

Membership and the UN Human Rights Council

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Established in March 2006 by General Assembly Resolution 60/251 to replace the discredited Commission on Human Rights, the Human Rights Council carries the heavy burden of restoring credibility to the United Nations' principal human rights institution. This article examines one aspect of this restoration process - the Council's specific membership provisions.

Beginning with a detailed synopsis of the downfall of the Commission this article aims to answer whether the provisions included at the Council's creation are rigorous enough to prevent criticisms of its membership similar to those which effectively crippled its predecessor. Through analysis of the structure and rules enacted at the Council's creation, pre-election provisions and election process it will be seen that the current provisions have thus far yielded only moderate success. This article concludes with a series of suggestions for how the current membership framework could be improved for the underlying intention of GA 60/251 to be fulfilled.

Établi en mars 2006 par la Résolution 60/251 de l'Assemblée générale pour remplacer la Commission sur les droits de l'homme, alors discréditée, le Conseil des droits de l'homme porte le lourd fardeau de restaurer la crédibilité de l'institution principale des droits de la personne des Nations Unies. Cet article examine l'un des aspects de ce processus de restauration – les dispositions spécifiques du Conseil portant sur la sélection de ses membres.

Après un résumé détaillé de la chute de la Commission, cet article cherche à analyser si les dispositions prévues lors de la création du Conseil sont assez rigoureuses pour empêcher les critiques de sa composition qui ont ébranlé son prédécesseur. L'analyse de la structure et des règlements adoptés à la création du Conseil, des dispositions de pré élection et du processus d'élection permet de constater que les dispositions actuelles ont eu un succès mitigé jusqu'à présent. L'auteur formule des recommandations visant l'amélioration des dispositions actuelles sur la composition du Conseil afin que l'intention sous-jacente à la Résolution GA 60/251 soit atteinte.

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I. INTRODUCTION

The UN Human Rights Council was established in March 2006 by GA Resolution 60/251. Created to directly replace the discredited UN Commission on Human Rights, the Council carries the heavy burden of restoring credibility to the United Nations' principal human rights institution. The credibility of the Commission on Human Rights (Commission) had been gradually eroded during its final years by accusations of politicisation, double-standards and unprofessionalism.¹ In particular, the Commission was disgraced by a recurring condemnation that some of its members' human rights records were so poor that they should not sit in a position to comment upon the records of other states, while some states were seeking membership of the body "not to strengthen human rights but to protect themselves against criticism or to criticize others."²

As a result of the acute and particularly destructive criticisms of the Commission's membership, attempts were made to architect the new Human Rights Council (Council) in such a manner so as to prevent similar unfavourable indictments. As such, resolution 60/251 contains a number of relatively voluntary membership provisions that are intended to deter states with questionable human rights records from seeking membership, while concurrently making the electorate aware that the Council should be reflective of states with a commitment to human rights.

The Council was established with the mandate to "review its work and functioning five years after its establishment and report to the General Assembly".³ This review process concluded in June 2011 with minimal change being made to the membership provisions established at its creation.⁴ Mindful that the present membership provisions are to continue, at least in the short term, this juncture presents an ideal opportunity to reflect on the first six years of the Council's existence and ask whether, in its current form, the body is in any way better protected from the overwhelming criticisms of its membership that brought about its predecessor's demise. As this piece considers all of the membership provisions enacted at the Council's creation, analysis will also be given to the structural basis upon which the new body has been established.

¹ Philip Alston, "Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council" (2006) 7 *Melbourne J Int Law* 185 at 187.

² *A More Secure World: Our shared responsibility, Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change*, UNGAOR, 59th Sess, UN Doc A/59/565, (2004) at para 283.

³ UN GA, Human Rights Council, UN Doc A/Res/60/251(2006) at para 16.

⁴ The only change made to membership was that from 2013, the yearly membership of the Council would start from 1 January. See *Review of the Human Rights Council*, GA Res 65/281, UNGAOR, 65th Sess, UN Doc A/RES/65/281, (2011) at para 4.

Prior to any analysis it will be illustrated how the absence of effective membership provisions eventually opened the Commission to a level of criticism which “cast a shadow on the reputation of the United Nations system as a whole”,⁵ thus leading to its downfall and replacement with the Council.

II. A FOCUS ON MEMBERSHIP

A. MEMBERSHIP OF THE COMMISSION ON HUMAN RIGHTS

On 15 March 2006 the General Assembly (GA) overwhelmingly voted in favour of establishing the Human Rights Council to directly replace the Commission on Human Rights.⁶ Established in 1946 the Commission had been the United Nations’ principal institution of human rights protection for 60 years before criticisms and widespread discontent led to its rapid demise.

The UN Charter of 1946 had instructed the Economic and Social Council (ECOSOC) to set up “commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions”.⁷ Initially, the composition of the Commission entailed a ‘nucleus’ of nine members, appointed in their individual capacity, who were instructed to “make recommendations on the definitive composition of the Commission to the second session of the Council”.⁸ In May of 1946, the majority of the nucleus group agreed that as both the GA and ECOSOC were populated with governmental representatives “the Commission on Human Rights, appointed by the Council, should not again consist of representatives of governments”.⁹ The only requirement for these proposed representatives was that they be ‘highly qualified persons’, who would serve as non-governmental representatives and be appointed from a list of nominees submitted by member states of the United Nations.¹⁰ The sole dissenter of this proposal was the Russian representative who had maintained that all members of both the Commission and sub-Commission should serve

⁵ United Nations, News Release, “Without reform of human rights body, UN credibility at stake, Annan says” (7 April 2005) online: United Nations News Centre <<http://www.un.org/apps/news/story.asp?NewsID=13895&Cr=commission&Cr1=rights>>.

⁶ 170 votes in favour, 4 against (Israel, Palau, USA and Marshall Islands) and 3 abstentions (Belarus, Iran and Venezuela).

⁷ *Charter of the United Nations*, 26 June 1945, CAN TS 1945 No 7, Chapter X, art 68.

⁸ *Commission on Human Rights and Sub-commission on the Status of Women*, ESC Res 5(I), UNESCOR, 1st Sess, UN Doc E/RES/5(I), (1946) at 124.

⁹ *Report of the Commission on Human Rights to the Second Session of the Economic and Social Council*, ESCOR, 2d Sess, UN Doc E/38/Rev 1, (1946) 1 at 8.

¹⁰ *Ibid.*

in a governmental capacity.¹¹

The proposal that individuals sit on the body in a personal rather than governmental capacity was not accepted by the ECOSOC. Had it been followed the Commission would have been a distinctly different body than the one it became. As Alston highlights, it may never have been “likely that governments would relinquish control over issues as potentially significant as human rights”.¹² Boyle has also asserted that this result was probably for the best, as, given the Commission’s remit to draft ambitious human rights treaties, the presence of governmental representatives was necessary to secure legitimacy.¹³ Instead it was decided that the Commission would consist of one representative from each member state of the United Nations and be selected by the ECOSOC.¹⁴ It was further intended that “[w]ith a view to securing a balanced representation in the various fields covered by the Commission, the Secretary-General shall consult with the governments so selected before the representatives are finally nominated”,¹⁵ yet it is unclear whether such a practice was ever fully adhered to.

Although it had been decided that the composition of the Commission was to be of an intergovernmental nature, it has been noted that “[i]n the first half of its history, the Commission was composed of heads of delegation who were key players in the human rights arena and who had the professional qualifications and experience necessary for human rights work”.¹⁶ It was the high calibre of these individuals who took part in the initial intergovernmental negotiations that gave rise to the Universal Declaration of Human Rights, although it has been commented that each member of the initial Commission, regardless of their specific qualities and experience, was bound to follow the orders of their political masters.¹⁷ In the latter half of the Commission’s lifespan, as its membership increased, the body became occupied by governmental representatives in the form of diplomats and envoys and this professional expertise was lost.

From its inception no qualitative criteria had been drawn up regarding Commission membership with the result being that any UN member state

¹¹ *Ibid.*

¹² Alston, *supra* note 2 at 190.

¹³ Kevin Boyle, “The United Nations Human Rights Council: Origins, Antecedents, and Prospects” in Kevin Boyle, ed, *New Institutions for Human Rights Protection* (New York: Oxford University Press, 2009) 11 at 22.

¹⁴ *Economic and Social Council resolution establishing the Commission on Human Rights*, ESC Res 9(II), UNESCOR, 2d Sess, UN Doc E/RES/9(II), (1946) 520, art 2(a).

¹⁵ *Ibid.*, art 2(b).

¹⁶ *Supra* note 3 at para 286.

¹⁷ Ed Bates, *The Evolution of the European Convention on Human Rights – From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press, 2010) at 36.

was eligible to join. Elections to the body were held in the ECOSOC where candidate states sought to secure membership for a period of three years.¹⁸ Successful members were immediately eligible to run for re-election,¹⁹ resulting in the permanent five members of the Security Council holding almost concurrently permanent membership on the Commission.²⁰ Much like other limited-membership bodies in the UN, membership of the Commission was drawn from five regional groups and based on a practice of equitable geographic distribution.²¹ During its 60-year history the Commission grew in size exponentially as United Nations' membership increased and the functions of the body grew more demanding.²²

B. THE DEMISE OF THE COMMISSION ON HUMAN RIGHTS

Commentators have been unable to provide a unanimous explanation for the Commission's fall from grace.²³ Criticisms of politicisation, selectivity, double standards and polarisation between western countries and developing nations are all attributed to some extent with the Commission's downfall.²⁴ Politicisation was highlighted in the sense that certain states sought to use the Commission as a vehicle to attack their rivals and settle old scores. Selectivity refers to the particular focus of the Commission on only one or two states, with the case of Israel being specifically a point of contention between western and Islamic states. Alongside this was a regular accusation that states were eager to identify and criticise the human rights records of their counterparts, while actively blocking any criticism of their own behaviour and practices. For the purposes of this study the issue of membership will receive consideration as it generally impinges on all of these areas and is the spark that ignited the

¹⁸ *Economic and Social Council resolution establishing the Commission on Human Rights*, ESC Res 9(II), UNESCOR, 2d Sess, UN Doc E/RES/9(II), (1946) 520, art 2.

¹⁹ *Ibid*, 2(d).

