specifications. Interviewees provided insight into what guidelines must be implemented in order to ensure that the review process is organized and productive. Every interviewee emphasized the need for oversight throughout the process. Sources noted that in order to provide the necessary supervision, there needs to be the appointment of an autonomous supervisory body and a plainly worded regulatory document. One organization representative working in Geneva indicated that this supervisory document must clearly outline, "who will be involved, who will speak and when, what topics will be discussed and what topics will not be discussed, and what conduct is strictly prohibited."

Many civil society interviewees were adamant that the discussion which occurs at the review must possess certain progressive characteristics to be considered uniformly legitimate by both NGO, academics and many states. Interviewees noted that the knowledge of what characteristics must be present in order to generate productive discourse is the result of past failures not successes. For instance, the past Durban conferences have been marked by rivalry and competition between states and agencies. The competition created a hostile environment where maintaining civility was more important than producing outcomes (Rajkumar Interview, 3 June 2009). A very important element of the review is its hastiness. One Western Ambassador exemplified a point which was emphasized by many when he described this review as a review where states can discuss reform without fearing instant implementation of proposals. The Ambassador went on to clarify that if the review is considered an attempt at quick fixes, all usefulness will be lost.

Many non-state actors included a list of what issues must be topics of discussion at the review. As Roy Brown proclaimed, "Any review must revisit the question of the criteria of membership.". Other interviewees felt that priority should

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be given to reforms which would not require significant systematic change. For example, Professor Connie de la Vega felt that the review was an opportunity to build on some of the positive work that has come out of the special procedures by "giving them more support through increased staffing and mandates" (Vega, 15 May 2009). Rudolf Knoblauch also held the position that the most productive topics at the review may actually be those which do not deliberately challenge the current structure. He provided examples including, the organization of debates and the role of civil society and the media (Knoblauch, 31 March 2009). Also, many state and non-state interviewees were adamant that this review would be the venue at which the pressing issues of the autonomy and authority of the OHCHR and the reinterpretation of the freedom of expression will be addressed.

Interviewees suggested that the manner in which state and non state actors approach the review is more important than any procedural or structural element of the review process. Those involved in the process cannot treat this review as a formality and revert back to casually talking about improving state commitments to human rights. Instead, those involved need to recognize that reform is the only means of addressing weaknesses. Further, reform is the only means to explicitly adjust the path of the Council and neutralize, and potentially reverse, deficiencies (Rajkumar Interview, 3 June 2009). It has been noted throughout the research that interviewees were concerned about recreating the protection gap which was the result of institution building efforts during the first years of the Council. However, as one academic interviewee provided, discussions must remain liberal and open, "it is too early to focus on the limitations of reform, we must remain simultaneously realistic and opportunistic."

Many interviewees adamantly clarified that the key component to a successful review process is the recognition that the circumstances are different. The Obama Administration of the US along with many other western leaders have renewed their commitment to human rights. States have expressed a willingness to openly discuss issues surrounding the "war on terror". The right to development has created a massive shift in regional relationships (Jimenez Interview, 28 April 2009). Further, interviewees noted promising trends to transcend regional and political divides. Thus, the stage is set for successful reform discussions if those involved in

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the process can: formulate a structure conducive to altruistic and liberal reform discussion, fight the inclination to attempt a quick fix, overcome the fear of change, minimize the influence of politicization by monitoring politically motivated actions, and avoid the general obsession with limitations.

## 5.2 Non Structural Variables

This research was primarily focused on the structure of the Council and the potential for structural reform to positively impact the Council's work. However, during the research process interviewees provided various proposals to improve the Council's efficiency and effectiveness without directly addressing its structure. Many of these proposals dealt with the manner in which we idealize the Council and how this conceptualization results in strategy. This section will briefly look at how we ideate the nature of the Council, proposals to redirect efforts of non state actors, and the involvement on new states as creating new opportunities.

Interviewees provided some distinctions in how we ought to conceive the Council's and how doing so may change the chosen tactics. Many interviewees, with experience working around the CHR and Council, pointed out that, when states begin to group they are no longer individual states and must be dealt with accordingly. As Cecilia Jimenez provided, "NGOs can campaign individual states all day but if they are unable to lobby the mentality of the blocs as a whole, their potential to impact the situation is limited" (Jiminez Interview, 28 April 2009). Another misconception, which interviewees described as a disconcerting practice at the Council, was that of non engagement. States and organizations have on numerous occasions opted to ignore member states, or the Council as a whole, in an effort to discredit their action. Interviewees noted that this is making an assumption about states at the Council which is not always accurate, they are assuming that states genuinely care. Instead of states receiving this tactic as punishment, states have accepted it as impunity. This suggests that active engagement may be most important in cases involving the worst violators.

