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# Preparing for judgment and the prospect of change: Approaching the 2011 review of the United Nations Human Rights Council

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While much has been said about the shortcomings of the UN Human Rights Council, improvement of the body's efficiency and efficacy has received few considerations. Recognition that there is considerable room for improvement at the Council inspired an investigation into proposals aimed at changing the structure and substance of the body. This article is based on extensive research which found that shifting trends in the international political landscape, the Obama administration's renewed commitment to human rights and US Council membership, and the approaching mandated 2011 review of the Council's mechanisms and work combine to create a unique context conducive to producing positive change at the Council. The research included over twenty interviews with international state and non-state actors working in or around the Council. The interviewees reflect various sectors of stakeholders, and different regional perspectives. The research recognized, and article discusses, the difficulties of creating change at the Council given the realities of international politics, and the lack of scholarly attention which the Council has received. While the Council receives significant criticism, the article reiterates that the Council is a unique space in which states, who are ultimately the implementation vehicles of rights standards, discuss serious human rights issues. As such, the Council provides a platform to gather and measure state commitments to specific international human rights situations. The article concludes by noting that if stakeholders recognize the usefulness of the body, and utilize this unprecedented window of opportunity, significant change at the Council is plausible.

**Key words:** Civil society, non-aligned movement, Obama administration, organization of the Islamic conference, reform, United Nations human rights council.

## INTRODUCTION

The United Nations Human Rights Council's (hereinafter; the Council) performance to date has raised questions as to whether Council's actions have promoted or actively constrained international human rights. The Council simultaneously exemplifies the primacy of human rights at the UN, and the practical limitations of human rights protection in the hands of states. While some commentators have accentuated troubling actions and trends at the Council, others emphasize the promising accomplishments the body has managed. Nonetheless, proponents and opponents of the Council agree that much can be done to address various shortcomings and enhance the body. As the international political landscape undergoes important alterations (namely the United States' renewed

commitment to human rights and new efforts challenging regional and political alliances), and the Council approaches its mandated review, the international community has an unprecedented opportunity to improve the efficiency and efficacy of the body.

Reformation of the UN's human rights body has been ongoing since 1947. The next mandated review of the Council's "work and functioning" will be held in 2011 at the UN Headquarters in New York. The 2011 review serves two basic purposes. Firstly, the review will allow states and regions to resume debates regarding the details and nature of the Council. These discussions were limited due to the fact that the Commission on Human Rights (hereinafter; Commission or CHR) had

been terminated before the Council had been created. Secondly, the five years allotted would give new mechanisms, namely the Universal Periodic Review, and other minor reforms a chance to develop. Henceforth, the 2011 review provides the international community with an extraordinary opportunity to publicly examine the nature of the Council and discuss reform proposals, which seek to positively impact the body. However, the chance for change at the Council is not limited to the mandated review. Transformations in the broader global political context may have a more immediate and deliberate impact on the Council's proceedings.

During its first years the Council members were tasked with the promotion of international human rights amidst distrust and hostility between regional blocs and political alliances surrounding the "War on Terror". However, recent developments in global politics have resulted in positive speculation regarding the future of the Council. Those working in and around the Council suggest that bloc alliances are facing unprecedented challenges. Furthermore, the Obama Administration has pledged to take a leadership role in relation to the genuine promotion of international human rights. Many stakeholders believe that US involvement at the Council is itself enough to significantly affect the direction of international human rights. Regardless, of whether or not one believes that the direction of human rights can be effected by only a number of changes in global politics, it is important to recognize that the contexts surrounding the Council are changing, and changes in the nature of the Council are imminent.

The research which guides this article is predicated upon the recognition of a convergence of immediate and approaching circumstances, which will influence, and likely evoke changes to the Council's structure and political dynamics. The research included a combination of over twenty interviews and documentary research, which sought to provide the most cumulative and complete portrayal of the prospective changes the Council may undergo in preparation for, and during the 2011 review. The research attempted to balance politicization by obtaining a range of perspectives, in terms of state and non-state actors as well as persons from each region.