²⁰ China 1947-1963, 1982-2005; France 1947-1976, 1978-2006; United Kingdom 1947-1978, 1980-1990, 1992-2006; United States of America 1947-2001, 2003-05; Russia 1947-2006.

²¹ The final Commission on Human Rights membership distribution was as follows: 15 Africa, 12 Asia, 5 Eastern Europe, 11 Latin America and Caribbean, 10 Western Europe and Other states.

²² Membership was enlarged several times after the 'nuclear' Commission of nine members met in 1946. Increase in members: 18 in 1946, 21 in 1962, 32 in 1967, 43 in 1980 and 53 in 1992. For further information see Boyle, *supra* note 14 at 22; Obertleiner notes how in 1979 ECOSOC Res 1979/35 entitled the Commission to coordinate the UN's human rights activities, see Gerd Obertleiner, *Global Human Rights Institutions – Between Remedy and Ritual*, Polity Press (Cambridge/Malden: Polity Press, 2007) at 42.

²³ Nico Schrijver, "The UN Human Rights Council: A New 'Society of the Committed' or Just Old Wine in New Bottles?" (2007) 20 *Leiden Journal of International Law* 809 at 822.

²⁴ Such reasons for the Commission's demise were reiterated at an informal Seminar on the Review of the Human Rights Council, see *Mission Permanente de la Suisse auprès de l'Office des Nations*, Open Ended Seminar on the Review of the Human Rights Council, Montreux, April 2010 at 3.

reformation process.

Although a long-standing complaint for many nations, focus on the specific issue of membership intensified in May 2001 when the United States failed to secure re-election to the Commission – the first time in the history of the body. After competing with Austria, France and Sweden for only three seats allocated to the Western Europe and Other Group (WEOG) the United States lost its seat with the result being largely attributed to heightened frustrations about the Bush administration's attitude to international organisations, a reluctance to ratify human rights treaties and opposition to the International Criminal Court.²⁵ With the United States failing to secure election, focus was immediately cast on who was serving on the Commission, and in particular, the level of commitment to human rights these states were exhibiting. Thus, when the Libyan Arab Jamahiriya (Libya) and Syria were, in the same year that the United States failed to gain re-election, concerns grew over the body's moral credibility. This focus was largely western driven, with Alston commenting that the United States in particular "came close to making a fetish of the membership issue".²⁶

In January 2003, as the focus on human rights records of member states was intensifying, the African group put forward Libya's representative as their candidate for Chairperson of the Commission. Libya's chairmanship came at a time when the composition of the Commission included a large number of states with questionable commitment to the promotion of human rights, i.e., China, Cuba, the Democratic Republic of Congo (DRC), Libya, Russia, Saudi Arabia, Sudan, Syria and Zimbabwe.²⁷ The focus continued throughout this period, culminating in May 2004 when Sudan was re-elected to the body despite worldwide condemnation of contemporary human rights violations in Darfur.²⁸

Parallel to these developments a number of reports were published wherein criticisms were made of the Commission's membership. In 2004 the United Nations High-Level Panel on Threats, Challenges and Change, commissioned by Kofi Annan to evaluate how existing policies and institutions had succeeded in addressing threats to international peace and security noted that the Commission's capacity to perform its tasks had "been undermined by eroding credibility and professionalism".²⁹ It also warned that the

²⁵ Henry J Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford/New York: Oxford University Press, 2007) at 793.

²⁶ Alston, *supra* note 2 at 203.

²⁷ For further information on the membership of the Commission on Human Rights see online: Office of the High Commissioner for Human Rights <<http://www2.ohchr.org/english/bodies/chr/index.htm>>.

²⁸ UN Economic and Social Council, Press Release, ECOSOC/6110, "United States Voices Objections as African Group Proposes Sudan for Election to Commission on Human Rights" (4 May 2004).

²⁹ High-Level Panel (2004), *supra* note 3 at para 283.

“Commission cannot be credible if it is seen to be maintaining double standards in addressing human rights concerns”.³⁰ On the composition of the body, the Panel specifically noted the highly charged opinions regarding membership, describing it as one of “the most difficult and sensitive issues”.³¹ The Panel went on to say that “the issue of which States are elected to the Commission has become a source of heated international tension, with no positive impact on human rights and a negative impact on the work of the Commission”.³² Specifically the Panel found that “[s]tandard-setting to reinforce human rights cannot be performed by States that lack a demonstrated commitment to their promotion and protection”.³³ In order to address the issue, and conscious of the risk of politicising it even further, the Panel recommended an expansion to universal membership,³⁴ and the return of “prominent and experienced human rights figures” as heads of each member’s delegation.³⁵

These criticisms were echoed by Kofi Annan in his own 2005 report, *In larger freedom: towards development, security and human rights for all*, particularly in criticising the practice whereby states “sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others”.³⁶ Annan believed that as a result of these practices “a credibility deficit” had developed which put the entire UN system at risk.³⁷ His solution was the replacement of the Commission with a smaller standing Council, wherein “[t]hose elected to the Council should undertake to abide by the highest human rights standards”.³⁸ The result was that, in March 2006, after months of often controversial negotiations, the GA voted to replace the Commission on Human Rights with a new Human Rights Council.

C. HUMAN RIGHTS COUNCIL MEMBERSHIP PROVISIONS

From the outset it was apparent that the rules regarding membership in the Council would be more specific and stringent than those that regulated entry into the Commission. Members of the Council are to “be elected directly and individually by secret ballot by the majority of the members of the General Assembly; the membership shall be based on equitable geographical

³⁰ *Ibid.*

³¹ *Ibid* at para 285.

³² *Ibid.*

³³ *Ibid* at para 283.

³⁴ *Ibid* at para 285.

³⁵ *Ibid* at para 286.

³⁶ *In larger freedom: towards development, security and human rights for all: report of the Secretary-General*, UNGAOR, 59th Sess, UN Doc A/59/2005, 3 at para 182.

³⁷ *Ibid.*

³⁸ *Ibid* at para 183.

distribution” with members serving for a period of three years and not “eligible for immediate re-election after two consecutive terms”.³⁹

Conscious of the criticism that some Commission members lacked a commitment to human rights it was further established that “when electing members of the Council, member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto”.⁴⁰ Furthermore it was stated that “members elected to the Council shall uphold the highest standards in the promotion and protection of human rights”.⁴¹ Member states are also “reviewed under the universal periodic review mechanism during their term of membership”.⁴² As a final measure it was established that with the support of a two-thirds majority present and voting, the GA could “suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights”.⁴³

Discussion will be given to each of these provisions individually, but as a general comment it can be seen that the Council has been established structurally in a relatively similar format to the discredited Commission, yet with a number of voluntary provisions intended to limit membership to states with a visible commitment to human rights. As Deputy Director of the New York Office of the High Commissioner for Human Rights (OHCHR) Craig Mokhiber has stated, these provisions “actually force Member States to put their human rights money where their mouth is”.⁴⁴

It is important to bear in mind that the onus is not entirely on the membership of the

Council, as Obertleiner has stated, resolution 60/251 “aims to raise the credibility of the Council by mixing voluntary self-commitments of members with heightened responsibility of the General Assembly to look after its subsidiary body”.⁴⁵ In theory these voluntary provisions should have been sufficient to restrict membership to states who were committed to human rights protection, but as will be seen, in practice they have enjoyed only isolated instances of success.

³⁹ GA Resolution 60/251, *supra* note 4 at para 7.

⁴⁰ *Ibid* at para 8.

⁴¹ *Ibid* at para 9.

⁴² *Ibid*.

⁴³ *Ibid* at para 8.

⁴⁴ United Nations, “Press Conference on Human Rights Council Elections” (12 May 2009) online: <www.un.org/News/briefings/docs/2009/090512_HRC.doc.htm>.

⁴⁵ Obertleiner, *supra* note 23 at 65.

D. ANALYSIS OF THE PARTICULAR MEMBERSHIP PROVISIONS OF 60/251

As has been seen, in 1946 the ECOSOC consciously made the decision to establish the Commission as an intergovernmental body for debate and discussion, rather than a body of 'highly qualified persons' as suggested by the nucleus membership. As such, the Commission was firmly established, like the GA, Security Council and ECOSOC, as an intergovernmental forum. During the period 2001 - 2006 an attempt was made to develop this aspect of the Commission's image. With regular criticisms of who was a member of the body it was perceived that the Commission must not only be inhabited by representatives in a governmental capacity, but that those individuals should represent states with a demonstrable commitment to human rights.⁴⁶ It was on this basis that criticisms of the human rights records of Commission members became most detrimental. With the purpose of the present article being restricted to an analysis of the Council's current membership provisions, as enacted by GA 60/251, there is little room to discuss from an ideological standpoint who should and should not have a say in human rights at the UN. This is, however, a worthwhile discussion which takes place elsewhere.⁴⁷

In analysing whether the Council's membership provisions have proven successful it would be futile to use the approach that the membership of any one state with an imperfect human rights record would discredit the body. This is as if such a membership criteria were applied the Council would most likely be an unrepresentative institution, both geographically and in terms of its members' religious, political and cultural backgrounds. Furthermore there is some evidence that the Council itself is attempting to drift away from the description of states with good and bad human rights records. Mokhiber stressed at the 2009 elections that the Council was not "a club of the virtuous" and that "[w]e would like to get away from the idea that there are good guys and bad guys".⁴⁸

It would be equally useless to apply the logic that the Council is strictly and solely an intergovernmental forum, as it is clear both in the demise of the Commission and the provisions included in the creation of the Council, that some element of sensitivity towards the human rights record of those wishing to serve on the body must be taken into account.

⁴⁶ During informal discussions into why the Commission was perceived to have failed, a number of states attributed this to a campaign "orchestrated by western media", Montreux review seminar, *supra* note 25 at 3.

⁴⁷ See Sabine C Carey, Mark Gibney & Steven C Poe, *The Politics of Human Rights: The Quest for Dignity*, (Cambridge: Cambridge University Press, 2010) at 26-27.

⁴⁸ UN News Centre, *supra* note 45.