Many scholars interviewed felt that the most concerning practice surrounding the Council was the tendency to magnify the negative. As one academic bluntly stated, "The practice of elaborating on state actions which are obviously anti-

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human rights not only gives these diplomats the attention they seek, it deteriorates an already pessimistic perception of the Council." The interviewee went on to state, "The people who follow the Council are not stupid and they don't need to be told what is right and wrong." Other interviewees agreed, emphasizing the usefulness of focusing on the states which seek to mobilize the victims while letting other behavior speak for itself. This viewpoint comes into direct conflict with the emphasis on shaming which is promoted throughout the human rights community but, it should be given further consideration. Dr. James Gomez legitimized this idea by pointing to the positive advancements of democracy in Asia as a result of effective promotion rather than efforts which attempted to discredit other forms of government (Gomez, 2009: 1).

### 5.2.1 Redirect Non State Actor Efforts

Proposals to redirect the efforts of non-state actors were favored over structural reform which is considered complex and difficult. Numerous NGO sector interviewees noted that non-state agents were more willing and able to adapt than states or systems whose behavior is quite fixed. Because the efforts of non-state actors are intended to impact the behavior and actions of states, different strategies provide a means by which to change the way states perceive and approach situations. One such proposal included efforts focused at forging new regional relationships.

Sources focused on the concept that while states may be able to embrace cross-regional bi-lateral and multi-lateral relationships, whole regions have not learned how to navigate one another. One academic interviewee felt that civil society could play a useful role in helping regions understand one another, which in turn assists regions in navigating one another. The research also identified the concept that NGOs could work to create new alliances, which would require creativity but may not be altogether impossible (Jimenez Interview, 28 April 2009). Furthermore, there was recognition that civil society could work to change current regional relationships. Examples of this would be; advocating separation between Ghana and Zambian from Algeria, and Philippines and Thailand separation from Burma and Vietnam (Roth, 2009: 26).

The research has made repeated references to the polarization of NGOs. These divisions must be addressed. State, regional, thematic and intra-thematic

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polarization is exactly what states desire and promote (Rajkumar Interview, 3 June 2009). NGOs have the ability to counter political alliances, transcending North/South divides and economic, social, and cultural rights, and civil and political rights (Rivero Interview, 29 April 2009). However, NGOs will only be able to promote states with a united front if they undergo a comprehensive self assessment, which many interviewees believe is long overdue. One state actor reiterated that state and non-state power relations are very important, but no more or less important that the power relationships between NGOs and their donors.

This research recognized a trend towards promoting efforts which seek to create a different type of engagement with and within governments. For instance, civil society members operating in states which are actively trying to promote human rights at the Council ought to call on their governments to mobilize the civil society of other nations. This could be done by helping journalists, academics and NGO representatives of the target state get to Geneva and New York (Roth, 2009: 26). Another approach of civil societies in all states is to further engage the debates which are taking place at the national level (Rajkumar Interview, 3 June 2009). NGOs could work towards increasing media coverage of domestic issues, and engaging NHRIs to further develop national human rights mechanisms.

The constructivist theory framework does not appear to be consistent with the proposal that the behavior of one state could somehow change the efficacy of the Council. However, examining how the US could shift the direction of the Council reflects the presence of a mutually reinforcing interplay between the structure and the agent. The US's ability to change the direction of the Council is based on a behavior adjustment process. That is, the US will not attempt to change the structure itself rather, the US will change the way it behaves within the structure. By utilizing the Council's structure in a certain manner the US is setting a precedent or providing an example of how states could, and as many interviewees suggested should, utilize the structure of the Council. This then sets in motion a process by which the behavior may become normative and the structure will provide a heightened level of genuine usefulness and guidance without undergoing any substantive changes.

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### 5.2.2 US Involvement

One key finding of this research was the enthusiasm displayed regarding the Obama Administration's ability to fundamentally change the nature of the Council. As Juliette de Rivero stated, "The most pressing and changeable issue at the Council is polarization and the lack of positive leadership. US turning its back on the Council gravely affected the Council. However, the US has the ability to contributed to changing the dynamics of the Council as it is not an EU block state and it unilaterally yields significant influence" (Rivero Interview, 29 April 2009). After recognizing the trend of interviewees referring to the importance of the US's involvement, the research pursued numerous US agencies. Furthermore, insight was gathered from interviewees to gain an understanding of how US involvement changes the current dynamics, and to understand what approach or behavior should be adopted by the US from the perspective of international agents.