Findings from the research revealed much about the predicted future of the Council, which as this article will substantiate, is contingent upon the ability of the Council's stakeholders to capitalize on the provided window of opportunity. This article proposes that a more effective and efficient Council is plausible if those state and non-state actors attempting a genuine human rights agenda: recognize that the political landscape in and around the Council is not fixed, denoting the need to consider new ways to navigate the landscape; learn from the shortcomings of past reform efforts in order to properly prepare for the 2011 review; begin a movement aimed at regulating member state behavior; utilize the

United States' membership as a tool which can influence the behavior of other member states; and above all acknowledge that the Council has the potential to be a useful vehicle to promote and protect international human rights.

The General Assembly resolution gave no specifics in terms of the review process. This effectively warranted states the ability to determine the specifics of the process, including which actors are included. In the past, NGOs have been completely left out of policy decision making processes. NGO representatives note that; "Civil society has not began to put the blocks in place and this will probably begin following the 2010 elections." Further complicating the involvement of non-state actors is the recognition that NGOs and academics are not a united front, they face the same difficulties in reaching consensus as states do (Jimenez Interview, 28 April, 2009). Henceforth, preliminary discussions and initiatives are required if members of civil society seek to put forth even a semi-unified voice.

### **Contextualizing and Preparing for the 2011 Review**

A successful review of the Council's work and mechanisms will require proficient preparation from both state and non-state actors. Preparation entails examining both the details of the review which have been established, and the details which remain undetermined. One detail of the 2011 review which has been established is the location of discussions. The review will take place in New York, as this is where the General Assembly is located. Additionally, those who will themselves be involved in the reform discussions confidently predict a lengthy process. One may only speculate about further details regarding who will be involved in the review, how the review will be conducted, and what the review will cover. However, utilizing the history of reform at the UN, namely the Commission to Council reform process, and examining the predictions of those who are heavily involved in the Council provides the necessary framework for pertinent foresight.

Many non-state actors provided insight about what issues may be the focus of review discussions. As Roy Brown proclaimed, "Any review must revisit the question of the criteria of membership." Others felt that priority should be given to reforms which would not require significant systematic change. For example, Professor Connie de la Vega felt that the review was an opportunity to build on some of the positive work that has come out of the special procedures by "giving them more support through increased staffing and mandates." Rudolf Knoblauch also held the position that the most productive topics at the review may actually be those which do not deliberately challenge the current structure. He provided examples including, the organization of debates and the role of civil society and the media (Knoblauch, 31 March,

2009). Also, many state and non-state actors were adamant that this review would be the venue at which the pressing issues of the autonomy and authority of the OHCHR, and the reinterpretation of the freedom of expression at the Council will be addressed.

In order to comprehensively understand the approaching 2011 review it is important to understand the Council's arcane foundations which were marked by turbulent developments in international politics and intensifying regional, religious and political divides. The UN's decision to reform the CHR came at a time when relations between North and South were being intensely strained by the US led invasion of Iraq, while the war on terror was changing the face of international politics (Terlingen, 2007: 2). Reform of a complex and controversial UN body occurred in a hostile environment where labels of imperialism had a sense of legitimacy, making even basic discussions difficult. The General Assembly recognized that the Council which was to be created represented the best possible compromise given the circumstances which surrounded the formation of the body (Yeboah, 2008:79). The idea that states had scheduled a review for 2011 before the Council had begun its work affirms the recognition of fundamental weaknesses in the Council's structure. As many interviewees noted, the preemptive nature of the review is promising as it indicates that the review will be substantive. As one foreign policy expert stated, "reviews are often formalities which are undertaken to appease critics, this scheduled review is obviously something more".

If the 2011 review is to be substantive and productive, the review will have to address, and overcome the shortcomings which manifested during the CHR reform process. At the outset of official reform discussions a sense of anxiety became evident from state and non-state stakeholders. This anxiety or uncertainty resulted in a rushed and hectic reform process. States prepared themselves for reformation negotiations, but the process began before any legitimate expert deliberations occurred. In fact, the CHR was officially terminated before negotiations on the structural details of the Council were completed. Unfortunately, the rushed process meant that only select structural and political problems were addressed (Yeboah, 2008: 79). It was clear from the initial stages of reform that the Council would be something of a leap of faith that may miraculously avoid repeating many of the same mistakes of the Commission (Abraham, 2006: 24).