The instances when criticisms of the body may become too acute and therefore will form the threshold for this analysis are twofold. Remembering that it was the presence of states with highly questionable human rights records, who served on the Commission at a time when they concurrently experienced domestic human rights emergencies at home, the first question, is whether the current provisions have sufficient rigour to restrict the entrance of “pariah” states to the body.⁴⁹ Two examples of such states in the demise of the Commission are Sudan, specifically during the Darfur crisis, and Zimbabwe, a state frequently criticised for its domestic human rights record.⁵⁰ Global examples of similar states during the brief period of the Council’s history are Myanmar,⁵¹ Libya, specifically during the revolution which led to the collapse of Gaddafi’s regime, and Syria, a state whose domestic human rights situation prompted three special sessions in less than one year.⁵² At a basic level, the very presence of any such state would appear so incongruous to the purpose of the body that the Council would inherently incur enormous criticism and thus lose a measure of the credibility it requires to function effectively.

The second question to be gauged is much more difficult to quantify. It asks whether the current membership directives are sufficient to prevent an unacceptably high number of states with questionable human rights records from sitting amongst the Council’s membership. Again this method of analysis is structured on the experience of the Commission, particularly the 2003 membership where the large number of states with poor human rights records opened the body up to the criticism it incurred from both the High-Level Panel and Secretary General. There is no quantifiable limit of how many states with questionable human rights records would be needed to discredit the body. As such, discussion will be focused on the impact and potential for impact of the GA 60/251 provisions on the overall composition of the Council.

Built into both indicators, analysis will be made of the overall approach of states to the membership provisions. As many of the instructions in 60/251 are voluntary the approach of states to their adherence may provide an initial indication of the overall willingness of states to engage cooperatively with the system of electing Council members.

⁴⁹ Baehr suggests that the current global pariah states are Sudan and Myanmar and that they have taken over the mantle held in the 1970’s by South Africa and Chile. See Peter Baehr, “The Human Rights Council: A Preliminary Evaluation” (2010) 28:3 *Nethl Int’l L Rev* 329 at 329.

⁵⁰ In 2003, the Commission narrowly passed a resolution on the situation of human rights in Zimbabwe, while Zimbabwe was amongst its ranks (28 votes to 24, with 1 abstention). See *Commission on Human Rights, Report on the 59th Session*, UNESCOR, 59th Sess, Supp No 3, UN Doc E/2003/23, E/CN.4/2003/135, (2003) at 376-80.

⁵¹ Myanmar’s domestic human rights situation invoked a special session in the Human Right Council in October 2007.

⁵² UNHRCOR, 16th Special Sess (2011); UNHRCOR, 17th Special Session (2011); UNHRCOR, 18th Special Sess (2011).

III. STRUCTURE AND RULES

Despite resounding support in the GA, it had been clear during the informal negotiations to establish the Council that states, particularly those from different regions, held opposing visions of the Council's structure and purpose.⁵³

A. COUNCIL SIZE

From the outset there had been debate over the question of what size the new Council would be. In 2004 the High-Level Panel advocated universal membership in order to diffuse potential controversy and make human rights work in the UN more about the substantive issues and less about who was voting on them.⁵⁴ The discussion of universal membership was reignited in 2011 when, at the review of the Council, Canada proposed that the membership should be made universal.⁵⁵ This proposal was not accepted, partially due to the fact that potential problems with universal membership had been raised at earlier informal discussions, specifically the challenges to participation of developing countries and the fact that there are approximately 30 UN states without representation in Geneva where the Council is based.⁵⁶

Kofi Annan's vision in 2005 was that a new Council should be smaller, believing that this would allow for greater focus in debate and discussions.⁵⁷ The EU agreed with Annan's approach on the assumption that a smaller body would allow the Council to work more effectively,⁵⁸ while the United States also strongly supported this initiative suggesting that the Council should only have twenty members at any one time.⁵⁹ In a study commissioned by the Swiss government, Kälén and Jimenez questioned whether a reduction in size would have been of any benefit to the Council at all. Instead they saw it as imperative for the body to remain representative of the international community, while

⁵³ UN Economic and Social Council, Summary of the open-ended informal consultations held by the Commission on Human Rights pursuant to Economic and Social Council decision 2005/217, prepared by the Chairperson of the sixty-first session of the Commission, UN Doc A/59/847 (2005).

⁵⁴ High-Level Panel (2004), *Supra* note 3 at para 285.

⁵⁵ *Report of the open-ended intergovernmental working group on the review of the work and functioning of the Human Rights Council*, UN Doc A/HRC/WG.8/2/1, (2011), at 132.

⁵⁶ Ministry of Foreign Affairs of Algeria hosting "Retreat of Algiers on the review of the work and functioning of the Human Rights Council" (Report from the Sheraton Hotel Club des Pins Resort and Towers, 19-21 February 2010), [unpublished].

⁵⁷ *In Larger Freedom: towards development, security and human rights for all*, A/59/2005/Add 1, UNGA Addendum 1, UN Doc (2005) at para 4.

⁵⁸ *EU Presidency statement - Human Rights Council: Status, Size, Composition and Membership*, online: (European Union @ United Nations) <www.eu-un.europa.eu/articles/en/article_5178_en.htm>.

⁵⁹ Yvonne Terlingen, "The Human Rights Council: A New Era in UN Human Rights Work?" (2007) 21:2 *Ethics and International Affairs* 167 at 171.

they were also concerned that a smaller membership still would not eradicate the deep-rooted intergovernmental tensions that were a primary cause of dispute in the Commission.⁶⁰ During informal consultations between regional and political groups the majority rejected Annan's proposal and instead advocated a membership of similar size if not larger than the Commission. In particular the Organisation of the Islamic Conference (OIC), the African and Arab groups strongly objected to any proposal to have a smaller membership than that of the Commission.⁶¹ This approach by largely southern states is unsurprising, as Alston comments that a "smaller membership would have made it easier for large states, and the US in particular, to exert its power over the new Council's deliberations".⁶²

The eventual limited reduction in size, from 53 to 47 states, has not been enough to make the Council more efficient or effective and has not provided the exclusivity that the United States in particular had desired. Even though the size of the body was smaller, the result was seen as a success by those who advocated a similar or larger-sized body and a loss by those who wanted greater restriction on the Council's membership.

B. EQUITABLE GEOGRAPHIC DISTRIBUTION

It was also decided that membership would be based on a system of "equitable geographic distribution".⁶³ Referred to as "an essential element of the features of the new body that would enhance its legitimacy" this proposal would be a continuation of the manner in which states were elected to the Commission.⁶⁴ At the time of the Council's creation, however, the membership was redistributed in light of more recent data.⁶⁵ This redistribution completed a power shift that had begun years earlier in the Commission. The shift was from a relatively balanced division of power in the Commission, to allow for dominance by Asian and African states who hold 26 of the Council's 47 seats. In the final years of the Commission, western states, although not as powerful as they had once been, still held a degree of influence over its direction. This influence was derived from the backing of ten members from the WEOG

⁶⁰ Walter Kälin & Cecelia Jimenez, *Reform of the UN Commission on Human Rights, Study Commissioned by the Swiss Ministry of Foreign Affairs* (Geneva: University of Bern, 2003).

⁶¹ ECOSOC, *Informal Consultations 2005*, *supra* note 54.

⁶² Alston, *supra* note 2 at 198.

⁶³ GA Resolution 60/251, *supra* note 4 at para 7.

⁶⁴ ECOSOC, *Informal Consultations 2005*, *supra* note 54 at 10.

⁶⁵ The 47 seats on the Council are distributed as follows: African states 13, Asian states 13, Eastern European states 6, Latin America & Caribbean states 8, Western Europe & Other states 7. This new data supposedly reflects a more proportional geographic distribution, see P Scannella & P Splinter, "The United Nations Human Rights Council: A Promise to be Fulfilled" (2007) 7 *Hum Rts L Rev* 41 at 48. For final Commission distribution see *supra* note 22.

and regular support from members of the eleven-strong Latin America and Caribbean Group (GRULAC). The distribution of seats at the Council's creation not only changed the number of seats allocated to each regional group within the body; in practical terms, it has permitted the African and Asian states to almost entirely control the Council's work.

Although discussion will be made of how the African and Asian groupings in the Council have dominated its agenda, it is important to note that these two regional groups do not effectively act as individual continental blocs. Instead, it is often the influence of various factions within these groups, particularly the African Union, Arab Group and OIC, who use their influence to direct the Council's work.

It is also necessary to note that in the international arena bloc and group voting are essential tools, particularly for smaller nations to have their voices heard.⁶⁶ Smith explains that bloc and group action empowers states to have a greater impact than would otherwise be possible; gives them the ability to conduct work informally thanks to often shared languages, customs and goals; allows for some level of contribution from the full diversity of UN's membership; may serve as a "tutorial functions" for new member states and generally leads to increased efficiency.⁶⁷

Despite there being obvious negative attributes to group action, such as a laborious negotiating process and the likelihood that a collective agreement often refers to the lowest level all states could agree upon,⁶⁸ it is only practical to concede that decisions taken by almost all UN bodies are a reflection of decisions taken by groups or voting blocs.⁶⁹ Nonetheless there is clear evidence that the direction the Council is currently being led is strongly influenced, often in a negative manner, by particular regional groupings and voting blocs.

i. Special Sessions

An illustration of how various groups are influencing the Council's work is visible in their approach to special sessions. The body is permitted to hold such sessions "when needed, at the request of a member of the Council with the support of one third of the membership".⁷⁰ The special sessions utensil is an excellent instrument for the body to draw immediate attention to situations of grave concern. Since 1990 the Commission had been able to use a similar

⁶⁶ Volker Rittberger, Bernhard Zangl & Andreas Kruck, 2nd ed, *International Organization* (Basingstoke: Palgrave Macmillan, 2012) at 93.

⁶⁷ Courtney B Smith, *Politics and Process at the United Nations: The Global Dance* (Boulder/London: Lynne Rienner Publishers, 2006) at 56-57.

⁶⁸ *Ibid* at 58.

⁶⁹ *Ibid* at 53.