Understanding what the Obama Administration brings to the Council and international human rights is important as it may change traditional thinking about the limitations of the body. After deliberating with US and international sources, the research concluded that the current context of the US is unique. The US is a Security Council member and is considered by many to be the hegemonic power whose reach is limited to its own foreign policies. The US is re-entering the human rights regime as a documented offender. Simultaneously, the US is operating under an administration which has vowed to become the global leader which revamps the potency of the UN human rights architecture (McDonald, 2009).

The Obama Administration has not been hesitant to renounce the Bush Administration's policy of disengagement. US Ambassador Rice proclaimed, "We do not see any inherent benefit as demonstrated by recent history in being outside the tent and simply being critical without having significant influence" (Rice, 2009). But, the question of whether or not the US is prepared for what lies ahead at the Council is undetermined. To date, the administration has taken steps towards alleviating its illegal practices surrounding the "War on Terror," and has made efforts to reach out to the governments of the South. Regardless of the promising changes the question remains, does Washington possess the political will and wherewithal to change the Council?

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Interviewees from all sectors who focused on the US involvement agreed that if, and only if, the US operates in a specific manner they may have a sizeable positive impact on the Council. The research gathered a plethora of perspectives, both US based and international, and from state and non-state actors. There were many consistencies, in terms of what the US should be prepared for and how they should react. Thus, this research was able to conclude on, and provide, a series of expected events and desired outcomes. The following paragraphs are not the author's personal view, rather these are conclusions (derived from commonalities and trends in the information) based on insight gathered from interviewees from all sectors and all regions.

This research proposes that if the US adopts a position never seen before at the Council, then unprecedented change may follow. Firstly, a number of interviewees proposed that the US appoint a credible human rights expert rather than a trained diplomat, as state representative. If the US must expects, accepts and promotes a discussion of its own past violations and provides unprecedented transparency through discussions, then the groundwork will be laid for genuine investigations into state violations. If the US engages in thematic discussions and standard setting efforts without reverting back to personal issues throughout the process, the US will set a new standard. It is important to note that during this process, the US will also be forced to engage in discussions about Israeli violations in the OPT, which are ongoing and unavoidable. If the US does not try to block these efforts and goes further to promote the discussions and work to only criticize arguments which are clearly biases and are counterproductive, then the US will be able to credibly challenge states which protect their allies from scrutiny.

If the US operates correctly, it will be recognized by its partner members at the Council and throughout the international community as promoting a pure and open stance on human rights. At this point, the US can begin to work towards state accountability for violations. Because the US possesses the political position that it does regions and states will naturally feel threatened and defensive. Many believe that US would benefit from a soft approach, which works to address and then assist governments in efforts to better their human rights records. Through holding itself, its allies and ultimately its neighbors accountable, and calling for cooperation, the US

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can change the working trends at the Council. It is also important to note that the US can use these discussions as negotiation tools in the Security Council and elsewhere, where real power is yielded. The US has the opportunity to set the tone for harboring Council oversight which leads to actual change on the ground. The process may be long and painful but, the end is possible even if only in a limited number of cases.

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# CHAPTER VI
# CONCLUSION

This research has presented a compilation of perspectives from state and non-state stakeholders who have various relationships with the Council. The structural framework of the Council provided the foundation on which the research investigated the current state of the Council and the prospect of change. The research was not based on any one argument or position. Thus this research did not produce any one finding, rather what emerged was a number of specific findings which have been largely unaddressed and deserve further consideration. While it would be pretentious to suggest that any one analysis of the presented material is sufficient or any more relevant than an alternative analysis, this chapter reflects upon the research process and findings to present some concluding observations.

When reviewing the body's history of reformation, which has been ongoing since 1947, it is revealed that the reformation of the body's structure has always been reflective of the international political landscape of the time. Despite the many changes that have occurred since the founding days of the Commission, the international community has yet to conduct a comprehensive review of the body as well as an examination of where the Council could, should and is headed. The absence of a sufficient evaluation of the Council is reflective of the overall discourse surrounding the Commission and Council, which is fundamentally incomplete. This may be attributed to an absence of scholarly attention or an obsession with accentuating state failures to promote and protect human rights. But it is the position of this research that unless the international community recognizes the importance of the Council's structure, the true potential of the Council will never be realized.