The series of events leading up to the Council formation produced a great deal of uncertainty about what would become of the Commission's existing work and many feared a "protection gap" (Abraham, 2006: 12). The concept of a "protection gap" refers to the belief that any span of time when the body is not operating, is a period during which international violations cannot be adequately addressed. One Western Ambassador

involved in the process stated, "...you cannot throw away one institution without having anything to replace it with. We wanted a new Council, and most people wanted it the next day." The same Ambassador went on to point out that the process did, however, provide states with the opportunity to skip the bureaucratic steps that often undermine the creation of new bodies (Yeboah, 2008: 89). The final decision was made to directly transfer the Commission's work to the Council and begin work immediately rather than taking time for reflections and discussions.

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

During the reform discussion the first inclination of those states which feared change appeared to be to discredit any proposed reform by claiming that such a change would discredit the importance of other UN bodies (UNGA, A/59/847-E:6). These states also continually pointed to the fact that changing the UN Charter was a "long and difficult process" immediately terminating any discussions of significant reform (UNGA, A/59/847-E/2005/73:10). In such an environment, only the most conservative proposals have any chance for true consideration and discussion. One Western diplomat interviewee, who was part of a state delegation assigned to the reform discussions, said that the most successful approach was to "...tell others what they want to hear and sell your proposals in a manner that makes them seem irrelevant." This interviewee compared the negotiation process to attempting to "...sell a used car." The international community walked away from the reform discussions without any significant discourse of the strengths and weakness of existing proposals. Not to be overlooked was the significant amount of state divisiveness that intensified and complicated the reform discussions. Individuals were aware that there was no uniformity of approaches and no consensus could be achieved through negotiations (Terlingen, 2007: 4).

Delegates were forced to fight doggedly to push their model through any political channel available in order to be heard. This was done with full knowledge that unanimity would be impossible to acquire. Political horse trading had replaced open discourse. Many assumed that open-liberal discourse would result in embarrassment and apprehension.

An alarming and overlooked aspect of the CHR reform was the negative effect it had on concerned NGOs. The reform talks became so technical that NGOs became alienated. Institutional reform debates were based on progressive realization, meaning that those involved in the reform process were engaged in a lengthy and intricate learning process, and NGOs lacked the time or resources to keep up with the learning curve. The Commission reform process really was detrimental to NGO participation, because thematic and country specific debates which NGOs were working to promote were put on hold and replaced by institutional debates of a very technical and increasingly consuming nature, which alienated some NGOs (Rivero Interview, 29 April, 2009). By examining the Commission to Council reform process we can make assumptions about the following features of the 2011 review: the structure and style of deliberations, the positions or arguments that states and regions will likely present regarding various issues, what initiatives will receive real considerations and which initiatives will be dismissed, and the implicit alienation of non-state actors.

Historically, institution-building work at the UN has been exhaustive. The political environment leads to extremely complex deliberations. This can be partially attributed to the idea that previous reform efforts have been largely reactive. Thus, the 2011 review is unique in that it was proactively scheduled allowing stakeholders to prepare. While sources express the lack of preparation for the 2011 review that has taken place to date, there are promising signs that both states and civil society are embracing the review as an opportunity. US Ambassador to the UN Susan Rice highlighted this in her remarks:

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

The research found that the 2011 review will likely focus on specific structural elements of the Council. Thus, to properly prepare for 2011 there must be stakeholder awareness of what structural components are likely to be the focus of the review. To date, the structural shortcomings of the Council have received few considerations

because the Council's actions are often observed through a purely political prism. However, the structure is a means by which changes in the direction of the Council are created. In this regard, the 2011 review will be, to some extent, constructivist oriented. Constructivism considers actors and structures to be mutually constituted, and thus mutually reinforcing. The structure (in this case, the rules and procedures of the Council) provides a “set of relatively unchangeable constraints” on the actor (in this case, the member states) (Hopf, 1998: 172). The structural framework attempts to guide the Council to ensure that the body is working towards its designated task. Because the structure plays at least a partial role in the Council's performance, it is necessary to recognize what structural elements will likely be discussed in 2011 and how these structural matters can improve the efficiency and effectiveness of the body.