⁷⁰ GA Resolution 60/251, *supra* note 4 at para 10.

mechanism, but only through the support of a majority of its members.⁷¹ The higher threshold of support to call for such sessions partially explains why in the 16-year period when Commission members could do so, they only held five such sessions.⁷² An example of this threshold being an impediment to the consideration of a potential human rights emergency occurred in 2003 when a group of 25 states failed to secure a special sitting on the issue of the “human rights and humanitarian situation in Iraq as consequences of the war”.⁷³ The dearth of special sittings during the final years of the Commission is also frequently attributed to hostility amongst mainly African and Asian states, and importantly Russia and China, to focus attention on one country, and the comparable opposition of the US and WEOG to isolate Israel for criticism.⁷⁴ The particular strength of historically southern states to avoid country specific focus is in their numbers, Freedman noting their awareness of this in forming much stronger alliances than their western counterparts.⁷⁵

Freedman has further highlighted the concern that the one-third threshold to call for a special session, requiring the support of only 16 Council members, gives greater influence to dominant groups and alliances to use this process to achieve their own political aims.⁷⁶ But this lower threshold has occasionally proved to be advantageous in that even in cases of sensitive situations, where regional support is divided, the Council as a whole has found it easier to pass the vote required to formally address an emergency.

In its initial six years the Council convened 18 special sessions. This is a remarkably large number given that only 19 regular sessions have been held in the same time. Boyle highlights one positive feature of the opportunity to call a special session being that the Council is “action orientated” in particular through the use of special procedures and following up the reports of missions.⁷⁷ Other visible benefits are that members are clearly vigilant and willing to address crisis situations and states are even willing to use them to

⁷¹ *Enlargement of the Commission on Human Rights and the further promotion of Human Rights and Fundamental freedoms, UN Doc E/Res/1990/48 (1990).*

⁷² First: Situation of human rights in the territories of the former Yugoslavia, 13-14 August 1992; Second: Situation of human rights in the territories of the former Yugoslavia, 30 November-1 December 1992; Third: Situation of human rights in Rwanda, 24-25 May 1994; Fourth: Situation in East Timor, 23-27 September 1999; Fifth: Grave and massive violations of the human rights of the Palestinian people by Israel, 17-19 October 2000.

⁷³ Commission on Human Rights, Fifty-Ninth Session, *supra* note 51 at 334.

⁷⁴ Obertleiner, *supra* note 23 at 66. See also BG Ramcharan, *The UN Human Rights Council*, (London: Routledge, 2011) at 21.

⁷⁵ Rosa Freedman, “New Mechanisms of the UN Human Rights Council” (2011) 29:3 *Nethl QHR* 289 at 290.

⁷⁶ *Ibid* at 313.

⁷⁷ Boyle, *supra* note 14 at 41.

address thematic concerns.⁷⁸

On the other hand, the approach to the special sessions mechanism, in particular but not exclusively by African and Asian states, has illustrated aspects of the selectivity and double-standards that attracted criticism of the Commission's membership in its final years. Terlingen and Ramcharan have both specifically highlighted this African and Asian dominance over the Council as a major problem, Terlingen stating that these two regions are using their comfortable majority "to set the agenda".⁷⁹ Ramcharan has asserted that this is a major problem for the body as states from both regions are using their numerical advantage to avoid criticism of gross violations.⁸⁰ Although there is overwhelming evidence to suggest that many African and Asian states are choosing to act in regional and political blocs, there remains a not insignificant number of states from each region who appear willing to act independently and vote differently to their regional bloc. Japan,⁸¹ Qatar,⁸² the Republic of Korea,⁸³ Mauritius,⁸⁴ Senegal⁸⁵ and Zambia⁸⁶ are all examples of African or Asian states who have been willing to draw attention to a particular human rights emergency, suggesting that they either vote their conscience, or choose to vote in non-regional voting blocs.

ii. *Israel*

The most visible example of how groups from these regions are using their numerical dominance to set the agenda of the Council is seen in its relationship with Israel. To date, one-third of the 18 special sessions called for have been to consider Israeli action.⁸⁷ The calls for a special session to focus on Israeli action have regularly emanated from African or Asian countries, with five of the six sessions being called for by a member on behalf of the Arab group.⁸⁸ All six of the sessions received large support from African and Asian states, providing 17 of the 21 votes for the first session; 13 of the 16 for the second; 20 of the 24 for

⁷⁸ The Council has held two thematic sessions: *The negative impact on the realization of the right to food of the worsening of the world food crisis, caused inter alia by the soaring food prices*, UNGAOR, 7th Special Sess, UN Doc A/HRC/S-7/2, (2008); *The Impact of the Global Economic and Financial Crises on the Universal Realization and Effective Enjoyment of Human Rights*, UNGAOR, 10th Special Sess, UN Doc A/HRC/S-10/2, (2009).

⁷⁹ Terlingen, *supra* note 60 at 171

⁸⁰ Ramcharan, *supra* note 75 at 13.

⁸¹ Japan supported Special Sessions 4, 5, 7, 13, 14, 15 and 16.

⁸² Qatar supported Special Sessions 6, 7, 9, 10, 12, 13, 15 and 17.

⁸³ Republic of Korea supported Special Sessions 4, 5, 8, 11, 13, 14 and 16.

⁸⁴ Mauritius supported Special Sessions 3, 4, 7, 9, 11, 12 and 14.

⁸⁵ Senegal supported Special Sessions 1, 2, 3, 6, 7, 9, 10, 12, 13, 14, 15, 16 and 17.

⁸⁶ Zambia supported Special Sessions 3, 4, 7, 9, 14, 15 and 16.

⁸⁷ Special Sessions 1, 2, 3, 6, 9 and 12.

⁸⁸ Special Session 12 was convened at the joint request of 19 members of the Council.

the third; 16 of the 21 for the sixth; 23 of the 31 for the ninth and 16 of the 19 for the twelfth.⁸⁹ With only 16 members needed to support a special session and these two regions contributing 26 seats on the Council, they virtually have a *carte blanche* to call for a special session concerning Israel at any time and thus maintain the Palestinian question on the Council's agenda. The power base exercised by these states is further strengthened by Cuban and frequently Russian support for special sessions concerning Israel, effectively making it only necessary for 14 African or Asian nations to vote in favour of convening such a meeting.⁹⁰ This is not to say that Israeli action or the situation in the Occupied Territories does not merit evaluation,⁹¹ but the suggestion that one-third of global human rights emergencies during the period 2006-2012 have involved Israel is somewhat unbalanced.

This practice of focusing so heavily on Israeli action highlights the further regional tensions between members on the Council. With it being evident that a number of African and Asian states will call for a special session to consider Israeli action on a regular basis, it has equally become apparent that members from the WEOG will almost never support such calls, even when there is a legitimate reason to do so. Of the six special sessions called to consider Israel only Switzerland from the WEOG, on one occasion, has lent its support.⁹²

This regional approach has been criticised by commentators like Scannella and Splinter who have highlighted the major disadvantage of the Council's members taking a regional approach to the protection of human rights which has led to positions being "worked out, at the lowest common denominator, within each regional or other group and then negotiated between groups to another even lower common denominator".⁹³ Acknowledging that although this phenomenon of regional groupings has existed for numerous years, Rouwette has commented that now even moderate states are more likely to operate within a group or voting bloc than before.⁹⁴

iii. Comparable Human Rights Emergencies

The heavy focus by many states from the African and Asian regional groups

⁸⁹ All Special Sessions can be located here: United Nations Human Rights Council, "Sessions" (21 February 2013) online: Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/HRBodies/HRC/Pages/Sessions.aspx>>.

⁹⁰ Cuba has supported every Israeli-based Special Session to date. Russia has supported all but the most recent.

⁹¹ Israel receives regular consideration as it is the only country singled out on the Council's agenda, an issue which is heavily criticised by the United States. See *supra* note 56 at 12.

⁹² Switzerland supported the call for Special Session Nine to consider Israeli action.

⁹³ Scannella and Splinter, *supra* note 66 at 50.

⁹⁴ Rene J Rouwette, "Russian Roulette. The Imminent Review of the Human Rights Council, 2009-2011" (2010) 28:2 *Nethl QHR* 157 at 160.

on Israeli human rights violations can be contrasted starkly with their lack of enthusiasm for considering human rights violations occurring elsewhere in the world. Weissbrodt has criticised both these groups in particular for hijacking the Commission's agenda by obstructing the 'name and blame' method of shaming states which had become regular practice within the Commission.⁹⁵ With the Council only being six years old, it is again apparent that many states from both of these regions will continue with their practice of attempting to shield individual countries, particularly those within their region, from global criticism.

Despite contributing 13 members to the Council, many Asian states have been entirely lacklustre in their approach to human rights emergencies occurring anywhere but Israel. Only four Asian states supported the call for a special session on Darfur;⁹⁶ two on Myanmar;⁹⁷ two on the DRC;⁹⁸ one on Sri Lanka;⁹⁹ three on the Cote D'Ivoire,¹⁰⁰ four on Libya¹⁰¹ and two, five and six on the respective Syrian special sessions.¹⁰² These statistics suggest that, unless a special session concerns Israel, the vast majority of Asian states on the Council will not support it.¹⁰³

African states have equally lacked diligence with no states from the region supporting the calls for a special session to consider human rights emergencies in Myanmar or the DRC.¹⁰⁴ Only one supported the call to consider the emergency in Sri Lanka¹⁰⁵ and two on Libya,¹⁰⁶ while only two supported the first and second sessions on Syria,¹⁰⁷ with four supporting the most recent.¹⁰⁸ The anomaly in the African states' voting record was the

⁹⁵ David Weissbrodt, "Reform of the UN Commission on Human Rights" (2004) 22:4 *Nethl QHR* 525.

⁹⁶ *Report on the Fourth Special Session of the Human Rights Council*, UN Doc A/HRC/S-4/5, 22 January 2007 at 4.

⁹⁷ *Report of the Human Rights Council on its Fifth Special Session*, A/HRC/S-5/2, 28 November 2007 at 5.

⁹⁸ *Report of the Human Rights Council on its Eighth Special Session*, A/HRC/S-8/2, 16 January 2009 at 6.

⁹⁹ *Report of the Human Rights Council on its Eleventh Special Session*, A/HRC/S-11/2, 26 June 2009 at 6.

¹⁰⁰ *Report of the Human Rights Council on its Fourteenth Special Session*, A/HRC/S-14/1, 19 January 2010 at 4-5.

¹⁰¹ *Report of the Human Rights Council on its Fifteenth Special Session*, A/HRC/S-15/1, 25 February 2011 at 6.

¹⁰² *Report of the Human Rights Council on its Sixteenth Special Session*, A/HRC/S-16/2, 6 May 2011 at 5; UN Human Rights Council, *Report of the Human Rights Council on its Seventeenth Special Session*, A/HRC/S-17/2, 18 October 2011 at 5; *Report of the Human Rights Council on its Eighteenth Special Session*, A/HRC/S-18/2, 2 December 2011 at 7.