This research challenges the apparent resistance to holistically adopt the notion that the constructivist theory framework is relevant to the context of the Council by proposing that the constructivist approach is relevant to nearly every component of the Council. That is, nearly all substantive criticisms that exist in

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relation to the Council can be traced back to some kind of shortcoming in the Council's structure. The research noted that reforms made to the structural components of the Council all have merit and may improve the Council efficacy and efficiency. However, it is important to note that the structure of the Council is comprehensive. Thus, addressing shortcomings in the membership structure without addressing issues surrounding the Council's mandate, working procedure or status fails to sufficiently address the existing structural problems. For this reason it is important to be aware of tendencies to give priority to certain structural issues, namely membership/composition, as this may inadvertently dismiss the importance of other structural issues. This attention to detail and constant awareness will prove to be progressively important as the 2011 review of the Council approaches.

In the process of preparing for 2011 state and non-state actors will be forced to make calculated decisions regarding what position they will take in relation to each structural issue. As a means of summarizing and analyzing the covered material, this research attempts to simulate the preparation process by presenting and justifying a chosen position in reference to the major structural reform issues. The importance of viability was referenced throughout the research, thus plausibility of various proposals significantly influences the decision making process. Furthermore, each proposal's ability to simultaneously transcend regional, political and religious alliance is cumulatively evaluated in order to determine the best option.

Membership is the most publicly scrutinized element of the Council's structure, however this research found that the best structural reforms to the composition or membership structure may be those which are the most conservative. Substantive reform proposals deserve consideration for future reference but, in terms of the immediate reform the best proposals may be those which don't require any change in the number or distribution of seats. Instead of pursuing complicated negotiations with a minimal chance at succeeded, the research supports strong campaigns to implement the minimum negative criteria and minimal changes to ensure that regions must appoint at least three more states than there are seats allotted. The proposed negative criteria should take the form separating and blocking only the worst of the worst. Negative criteria which tries to somehow separate the good and the bad are misguided considering the recognition that there is some merit to having

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states which have much room for improvement. The main objective of the proposed membership reform is to ensure that those states whose human rights commitment is non-existent and who seek membership at the Council for the sole purpose of ensuring its ineffectiveness.

Whether or not the Council ought to be promoted to a principal organ is a divisive issue. Supporters of the promotion noted both symbolic and practical reasons for their position, while opponents stated that the Council is simply not ready for promotion and such efforts would distract focus from more pressing issues. The research concluded that while promoting the body to a principal organ may be something for which to strive, taking a strong stance in favor of making the Council a principal organ may not be the best approach given the current context. The logic behind the decision to advocate against a promotion had nothing to do with the question of whether or not the Council is ready. Rather, the decision to resist the temptation to push for status promotion was based on the recognition that promotion is not a pressing issues relative to other reforms.

An unpredicted issue which emerged to become a focus of the research was that of the various perceptions of what the Council is in place to do. The research found that the Council is polarized by states and regions which favor cooperation with and support of offenders, and those states and regions which seek to confront and punish violators. The divide relating to the perceived purpose of the Council is reflective of cultural norms. There is recognition that supervisory efforts have, to date, failed to produce results but, proponents of enforcement at the Council believe that this practice must continue to be pursued. The research concluded that both sides have compelling arguments and the best stance to take may be the middle ground. Many human rights advocates favor supervision as a means of accountability but, efforts to expand upon the current supervision materials may be misguided. Because supervision has failed to date the best efforts may be to attempt to maintain the current balance of support and supervision in the mechanisms and work to maximize the potential of the available mechanisms.

The research found that many state and non-state actors are satisfied with the Council's mandate in terms of content but, noted many shortcomings in the interpretation and utilization of the Council's mandate. Thus, there is a recognized

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opportunity to improve the Council by addressing mandate related issues. While the Council's mandate did not receive much direct scrutiny, this research concluded that mandate reforms may provide the necessary protection for independent entities operating at the Council. The research recognizes a need to implement mandate additions which designate that the Council has no ability to breach or in any way alter the independence of the OHCHR and its appointees. The OHCHR provides an independent counterweight to the Council and is in need of proactive protection which can be provided by mandate reform.

When it comes to the application of the constructivist framework to the dynamic political landscape of the Council, it becomes evident that some structural reforms may be more likely to produce immediate and substantial change than others. In this regard, the research concluded that working procedure reforms are both the most viable proposals and the most capable of creating immediate change. This research supports measures to control states behavior which may most effectively be done through the creation and implementation of a "state code of conduct", which a number of interviewees proposed. The code of conduct's main purpose would be to limit the ability of states to intervene and block discussions which they may find threatening which would effectively ensure that discussions at the Council remain open and unrestricted. This initiative is considered viable because it does not appear to fundamentally change the structure or capabilities of the Council. Further, a state code of conduct could be lobbied or promoted as a tool which would provide greater organization at the Council. The proposed code of conduct's implicit impact on the discussions, and ultimately actions, at the Council would be significant as there would be no opportunity to redirect discussions.