The membership or composition of the Council is the most publicly scrutinized element of the Council's structure and is considered the structural component which is most urgently in need of reform. State and non-state actors recognized that there may be some virtue in previously proposed composition reform namely, elite membership and universal membership. During the Commission reform process Cuban Ambassador Rodrigo Malmierca Diaz supported universal membership by stating, “If human rights are universal and are everybody's responsibility, why should the decision making mechanism on these issues be limited?” (A/60/PV.72). The counterpart to the concept of universal membership were proposals to designate an elite membership system. Cecilia Jimenez noted potential benefits of elite membership by stating; “The model which promotes the greatest efficiency is one with less members, ideally between 18 - 30 would promote better state performance and create an intense movement towards competition” (Jimenez Interview, 28 April, 2009). Regardless of what model was under consideration, each proposal possessed a certain amount of appeal and limitations.

States and civil society note that while changing the membership structure is unlikely, there is much that can be done to improve the existing composition. The most noted of which is the application of negative criteria to determine which states are disqualified from Council membership. The General Assembly surprised the international human rights community when it refused to ban countries which were being sanctioned by the UN Security Council for human rights violations (Morse, 2007). However, this initiative is considered both viable and necessary, and will likely be promoted again in 2011. Another, more provocative proposal, which may be discussed in 2011 is the concept of reformed regional distribution.

State representatives who wanted to maintain the membership structure of the CHR agreed to a minor reduction in members as long as changes were based

upon “equitable regional representation” (UNGA,A/59/847 - E/2005/73:17). This claim of equitable distribution however, is misleading. Article two of the UN Charter declared that member states must adhere to the principle of sovereign equality. Henceforth, the distribution at the Council adheres to “one country one vote” however, critics of this system note that it is not necessarily democratic. Upon examining the current distribution, it is obvious that the current system is not reflective of a true geographical balance in terms of population. According to the UN Population Division, the current world population is estimated to be 6.788 billion, the current population of the African states group is approximately 921 million. Thus, despite possessing only 13.5% of the world's population, African states hold 28% of the Council's seats. This disparity in representation brings the legitimacy of the current distribution into question.

The one membership component for which reform is considered “non-negotiable” is the current regional election process and the resulting practices. The initial elections of 2006 were marked by strong regional competition. However, in the elections that followed only two regions (Western Europe and other States, and Eastern European States) offered more candidates than the number of available regional seats. The recent decision of New Zealand to withdraw its candidacy to ensure the appointment of the US displays how regions are able to determine their representatives. Critics of this practice note that it is a return to practices of the CHR, where elections became something of a formality (Yeboah, 2008:90). R.J. Rajkumar reflected the perspective of many working in and around the Council when he called for a deliberately worded procedure which promoted more democratic and transparent process. An example of measures which could make the process more democratic and transparent would be the establishment of a public regional forum for selecting nominees and requiring regions to nominate three or more states than there are seats allotted. Such a proposal reveals that while any major changes to the membership structure may not be considered a plausible outcome of the 2011 review, detailed issues relating to membership will be considered one of the priorities.

The Council's mechanisms are considered by some to have an important impact on the Council's work, and considered minimally important to others. As one Asian state representative stated, “...the Council has the right tools, state abuses of the tools cannot be solved by providing them with new or improved tools.” However, many feel that much can be done to improve the Council by refining its mechanisms, and during the 2011 review, elements and issues relating to the Council will receive great scrutiny. It must be noted that sources warned against proposing new mechanisms in 2011. As Professor Connie de la Vega noted, “The rules that have been established are not being respected so, rather than further complicating the system efforts should be focused

on ensuring that the rules are enforced.” In terms of working procedures, most criticisms related to the technical nature of the procedures which leaves too much room for interpretation.