¹⁰³ Special Sessions, *supra* note 90.

¹⁰⁴ *Report of the Human Rights Council on its Fifth Special Session*, *supra* note 98; *Report of the Human Rights Council on its Eighth Special Session*, *supra* note 99.

¹⁰⁵ *Report of the Human Rights Council on its Eleventh Special Session*, *supra* note 100.

¹⁰⁶ *Report of the Human Rights Council on its Fifteenth Special Session*, *supra* note 102.

¹⁰⁷ *Report of the Human Rights Council on its Sixteenth Special Session*, *supra* note 103; *Report of the Human Rights Council on its Seventeenth Special Session*, *supra* note 103.

¹⁰⁸ *Report of the Human Rights Council on its Eighteenth Special Session*, *supra* note 103.

special session concerning the post-election violence in the Ivory Coast that was tabled by Nigeria and supported unanimously by the African members on the Council.¹⁰⁹ Boyle has provided a potential explanation of this in that “[i]t is the policy of the African Group that it alone may table a resolution on an African state and the Group’s rules require that the state in question should be consulted over any resolution”.¹¹⁰

The reluctance of states from these two particular regions to single out individual nations for criticism has resulted in a higher burden being placed upon western states to seek support from other regional groups. Maurer suggests that western states only realised relatively late what impact the geographic distribution would mean in a smaller body.¹¹¹ Schrijver has noted that western states are increasingly close to those in Eastern Europe and that combined both groups would have 13 seats on the Council.¹¹² Given that Russia will regularly serve as one of the six Eastern European states that number in reality is 12, yet it does suggest that it remains possible for western states to lobby enough support to convene a special session when a pressing human rights emergency requires it, especially given the region’s historic support from some Latin and South American states.

C. LIMITED TERM MEMBERSHIP

At the Council’s creation it was decided that members would serve for three-year terms and would not be eligible for re-election immediately after two consecutive terms.¹¹³ Little comment can be made on the impact of this provision as of yet as the Council is still in its infancy. The 2013-2014 terms may prove hugely influential, as the composition of the Council will be without a number of familiar influential faces. China, Cuba and Russia will all see their second term expire in December 2012, allowing for a yearlong gap before they are eligible for re-election. This period poses the prospect of a more western dominated Council as the United States will be eligible for re-election having served only one term.¹¹⁴ In addition, France and the United Kingdom will both have the opportunity to run for election once again given that their second

¹⁰⁹ *Report of the Human Rights Council on its Fourteenth Special Session*, *supra* note 101.

¹¹⁰ Boyle, *supra* note 14 at 19.

¹¹¹ Peter Maurer, “About the Negotiation Process in New York (from 2005 until 2006): Of Ants, Caterpillars and Butterflies” in Lars Müller, ed, *The First 365 Days of the United Nations Human Rights Council* (Bern: Swiss Department of Foreign Affairs, 2007) at 35.

¹¹² Schrijver, *supra* note 24 at 816.

¹¹³ Human Rights Council, *supra* note 4 at para 7.

¹¹⁴ On winning the 2008 Presidential election Barack Obama reversed the Bush administration’s approach to the UN Human Rights Council and the United States was subsequently elected to the body (2009-2012).

terms concurrently expired in May 2011.¹¹⁵ The 2013-2014 Human Rights Council may present a fascinating case study into the dynamics and influence of the presumed western powers on the politics of human rights in the UN.

D. SUSPENSION

Resolution 60/251 provides the GA the power to suspend any member of the Council “that commits gross and systematic violations of human rights”.¹¹⁶ The experience of having a Sudanese representative sitting amidst the ranks of the Commission while a human rights crisis gripped Darfur, created a deep scar of division within the body. Conscious to avoid a similar episode, the Council was established with recourse to suspension through the GA if a similar situation were to arise again.

Whether suspension is the most appropriate remedy or not is a point of debate. One may argue that having a state which is committing large-scale human rights violations within the ranks of the Council at least presents an opportunity to engage that state in constructive dialogue with the relevant UN body. Duxbury takes the other side of this argument, suggesting that the threat of suspension may compel states to act in compliance with the body’s rules.¹¹⁷ In a practical sense, if a state is prepared to commit gross and systematic human rights violations it may be unlikely that the threat of suspension from an international institution will encourage compliance. Furthermore suspension from the Council would not directly mean suspension from the GA and thus the State in question would still be subject to the pressures of international opinion.¹¹⁸ Nonetheless with the suspension measure available to the GA there is at least a provision with the potential to protect the Council’s credibility.

From the outset the prospects of ever suspending a member from the Council appeared low. This pessimism was grounded in a number of reasons. First, any decision to suspend a member of the Council would likely have to originate within the Council itself. Given the continued tactics by largely African and Asian members, with the regular support of Russia, of refusing to isolate most individual states for criticism, it appeared unlikely that interested states would be able to garner enough support amongst members to make such a recommendation. Second, the requirement of a two-thirds majority vote for suspension provides a relatively high threshold to achieve. Ghana has noted that the decision to suspend a member “ironically has a higher bar

¹¹⁵ France and the United Kingdom: Term one, 2006-2008; Term two, 2008-2011.

¹¹⁶ Human Rights Council, *supra* note 4 at para 8.

¹¹⁷ Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (New York: Cambridge University Press, 2011) at 22.

¹¹⁸ Simon Chesterman, Thomas M Franck & David M Malone, *Law and Practice of the United Nations - Documents and Commentary* (New York: Oxford University Press, 2008) at 24-25.

than the decision about HRC membership itself".¹¹⁹ Furthermore, as the GA is the body tasked with suspension as well as election a large number of the GA membership would be reversing their decision to grant a candidate state a position on the Council in the first place. This process is made more awkward given that the GA is tasked with electing members based on their commitment to human rights.

Despite this presumed difficulty, the Council successfully united to advise that the GA suspend Libya in March 2011. In the days approaching the Libyan special session and indeed in the session itself it appeared that states would maintain their traditional approaches to internal conflicts that had seen Sudan re-elected to the Council during the Darfur crisis. The call for the session was only supported by 6 of the 26 African and Asian countries on the Council, with Russia and Cuba unsurprisingly refraining from lending their support to the crisis meeting. Moreover during the special session both China and Russia voiced their concerns that the Council would be setting a dangerous precedent in suspending Libya.¹²⁰ Nonetheless, the Council unanimously decided to advise the GA to suspend Libya's membership paving the way for the issue to be addressed at the GA.¹²¹

In a symbolic gesture, the GA resolution to suspend Libya was proposed by Lebanon, a member of the OIC and immediately supported by Mauritius on behalf of the African Union.¹²² Furthermore, the Russian GA representative reversed the concerns made by his colleague in the Council, clarifying that it did not create a precedent that would allow for the removal of Council members without the use of procedures.¹²³ The two-thirds vote was subsequently passed by acclamation and for the first time in its history, the United Nations suspended a state from its leading human rights body.

IV. PRE-ELECTION PROCEDURES

Given the frequent and often destructive criticisms of states, international bodies and NGOs that the composition of the Commission is what led it

¹¹⁹ Nazila Ghanea, "From UN Commission on Human Rights to UN Human Rights Council: One step forwards or two steps sideways?" (2006) 55 ICLQ 695 at 701.

¹²⁰ United Nations Human Rights Council, "Human Rights Council debates situation of human rights in Libya" (21 February 2013) online: Office of the High Commissioner for Human Rights <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10766&LangID=E>.

¹²¹ *Situation of Human Rights in Libyan Arab Jamahiriya*, UNGAOR, 15th Special Sess, UN Doc A/HRC/RES/S-15/1 (2011) at para 14.

¹²² Department of Public Information, "General Assembly Suspends Libya from Human Rights Council" (21 February 2013) online: United Nations General Assembly <www.un.org/News/Press/docs/2011/ga11050.doc.htm>.

¹²³ *Ibid.*

to disrepute, suggestions were made to include some form of qualitative assessment of candidacy for the new Council. The main sponsor for placing a restriction on who would be eligible for membership was the United States. Supported notably by EU members, the US pursued a proposal that membership would not be granted to any state currently subject to Chapter VII measures by the Security Council in relation to human rights abuses or acts of terrorism. This proposal gained little traction in the negotiations that would establish the Council and was a primary reason for the United States voting against Resolution 60/251.¹²⁴ Once again, the leading opposition to such provisions were Arab states who were opposed to placing any such restrictions on who could serve on the body.¹²⁵ Yeboah has highlighted that during the negotiations that would establish the Council “it became evident that the demand for each membership criteria type was accompanied by a certain vision of the role of the Council”.¹²⁶

Some of the world’s largest human rights NGOs made similar proposals for the establishment of specific membership criteria, yet after comprehensively addressing them Alston has defined their suggestions as unworkable concluding that none of the proposals could ensure that only states with positive human rights records would be eligible at election.¹²⁷ Obertleiner has highlighted by way of an example one proposal for only allowing states who had issued a standing invitation to serve on the Council, yet this would have excluded all but 55 states from serving on the body.¹²⁸

The compromise was the decision that the GA, as electorate, should “take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments”.¹²⁹ Although states are reminded “that the promotion and protection of human rights should be based on the principles of *cooperation* and *genuine dialogue*”,¹³⁰ the voluntary nature of the pledge system and direction to assess a state’s human rights record has left it susceptible to non-compliance by member states of the Council and those in the GA. That being said however, as Smith highlights,

¹²⁴ The other primary reason for the United States voting against 60/251 was the decision that only a majority vote (rather than a vote of 2/3^{rds}) was required to gain election to the body. See Sally Cummins, ed, *Digest of United States Practice in International Law 2006*, (Washington: Oxford University Press, 2006) at 331.

¹²⁵ ECOSOC, Informal Consultations 2005, *supra* note 54.

¹²⁶ Nana Yeboah, “The Establishment of the Human Rights Council” in *Managing Change at the United Nations* (New York: Center for UN Reform Education, 2008) at 82, online: GlobalSolutions.org <www.globalsolutions.org/files/public/documents/ManagingChange-5.pdf>.

¹²⁷ Alston, *supra* note 2 at 196.