The research also discussed proposals that were not directly related to the structural reformation of the Council. The research concluded that the best way to make the Council more effective without altering its structure may be by reconsidering how the Council is utilized. The Council has been demonized Council for its inability to produce human rights discourse which meets the expectations of some members of civil society. But, the research concluded that the Council should not be expected to produce inspiring human rights discourse and guidance. Hence, the Council is considered a burden because it is not being utilized and publicized

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correctly. States are the agents which determine the implementation of human rights, therefore their voices must be heard to, if nothing else, recognize what needs to be done. The research proposes that the international community may benefit from treating the Council like a measurement tool which exposes the shortcomings in international human rights development. The shortcomings of the Council provide useful insight into what issues may need more considerations or which approaches may need to be modified. Thus, by embracing the Council's shortcomings, civil society may be able to strengthen and maximize the development of international human rights.

A perceived purpose of this research is to act as a tool for those who are preparing for the 2011 review of the Council. The research concluded that immediate action may need to be taken to ensure that the review is structure in a manner conducive to useful discussions. The first concern which needs to be addressed is the venue of the review. The research urges the international community to campaign for relocation of the review from New York to Geneva in an effort to maximize the involvement of the human rights community. Secondly, steps to establish the details of the review are needed to give states and civil society ample opportunity to prepare for the discussions. Finally, the international community can capitalize upon the changing context of international politics by recognizing that the context of the review are unique making the review all the more relevant. Given the involvement of the Obama Administration and the changing dynamics, states must be convinced that the review can be productive. Further, the research found that while the regional, political and religious blocs have paralyzed the Council, state and non-state actors which have accepted and adapted to these divisions are now beginning to challenge them which suggests that much can done around the review to effect the behavior or attitude of states and alliances.

The one concluding finding of the research is that the international community should not be overly quick about writing the Council off. The Council is still a toddler which is taking baby steps, sometimes in the wrong direction. But, this research has displayed that the Council is worth the trouble. As one UN official put it, the Council is the world, a mere reflection of the Member States and even though

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presently it is dealing with some difficult times, it will always continue to experiment (Yeboah,2008:94).

## RECOMMENDATIONS

1. The scholarly attention which the Council receives needs to increase. The frustrations which repel academics should be treated as that which we don't sufficiently understand.
2. Civil society and states should adopt a systematic mindset when preparing for reform discussions. There must be an understanding the structure and dynamics of the body, as well as recognition of the potential and limitations of reform.
3. States and civil society should advocate for a relocation of the scheduled venue for the 2011 review, moving the discussions to Geneva. Furthermore, advocacy should begin now in relation to the review process and a clear code of conduct.
4. The 2011 review should be the forum at which the international community discusses:
    a. The perceived purpose of the Council, including the strengths and weakness of cooperation and supervisory capabilities.
    b. How to reduce the technical nature of the working procedures and mandate, effectively reducing the chance for interpretation.
    c. The strengths and weaknesses of all membership reform proposal, regardless of viability in the current context.
    d. Practical and symbolic reasons for promotion of the Council to principal organ status.
    e. How to ensure that the OHCHR and Special Procedure mandate holders retain their autonomy and authority. Further, discussions should consider how to strengthen these actors.
    f. The Council's relationship with the Security Council, the Secretary General's office and regional human rights bodies.
    g. How to address the recognized weaknesses of the structure including; states ability to indiscriminately object or call a point to

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order, regional distribution disparities, regional voting processes and state impunity in UPRs.

h. Civil society should prepare for lengthy deliberations as state actors have expressed the desire to make sure that the review is not hasty. However, steps should be taken to ensure that a protection gap is not created, as it was during the CHR reform.

5. When states at the Council begin to group, states and non-state actors may need to reconsider their approach. In this regard, addressing states as individuals may not always be the optimum approach.

6. NGOs must address issues of polarization in order to become an effective presence in the international human rights regime.

7. NGOs and states should actively engage regions to help them navigate one another, and to potentially produce new creative alliances.

8. Civil society must re-evaluate its role as a shaming tool. Shaming can be a very useful tool but it can also be destructive. Civil society could also consider mobilizing states which are making positive developments at the Council. The actions of states which seek to undermine human rights speak for themselves.

9. Civil society and states that recognize the Obama Administration's renewed commitment to human rights as an opportunity. These actors should work to lobby and provide direction for the US to ensure that their delegation behaves in a manner that creates positive at the Council.

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