States have used technicalities to re-interpret their capabilities, which are designated in the Council's working procedures. Non state actors pointed to the ability to call a point of order (an objection by a member state reviewed by the Council Chair) at will, as very problematic. As one NGO executive based in Geneva stated; “There is really no legitimate reason to allow this behavior, if states disagree with what is said they have the ability to address the issue when they have the podium. We can see that objections are not just a formality, the OIC has successfully limited the freedom of expression at the Council based on an ‘objection’.” Whether or not stakeholders at the Council would ever consider completely terminating the state's ability to object needs further investigation but, this research found that many were concerned with the usage of this capability.

The issue of state oversight of independent entities at the Council, which relates to the Council's mandate, has become an increasingly pressing issue. States have attempted to translate the text to limit the authority and autonomy of special procedure mandate holders and the Office of the High Commissioner on Human Rights (Rajkumar Interview, 3 June, 2009). States have worked to influence the independent voices of the Council, which serve as the main antidote to the politicized state discourse which has a questionable influence on the promotion of international human rights (Roth, 2009:11). Sources declare that if these practices are not urgently addressed, the OHCHR and/or special procedure mandate holders may lose their autonomy or authority, which could be the true demise of the body. During the 2011 review many details of the Council's procedures will be discussed. While the list of details may be extensive, one issue that has been raised is that of secret ballot voting in the election and decision making processes. While some view secret ballot voting as detrimental to accountability and granting states virtual impunity, others felt that secret ballot voting was the only means of defeating regional bloc voting. The introduction of secret balloting deserves further examination as it arguably “allows countries to vote their conscience rather than as pressured by others in their region” (McDonald, 2009).

The Universal Periodic Review (a periodic assessment of the human rights situation in all nations regardless of Council membership) was considered the one legitimate structural reform which emerged from the Commission to Council reform process. The first two years of UPRs has resulted in a steady flow of reports from NGOs and academics expressing concern and occasionally outrage in relation to the reviews which had been produced. Further, the relationship between the UPR, the treaty monitoring bodies and country-specific rapporteurs,

which all logically overlap, is unclear (Forsythe and Park, 2008: 34). But, sources noted that the process was too new to determine whether or not it will be a useful mechanism or another formality. The UPR will definitely be a focal point of the review and many sources noted that while the UPR has the potential to be a useful tool, it fundamentally flaws in process. One Western academic and former state representative explained that, because the UPR is so new states will only push for "...minimal steps which ensure that the UPR is not hijacked by the worst human rights abusers, as is currently the case."

The recognition of the Council's mandate and working procedures as a work in progress is crucial. Efforts to ensure that the mandate is robust and relevant to the field should be continuous (Jimenez Interview, 28 April, 2009). The search for ways in which to strengthen the Council's tool requires a process of constant evaluation and search for inspiration. Numerous sources believe that the Council's stakeholders may benefit from turning to other international organizations for inspiration and insight into different practices. For example, R.J. Rajkumar referenced the usefulness of working procedures at organizations like the ILO whose tripartied system (which implements the state, the organization, and the person of interest) could be considered in 2011 and future reform discussions (Rajkumar Interview, 3 June, 2009).

The question of whether or not the Council should be promoted to the status of a principal organ is highly divisive. If the Council were promoted to the status of principal organ, it would become the seventh principal organ of the UN. When the 2011 review was scheduled, many felt that this would be the platform at which the Council's promotion would be announced. Others refuted these claims made during the CHR reform discussions stating that the Council will not become a principal organ in 2011 for the same reason that it did not do so in 2006. Proponents and opponents of promoting the Council to a principal organ note both symbolic and practical reasons. Those who support promotion of the Council feel that doing so is necessary to ensure that the Council possesses the necessary independence and authority. Furthermore, the status of principle organ is also needed to ensure that human rights maintain a primary symbolic position. Conversely, Roy Brown IHEU Main Representative at Geneva, presented a position held by many interviewees by stating that discussions relating to the status of the Council deflects attention from the real issue of ensuring that member states are working to promote and protect human rights.