¹²⁸ Obertleiner, *supra* note 23 at 45.

¹²⁹ Human Rights Council, *supra* note 4 at **para 8**.

¹³⁰ Human Rights Council, *supra* note 4.

“there is a clear underlying intention in the resolution to make states in the Council accountable for their human rights record”.¹³¹

A. VOLUNTARY PLEDGE SYSTEM

In the case of the voluntary pledge system the burden of compliance is split between the candidate state to voluntarily submit a meaningful pledge at election and the electorate to take account of that pledge by selecting countries they feel should serve on the body. Much of the discussion on the voluntary pledge system relates directly to the evergreen discussion of state compliance with human rights treaties. Compliance with the voluntary pledge process comes in a variety of forms. Initially a state may evidence its willingness to participate in the process by submitting the voluntary pledge prior to elections. Following election a state has a further opportunity to engage with process by complying with its various pledges, for instance the signing of a relevant treaty or optional protocol or the extension of an invitation to a Special Rapporteur. A final method of compliance with the pledge process is illustrated by the electorate, i.e. the General Assembly, who are directed to take into account pledges and a state’s human rights record at election.¹³² There are isolated examples of the pledge system working well, yet over the past six years the dominant theme that has emerged is of frustration at unfulfilled potential.

An instance where the system has operated effectively can be seen when Djibouti pledged to ratify the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in 2006 prior to the inaugural elections to the Council.¹³³ Three years later and with no evidence of effort to ratify CERD, Djibouti was re-elected throwing up concerns that the electorate, at such an early stage, had abandoned evaluating voluntary pledges. Within a year of its formation the Council had strengthened the voluntary pledge system by issuing a requirement that pledges are assessed when the countries are evaluated under the Universal Periodic Review (UPR) system.¹³⁴ Despite Ramcharan noting that “[i]n practice, however, there has been little follow-

¹³¹ Rhona K Smith, *Texts and Materials on International Human Rights* (London and New York: Routledge, 2010) at 134.

¹³² See on compliance Oona A Hathaway, “Do Human Rights Treaties Makes a Difference?” 111 *Yale LJ* (2001-2002), 1935 – 2042, at 1957; see *supra* note 68 at 282-84.

¹³³ Rhona K Smith, *supra* note 132.

¹³³ *Permanent Mission of the Republic of Djibouti to the United Nations*, online: General Assembly of the United Nations <www.un.org/ga/60/elect/hrc/djibouti.pdf>; *Djibouti’s voluntary pledges and commitments in accordance with resolution, A/RES/60/251*, online: General Assembly of the United Nations <www.un.org/ga/60/elect/hrc/djibouti.pdf>.

¹³⁴ *Institution-building of the United Nations Human Rights Council*, UNGAOR, 2007, UN Doc A/HRC/RES/5/1 at para 1(d).

up on voluntary pledges”,¹³⁵ when assessed under the UPR in October 2009, Turkey urged Djibouti to fulfil their election pledge of 2006 by ratifying CERD.¹³⁶ The result was that in September 2011 Djibouti finally ratified the treaty.¹³⁷ Albeit at a slow pace, the case of Djibouti is a successful example of the pledge system in operation.

Experience has illustrated frailty in the system as a number of states are submitting pledges with either weak intentions to act at some point in the future, or no verifiable commitment to act whatsoever. Despite guidance being issued by the OHCHR asking for states to include “specific, measurable and verifiable commitments in their submissions”,¹³⁸ Angola ambiguously pledged to “[accelerate] the process of ratifying” the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and CERD prior to the 2007 elections,¹³⁹ yet five years later there has been no visible movement towards the completion of these pledges. Furthermore, Bolivia in 2007 submitted a pledge pronouncing the great successes the state had made in the promotion and protection of human rights and a political commitment to continue, yet without any verifiable pledges for future action.¹⁴⁰ Similarly, Kyrgyzstan made a series of declarations of how it will continue to support and enhance the protection of human rights, internationally and domestically, yet without any tangible commitments for states to assess.¹⁴¹

It should be noted that these states are not the only candidates to take such an approach. Terlingen has highlighted that the quality of pledges varies widely between states,¹⁴² Alston has emphasised that the quality of the pledge is restricted by some states merely making “general expressions of good intentions”,¹⁴³ while Steiner *et al* have criticised them for being “vague and

¹³⁵ Ramcharan, *supra* note 75 at 36.

¹³⁶ *Report of the Working Group on the Universal Periodic Review Djibouti*, UNGAOR, 11th Sess, UN Doc A/HRC/11/16, (2009) at para 42.

¹³⁷ For a full list of ratifications, see United Nations, online: United Nations Treaty Collections <treaties.un.org>.

¹³⁸ United Nations Human Rights Council, “Suggested Elements for Voluntary Pledges and Commitments by Candidates for Election to the Human Rights Council” (21 February 2013), online: Office of the High Commissioner for Human Rights <<http://www.ohchr.org/Documents/HRBodies/HRCouncil/Pledges.pdf>>.

¹³⁹ *Letter dated 3 May 2007 from the Permanent Representative of Angola to the United Nations addressed to the President of the General Assembly*, UNGAOR, 61st Sess, UN Doc A/61/895, (2007).

¹⁴⁰ *Letter dated 26 March 2007 from the Chargé d'affaires a.i. of the Permanent Mission of Bolivia to the United Nations addressed to the President of the General Assembly*, UNGAOR, 61st Sess, UN Doc A/61/839, (2007).

¹⁴¹ *Note verbale dated 20 April 2009 from the Permanent Mission of Kyrgyzstan to the United Nations addressed to the Secretariat*, UNGAOR, 63rd Sess, UN Doc A/63/873, (2009) at 2.

¹⁴² Terlingen, *supra* note 60 at 172.

¹⁴³ Alston, *supra* note 2 at 201.

limited in scope".¹⁴⁴

Despite these instances it is clear that the pledge framework can operate successfully, so long as states adhere to it fully. This reliance on the good faith of candidate and electorate states has been its downfall on a number of occasions. For the first two years of elections every candidate routinely submitted a pledge.¹⁴⁵ Having submitted pledges at prior elections a number of states failed to resubmit new pledges when they ran for election or re-election to the Council on a second occasion. Resolution 60/251 does not demand that states resubmit pledges when presenting themselves for a second candidacy, yet thus far the practice of most states has been to do so. However, Gabon in 2008, Saudi Arabia in 2009 and Qatar in 2010, were the first three states to stand for election without submitting an up to date pledge, instead relying on a previous submission.¹⁴⁶ In the 2010 elections Uganda appeared to be the first state to put forward its candidacy without submitting a voluntary pledge prior to election.¹⁴⁷ These instances may reflect a shrinking enthusiasm amongst candidate states to comply with the voluntary nature of this provision of 60/251. During the 2011 elections all candidates promptly presented voluntary pledges prior to election illustrating that although a dangerous precedent had been set, it had not proved to be a catalyst for other candidates to avoid submitting pledges. While the system remains voluntary, its precarious future will firmly be in the hands of the candidate states to choose whether or not to comply with the relevant provisions.

For the pledge system to be effective in any way the presence of good faith must not be limited to the actions of the candidate state, but must also extend to the electorate. A large degree of disinterest was illustrated by the electorate in 2010 when 164 states voted in favour of Uganda's membership, despite the African nation not having submitted a voluntary pledge. Unfortunately, this episode is not the only evidence that pledges are not being reviewed before election. In each of the six elections since the Council was established a number of states have illustrated that they are entirely unaware of who is running for election, resulting in a number of stray votes. As only candidate states submit pledges, some in the electorate have illustrated a lack of awareness in the content or even existence of the candidate's voluntary pledge by voting for

¹⁴⁴ Steiner, *supra* note 26 at 806.

¹⁴⁵ Boyle, *supra* note 14 at 33.

¹⁴⁶ Voluntary pledges can be found on the Human Rights Council elections homepage. See United Nations Human Rights Council, "Human Rights Council Elections" (21 February 2013), online: Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCElections.aspx>>.

¹⁴⁷ Uganda eventually submitted its voluntary pledges under the Universal Period Review system in 2011. See *Report of the Working Group on the Universal Periodic Review*, UNGAOR, 19th Sess, UN Doc A/HRC/19/16, (2011) 1 at 25.

states that are not standing for election. In 2006 nine non-candidate countries received votes; this number was twelve in 2007, seven in 2008, four in 2009, one in 2010 and five in 2011. Worryingly, although being subject to a special session to consider gross human rights violations against its civilian population only weeks before election in 2011, the government of Syria received five votes despite not submitting itself as a candidate state.¹⁴⁸

B. ELECTING ON THE BASIS OF A STATE'S HUMAN RIGHTS RECORD

Alongside the voluntary pledge system, there is a requirement that the electorate take account of the "contribution of candidates to the promotion and protection of human rights".¹⁴⁹ As this provision is also only an instruction and as all elections are by secret ballot, there is no opportunity for accountability when the electorate votes for a candidate based on commercial interests or regional allegiances rather than on the basis of that state's human rights record. That being said, this provision appears to be enjoying some success with regards to the composition of the Council.

The instruction to elect candidates based on their human rights record initially had two positive outcomes. First, the requirement appears to have had the desired effect of acting as a deterrent to nations with questionable human rights records from seeking election. Thus far both Sudan and Zimbabwe have refrained from seeking seats on the Council despite relatively recently holding seats on the Commission. Iran withdrew its candidacy in 2010 when it became apparent that it was unlikely to be elected due to its poor record on human rights,¹⁵⁰ while Ramcharan has also noted that Belarus had announced its candidacy to run at one stage, but withdrew after extensive pressure from NGOs.¹⁵¹ The second positive impact is that there is evidence that some of the electorate are fulfilling their obligation to take account of the human rights record of candidates. Examples lie in Iran and Venezuela both failing to secure election in 2006 and Belarus receiving only 78 votes in the 2007 Council elections. These instances serve to illustrate that some in the GA are conscious of the impact the membership of the Council has on its credibility.

Despite visibly enjoying more immediate success than other provisions, this provision still holds frailties, the most immediate problem being the highly subjective nature of using a state's contribution to the promotion and protection of human rights to assess its candidacy. The case of Malaysia can

¹⁴⁸ 'Report of the Human Rights Council on its sixteenth Special Session' *supra* note 103.