Most acknowledge that the existing inconsistencies and uncertainty within issues relating to the intricacies of NGO involvement in the Council's proceedings require reform. The present confusion can be partially attributed to the fact that while reasonable and workable procedures were developed during the first three years of the Council, they were not put in writing, which caused major

problems when staff and member state changes occurred. The contentious issue which emerges regarding the official involvement of NGOs is whether NGOs should be granted greater involvement and authority, or subjected to greater limitations and restrictions. While many non-state actors campaign for increasing the amount of NGO involvement at the Council, there are also strong alliance aligned lobbies working to ensure that the voice of, and visibility of NGOs is minimal. A Western Ambassador went one step further to state; "I am troubled by NGOs penchant for reporting rumors (which often turn out to be false) as facts, and would be troubled if that fed an already compromised Council." Interviewees who felt that NGO involvement was imperative claimed that NGOs were not only the voice of human rights victims they promoted transparency and accountability. Furthermore, NGOs possess expertise which could assist in the process of drafting resolutions and provide states with a better understanding of complex human rights issues. However many state actors suggest that NGO involvement at the Council do little more than further complicate and politicize an already complex body. The official guidelines for state involvement at the Council is an issue that states and non-state actors will be prepared to discuss in 2011 however, if and how civil society will be included in the 2011 review is not yet confirmed.

### **Addressing challenging issues which surround the Council**

The Council faces a unique set of challenges that stem from the political context and the nature of human rights diplomacy. Understanding these challenges is a prerequisite of sufficiently analyzing the potential future of the Council. The first thing that needs to be recognized is the fact that the UN is not a national setting, it is extra-territorial in nature. Thus, the Council is a unique venue in that state voices can be heard regarding sensitive international issues without grave consequences. There is a sense that Council resolutions and actions, regardless of their questionable content, symbolize the positive international recognition of the magnitude and severity of human rights violations. The hope displayed by Burmese political prisoners when resolutions are passed on the situation in Burma, is exemplary of the symbolic power the Council possesses as an institution (Rajkumar Interview, 3 June, 2009). However, few efforts have been dedicated to identifying different ways in which the body could be improved. Rather, much of the attention which the Council has received relates to the Organization of the Islamic Conference's ability to push its own agenda, and regional and political alliances which have successfully blocked Council investigations into recognized gross and/or systematic human rights violations. The division, confusion, and controversy which manifest in those

working in and around the Council reflect complicated issues regarding context surrounding the body.

A pressing issue apparent at the Council is the existing dichotomy which divides state and non-state actors. Many scholars and state actors felt that the most concerning practice surrounding the Council was the tendency to magnify the negative. As one academic bluntly stated, "The practice of elaborating on state actions which are obviously anti-human rights not only gives these diplomats the attention they seek, it deteriorates an already pessimistic perception of the Council." A number of state representative and academics provided insight into why civil society has been so adamant about highlighting the shortcomings of the Council. Some skeptical state actors described the negative reporting as a means of reiterating their usefulness. One state politician noted, "...the constant Council criticism [from NGOs] is reflective of a larger obsession to demonize and discredit states in order to highlight the necessity of their existence and ongoing efforts."

Numerous academics noted that academia simply doesn't understand the Council that well. Professor David Forsythe considered the pattern of under-appreciating the promising trends of the Council to be a symptom of a lack of scholarly attention (Forsythe and Park, 2009:17). To date, only three books (Lempinen, 2005; Marie, 1975; Tolley, 1987) have been written on the Commission or Council and very little empirical evidence of effectiveness exists (Forsythe and Park, 2008:1). Thus, the obvious frustrations which repel academics could justifiably be considered; "that which we don't sufficiently understand." Regardless of whether one agrees or disagrees with the current criticism of member states, it is important to recognize that much needed structural reform discussions have taken a back seat to efforts attempting to rectify the Council's reputation.