¹⁴⁹ Human Rights Council, *supra* note 4, art 8.

¹⁵⁰ Louis Charbonneau, "Iran withdraws bid for seat on UN rights council", *Reuters News* (23 April 2010) online: Reuters.com < <http://www.reuters.com/article/2010/04/23/us-iran-rights-un-idUSTRE63M4GV20100423>>.

¹⁵¹ Ramcharan, *supra* note 75 at 36.

be used as a practical example to illustrate the difficulty of defining a good human rights record. Despite having failed to ratify four of the six core human rights treaties, or extend any open invitations for special procedures, Malaysia was successful in the Council's inaugural elections.¹⁵² One could argue that because Malaysian authorities had refrained from signing these Conventions they should not be allowed to sit in a position in which they can comment upon the human rights records of other nations. Conversely, it could also be argued that Malaysia ran for election alongside candidates with human rights records equally as questionable as their own. Other candidates in the 2006 Asian region elections included Iran, Iraq, Saudi Arabia and Sri Lanka, some of whom have ratified many of the international conventions Malaysia have not.¹⁵³ Furthermore, as Hathaway has argued extensively, there may be no direct correlation between signing and ratifying treaties and better human rights practices. Indeed she suggests that there is "the possibility that human rights treaties may sometimes lead to poorer human rights practices within the countries that ratify them".¹⁵⁴

Not only is it hugely difficult to define "a good human rights record", but it is also unrealistic to enforce such a subjective criteria fully due to the inherently political nature of an intergovernmental body. Powerful and wealthy states are always more likely to receive votes at election than their smaller, less well connected counterparts. A perusal of voting patterns illustrates this point. India was elected with 185 votes (2007), Japan with 155 (2008), France 123 and the UK with 120 and in 2009 China was awarded 167, Russia 146 and the United States 167.¹⁵⁵ A number of these states do not have glowing human rights records, yet their election was a mere formality due to the significance they each play in global geopolitics. Unsurprisingly it is states that lack an equally powerful network of allies and affiliates who have failed to secure election, Belarus being the key example.¹⁵⁶

¹⁵² Malaysia has not ratified the following: *Convention on the Elimination of all Forms of Racial Discrimination*, 21 December 1965, UNTS 660 at 195; *International Convention on Economic, Social and Cultural Rights*, 16 December 1966, UNTS 993 at 3; *International Convention on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, arts 9-14, or *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, UNTS 1465 at 85.

¹⁵³ Report of the Human Rights Council on its eleventh Special Session, *supra* note 100.

¹⁵⁴ Hathaway, *supra* note 133 at 140.

¹⁵⁵ For a breakdown of candidates and voting for the United Nations Human Rights Council see online: Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCElections.aspx>>.

¹⁵⁶ Similarly, Ghana notes that it is such isolated states who commonly receive criticism under the 1235 and 1503 procedures in Ghana, *supra* note 120 at 697.

V. ELECTIONS

Elections to the Commission were highlighted as one of the most sensitive issues by the High-Level Panel. This disposition has continued into the era of the Council even though elections occur in a distinctly different manner.

A. ELECTION IN THE GENERAL ASSEMBLY

Kofi Annan had put forward the proposal that elections to the Council should be held in the GA, rather than the ECOSOC, in order to make the membership of the Council “more accountable and the body more representative” and as it would give the Council “greater authority than the Commission”.¹⁵⁷ In particular, Annan noted that election by the GA would “reflect the importance accorded to the body”.¹⁵⁸ Rehman has commented that election by the GA “in practice should provide greater latitude in electing States that are more committed to human rights issues”.¹⁵⁹ The proposal was supported by the African, Arab and European groups at negotiations and as a result election to the Council is now decided by the 193 strong GA, rather than the 54 strong ECOSOC.¹⁶⁰

The inclusion of the GA in such a sensitive and controversial aspect of the Council has both positive and negative implications. It is positive because Council membership is democratically elected by the entire UN, providing it with a greater mandate and individual members with greater responsibility than under the previous Commission. A negative implication is that when the GA elects states with questionable human rights records, it opens the organisation’s primary body up to criticism rather than isolating that criticism to a subsidiary body, such as the ECOSOC. In conceptual terms, therefore, election through the GA is certainly an advancement of the position of human rights within the UN, but in practical terms, it may give rise to more unwelcome criticism of the United Nations system as a whole.

B. PROPORTION OF VOTE TO SECURE ELECTION

The issue of what proportion of the vote would be required to gain

¹⁵⁷ In larger freedom, *supra* note 58 at para 4.

¹⁵⁸ *Ibid* at para 12.

¹⁵⁹ Javaid Rehman, *International Human Rights Law*, 2d ed (London, UK: Pearson Education Limited, 2010) at 49.

¹⁶⁰ Another reason why elections are held in the GA is that it was envisioned at the Council’s creation that the body would be elevated to the status of full Council in the UN framework. The decision was taken in June 2011 for the Council to remain as a subsidiary of the GA, but that the issue would be considered again “no sooner than ten years and no later than fifteen years”. See *Review of HRC, supra* note 5 at para 3.

membership was not accepted quite as readily. From the outset Kofi Annan had proposed that members of the Council would need the support of two-thirds of GA members present and voting to secure election.¹⁶¹ Theoretically this would have made it much more difficult for states with poor human rights records to succeed in elections. Annan's proposal was supported by the United States and the rest of the WEOG regional body.¹⁶² Coincidentally a two-thirds benchmark would have meant that elections to the Council would have been as rigorous as the elections to the Security Council and thus would have made success at election a much higher accolade than it has become.

Again, this was an issue where historic southern countries took a different position to that held by their western counterparts. Southern states stressed that a two-thirds majority would be prejudicial to "developing countries due to obvious constraints in their ability to undertake lobbying efforts compared with developed countries".¹⁶³ A simple majority was advocated by both African and Arab groups at negotiations.¹⁶⁴ It was eventually decided that members of the Council are to be elected by a majority of the GA, "directly and individually by secret ballot".¹⁶⁵ As such, instead of the support of 128 GA members, candidate states need only the support of 97.

It is interesting to note that if Kofi Annan's two-thirds approach had been followed, in the 2006 elections at the first ballot neither the authoritarian monarchy of Saudi Arabia or Sri Lanka, a nation whose domestic human rights situation caused a special session to be called in 2009, would have been elected. The voting in this manner is further evidence that some members of the GA did take the human rights record of candidates into account prior to the first session.

C. SECRET AND INDIVIDUAL ELECTIONS

It was decided that elections to the Council would be secret. Obertleiner had seen the inclusion of secret ballots in elections as a positive step at the establishment of the Council in that it would have the potential to prevent horse-trading over votes.¹⁶⁶ The decision was also made that the Council membership would be elected individually, rather than through the previous Commission practice of candidate states being put forward in their regional grouping to the ECOSOC. Rehman has noted how this was "intended to allow

¹⁶¹ In larger freedom, *supra* note 37 at para 183.

¹⁶² Boyle, *supra* note 14 at 30.

¹⁶³ ECOSOC, Informal Consultations 2005, *supra* note 54 at 10.

¹⁶⁴ *Ibid.*

¹⁶⁵ Human Rights Council, *supra* note 4 at para 7.

¹⁶⁶ Obertleiner, *supra* note 23 at 64.

states all possible opportunity to elect states based on their human rights credentials",¹⁶⁷ while Alston presumed that this would "encourage more nominations than there are places".¹⁶⁸ Despite the good intentions and high hopes for these two particular provisions they have proved almost entirely unsuccessful and done more than anything else to undermine the body in its early years.

i. Secret ballot

The secret nature of the ballot means that the electorate is now totally unaccountable for whom they vote for.¹⁶⁹ States are free to vote for whomever they want on the basis of commercial, regional or political alliances, rather than on the intended basis of voluntary pledges and an evidenced commitment to human rights. This has resulted in a situation whereby states with poor human rights records are being elected to the Council, causing outcry amongst observer groups and states, and yet there is no accountability to the electorate for putting the state there in the first place. Thus when Libya was elected to the Council in May 2010 with 155 votes (approximately 80% total votes); there was no accountability to the electorate by civil society or NGOs.

ii. Individual election: 'Clean Slate' voting

The bane of elections to the Commission was a process known as 'clean slate' voting. This occurred when a regional group put forward the same number of candidates as seats available, meaning that the ECOSOC had little choice but to vote for those candidates. In practice, the decisions of which states would put themselves forward for election would be made behind closed doors and through regional negotiations.¹⁷⁰ This practice is not strictly reserved for elections to human rights bodies and is present in almost all limited-term membership bodies in the UN. Yet, it is a practice that can be tremendously detrimental to any institution where credibility is an issue of concern. It is this practice in particular that had presented the opportunity for pariah states, notably Sudan, to gain a seat on the Commission.

Despite enjoying an early success, elections to the Council have become the principal area of concern. In the Council's inaugural elections of 2006 every region was overrepresented as states sought membership to the first Council. There were 65 candidates for an initial 47 seats in what would prove to be the

¹⁶⁷ Rehman, *supra* note 160 at 51.

¹⁶⁸ Alston, *supra* note 2 at 199.

¹⁶⁹ For discussion on Secret Ballots see *supra* note 68 at 67.

¹⁷⁰ An example of clean slate voting in action was the 2004 elections to the Commission. From the five regional groups where candidates are selected from, only the Asian and WEOG regions held competitive elections, while the other three submitted clean slates.

only truly competitive election in the body's brief history. The first elections evidenced rejuvenation in the UN human rights programmes, although the large number of candidates could also be attributed to NGO pressure on states to seek membership. One particular success at the first election was that the competitiveness of the GRULAC region saw Venezuela fail to secure election at the first ballot, despite receiving 101 votes. The only disappointment in this election was that the African group effectively put forward a clean slate, with only 14 candidates for 13 seats, meaning that when Kenya withdrew its candidacy all other candidates were elected unopposed.

By the 2007 elections the rejuvenation and energy that had greeted the Council's creation had faded. Only 16 states sought election for 14 available seats in an election that would see the African, Asian and GRULAC regions put forward the same number of candidates as seats available, thus returning to the clean slate voting which had plagued the Commission. The 2008 elections continued in the same manner with both the African and GRULAC regions putting forward clean slates for the GA to ratify, thus reducing the electorate's position to one of merely rubber-stamping the decision. On this occasion only 19 states ran for the 15 available seats on the body.

The 2009 election followed in a similar vein with the Asian, GRULAC and, for the first time, WEOG groups all putting forward clean slates. In total, only 20 states ran for 18 positions on the Council. It should be noted that on this occasion the African election proved to be so competitive that Kenya failed to secure membership despite having received 133 votes. The 2010 elections proved to be entirely uncompetitive across the board with all five regional groups reverting to clean slate voting. The most recent elections of 2011 saw little improvement due to the African, Asian and WEOG groups retaining the practice.

VI. CONCLUSION

The Council is not in any immediate danger of collapse. Commentators and member states alike are mindful that the body is in its infancy and since the first cycle of the UPR has only relatively recently been completed the likelihood is that, despite criticism, the Council can continue in its current form for the foreseeable future. Nonetheless, the Council's very foundation of strength rests in its credibility to act as a moral authority - a characteristic inextricably linked to its membership. All that stands between the Council and complete vulnerability to a collapse in moral authority is the loose membership provisions enacted in GA 60/251.

After six years in office, the jury is still out as to whether these provisions can be viewed as a success or failure. There has been some reason for optimism

as, undoubtedly assisted by the wave of energy that greeted the new body, its composition has been relatively balanced in favour of states with a positive commitment to human rights protection. This is reflected best in isolated instances where states with poor human rights records have failed to secure election (Iran, Venezuela, and Belarus) and through suspension of those who have committed gross human rights violations while serving on the body (Libya). Save for Libya's interrupted membership, the Council has also been free from the presence of any real pariah state.

Despite these successes there remains an underlying fear that the Council's credibility lies on the edge of a precipice because of its fragile membership provisions. There is a growing apathy to the voluntary pledge system and the concurrent request to review a state's human rights record on election, while powerful states that lack a demonstrable commitment to human rights continue to seek and secure membership. Most worrying of all is the increased use of clean slates in regional voting blocs that could act to nullify every good intentioned provision included in GA 60/251.

At discussions to review the Council's work and efficiency in 2011 a number of states, conscious of these weaknesses, proposed solutions intended to give the process greater resolve. Austria suggested that candidate states should include in their membership pledge "a commitment to fully cooperate with Special Procedures, including by issuing a standing invitation, and there could be a regular review and follow-up with States on such pledges in the HRC".¹⁷¹ The United States and Germany proposed models whereby candidates could "present voluntary pledges and commitments in an interactive dialogue before the General Assembly using a standard format that includes specific and measurable benchmarks".¹⁷²

A number of states suggested that the level of a candidate's cooperation with Special Procedures should be used as an indicator for their candidacy.¹⁷³ The Czech Republic proposed that a "persistent lack of cooperation should mean [a] state is not qualified for membership".¹⁷⁴ Argentina and Chile jointly suggested that the OHCHR could "compile and make available objective information on the cooperation programme between states and UN Human Rights mechanisms".¹⁷⁵

Despite raised concerns, largely from western and South American states, that the pre-election system was not operating at its full potential these suggestions were rejected and accordingly the provisions remain much the

¹⁷¹ Report of the open-ended intergovernmental working group, *supra* note 56 at 79.

¹⁷² *Ibid* at 120 and 132.

¹⁷³ *Ibid* at 131.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* at 77.

same as they were at the Council's birth. It is likely that states which are benefiting from the structure and lack of membership criteria in the Council are reluctant to agree to any change which may see their power or access to the institution limited. With the decision not to strengthen this system any further, the Council's credibility remains vulnerable to exploitation by both candidates and the electorate.

Of immediate concern is the willingness of states to continue the process of clean slate voting. Admittedly, the Council is an intergovernmental organisation and in that sense political, regional and cultural factions are presumed to cooperate on ventures. However, to do so in a manner that inherently undermines the protections which states themselves have drafted for the Council's credibility is unacceptable. No region is free from criticism of this process. Despite the condemnation of both France and the United States of the clean slate voting practice,¹⁷⁶ the WEOG group has utilised it on three occasions, including the 2009 election which saw the United States elected.

It is this process which will expedite the election of pariah states, whose very presence erodes the credibility of the Council. After all, it was the universal clean slate voting practice of the 2010 elections that saw Libya elected to the body. Despite Council members awareness that there is a threshold of acceptability in relation to both a state's conduct while serving on the Council, and the presence of pariah states in the first place, the process of clean slate voting removes all global protection from the election of such states and isolates the decision to a regional group.

VII. SUGGESTIONS FOR REFORM

Freedman concluded her analysis of the politicisation of both special sessions and the UPR process by stating that "[i]n order to strengthen these mechanisms, and indeed the Council as a whole, the body's problems regarding membership must be tackled".¹⁷⁷ As already illustrated during the 2011 review, a number of states noted the frailties of the current provisions, yet no substantive changes have been included in the reform. As such, the following proposals are somewhat conscious of the differing attitudes within the Council towards change.

It is imperative that any reform is enacted prior to the next full Council review process in 10-15 years time. Change will be far more effective if it takes while the voluntary structure is still yielding some positive results as states may have stopped complying with voluntary provisions altogether before the

¹⁷⁶ *Ibid* at 130-132.

¹⁷⁷ Freedman, *supra* note 76 at 323.

next review process.

a. Voluntary pledges

Remove the voluntary nature of the pledge system. Presently, the provision neither acts to prevent states with poor human rights records from entry to the Council, nor encourages those states to improve their human rights compliance once elected. Despite this, the pledge provision has the potential to become an astute method of human rights protection, particularly in promoting the ratification of core human rights treaties and compliance with UN bodies.

Pledges should be effectively evaluated during a state's UPR session - and if the state in question is found not to have made a visible effort to comply with their pledges they should not be eligible for re-election or election to the body for a number of years.

An identifiable framework for pledges should be developed with reference to the 'Human Rights Voluntary Goals', which were approved by the Council in September 2008. Included in this document is an invitation to states to "report on the progressive implementation of the human rights voluntary goals" at UPR stage.¹⁷⁸ It would be relatively straightforward for this report to be made at the voluntary pledge stage for candidates along with commitments on how other goals are to be fulfilled.

The goals provide a roadmap for states to "accomplish progressively" a set of human rights objectives.¹⁷⁹ Although they include increasing cooperation with human rights enforcement mechanisms such as special procedures and treaty bodies,¹⁸⁰ a proposal rejected during the Council review discussions, they would still provide a defined checklist against which states could direct their pledges. Given that it was the membership of the Council who drafted and accepted the goals in the first place, there is room to suggest that they would be a popular proposal for a framework for the voluntary pledge system.

b. Contribution to the promotion and protection of human rights

Instruct the OHCHR to produce a comprehensive list of indicators which the electorate should take into account when voting for candidates in elections to the Council. Again, this list of indicators can be made with reference to the Human Rights Voluntary Goals, and include such factors as the "[u]niversal

¹⁷⁸ *Report of the Human Rights Council on its 9th session*, UNGAOR, 9th Sess, UN Doc A/HRC/9/28, (2008) 40, art 2.

¹⁷⁹ *Ibid*, art 1.

¹⁸⁰ *Ibid*, art 1(g).

ratification of the core human rights instruments”,¹⁸¹ “establishment of human rights national institutions”¹⁸² and the “strengthening of mechanisms to facilitate international cooperation”.¹⁸³ The list provided by the OHCHR should be non-exhaustive and created with the cooperation of member states of the Council.

c. Elections

Two proposals can be made to improve the election process. The first should be the removal of secret balloting from the election process. Admittedly, this practice has the potential to remove some of the hard bargaining which was rife in Commission elections, yet it would appear that such activities have merely been relocated to behind closed doors in regional assemblies resulting in the widespread continued use of clean slate voting. By paving the way for a more transparent system the voluntary nature of the current membership provisions would be greatly improved, as states would be more accountable for whom they elect to the Council.

The second, and more essential, step is to declare void all regional elections where candidates run unopposed. If all regional elections in which clean slates of candidates are put forward were declared void, there would be an onus on at least one extra candidate state to declare and run for election in each region. If this were the case across all five regional groups then, despite being relatively uncompetitive, the other aspects of the system would see a major improvement. For instance, if the Group of Eastern European states were required to put forward three candidates for two available seats, there would be an added incentive for each candidate to comply with the pledge system by submitting a meaningful commitment to human rights. Admittedly, negotiations would continue to take place behind closed doors and many would still be elected due to regional, political, cultural or economic alliances. Nevertheless, it would give rise to elections where the calibre of a candidate’s commitment to human rights would become a more relevant factor.

This second proposal is perhaps overly ambitious given the apathy to reforming the election process in the review of the Council. As such, states with a particular interest in seeing an end to clean slate voting should act in unity to oppose the practice. Given that it has been states from the WEOG group who have been most vociferous in their criticism of the practice - despite utilising it three times in six elections - states from this group and their global allies should refrain from voting for candidates in regional groups who submit clean slates. The requirement to secure election in 60/251 is to secure

¹⁸¹ *Ibid*, art 1(a).

¹⁸² *Ibid*, art 1(c).

¹⁸³ *Ibid*, art 1(h).

the support of “the majority of the members of the General Assembly”.¹⁸⁴ It may therefore be possible for states submitted on clean slates to fail to receive the electoral majority necessary to secure a seat on the Council, thus forcing reform on this issue.

The likelihood for success of these proposals is entirely dependant on the willingness of states to engage constructively with one another. Despite clear reluctance from many states during the 2011 review to change the membership provisions in any way it must be remembered that these were the same states which had agreed prior to 2006 to enact, albeit limited, membership provisions seen in GA 60/251. A return to the spirit of cooperation exhibited in the drafting of 60/251 would enhance the possibility of the proposed improvements to the current framework.

For the Council, actions will always speak louder than words. The willingness to address emergency situations in special sessions, completion of the first UPR cycle and specifically the suspension of Libya has given the body a strong footing to rise from the ashes of the Commission. Yet due to a series of frailties in its membership provisions the Council will continue to remain susceptible to criticism. The body’s precarious future, both in the long and short term, is entirely reliant on a level of good faith from its membership and the wider GA that has not yet been fully evident. It is in their hands entirely which direction this chapter in the UN human rights project takes.

¹⁸⁴ Human Rights Council, *supra* note 4 at para 7.