When examining various structural reform proposals, a disparity of perspectives concerning the purpose of the UN's primary human rights body becomes evident. Attempts to address structural reform without first addressing inconsistencies in the perceived purpose of the body will undoubtedly fail. As Cecilia Jimenez stated in her 2003 report, which far preceded the actual CHR reform process; "Lack of consensus about the primary function of the Commission underlies many of the battles on technical aspects of the reform and makes it difficult to agree on even small steps towards real reform" (Jimenez and Kalin, 2003: 3). Thus, obtaining an understanding of the various perspectives on the body's purpose is a vital preparation measure for structural reformation negotiations. A shift in the perceived purpose of the body was marked by the 1235 and 1503 procedures, at the end of the 1960's and early 1970's. The 1235 and 1503 ECOSOC resolutions were an ambitious attempt to protect international human rights standards at the UN. Some consider the 1235 and 1503 procedures the definitive mandate shift which politicized the Commission's

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

Distinct differences in the perceived purpose of the body became evident during CHR reform negotiations. The stance which states maintained during negotiations reflected their position on the perceived role of the Council. Furthermore, disparities in perceptions regarding the purpose of the body, which were most obviously manifested during deliberations addressing membership composition and criteria, represented a larger North/South division (Yeboah, 2008: 82). This can be attributed to the idea that the spectrum of stances on the purpose of the Council is the result of cultural differences (Jimenez Interview, 28 April, 2009). During discussions, the North tended to support increased state supervision while the South emphasized the need to remain supportive and conduct cooperative dialogue.

During reform negotiations, states from the North advocated for an exclusive-elite membership system combined with increased special procedures and country specific resolutions (Yeboah, 2008: 84). Conversely, Southern states and groups advocated for more inclusive membership during the CHR reform, and envisioned a Council that would be based on supportive dialogue and cooperation. According to notes from the UNGA 72<sup>nd</sup> Plenary Meeting, Margaret Ferrari, who spoke on behalf of CARICOM, explained that her regional group envisioned an all inclusive Council which ought to serve as "...a vehicle for the promotion of genuine cooperation for capacity-building and for mutual assistance" (A/60/PV.72). Pakistani Ambassador Munir Akram, expressed his position about the problematic environment at the body by stating; "...the actual problem of the Commission was not its flawed membership composition but rather the confrontational atmosphere that characterized its work" (A/60/PV.72). Henceforth, the perceived purpose of the UN's human rights body has remained a highly divisive issue that will continue to accentuate regional divides and cultural differences.

### **Navigating the political landscape**

Even minor shifts in global political orientations directly correlate to the Council, where almost every facet deteriorates into a numbers game. The Council is roughly divided into thirds. One group largely promotes human rights initiatives, the second consists of states who have opposed human rights initiatives and a third which includes swing states (Roth, 2009: 23). Traditionally,

swing states have tended to vote in coordination with regional alignment. This is why gaining a majority vote on initiatives promoting human rights, even if only symbolic or diplomatic, has failed to date (Forsythe and Park, 2008: 4). State and non-state actors note that while there is no apparent change in the number or behavior of hard-line states, there are promising changes in the tendencies of swing states. The cause of the current shifts in regional relationships is undetermined but, Cecilia Jimenez suggested that changes may be partially a result of increased emphasis on the right to development.

There is speculation that swing states may be adopting a new mindset in relation to voting on human rights initiative, and commitments to regional and political alliances. These blocs have traditionally been considered fixed, but the strength and legitimacy of these alliances are being challenged. One Western diplomat working around the Council in Geneva described the current context as a covert deterioration of the OIC and NAM, which have to date displayed “unprecedented control and manipulation.” While the diplomat did not provide any specific examples, he noted “obvious internal clashes” amongst blocs, and movements towards “increased independent political will.” The claims of this particular interviewee were echoed by other state actors and members of civil society during subsequent interviews. Furthermore, in recent events, moderate states from the African Union have had positive dialogues with the US concerning the ability of moderate African nations to address pressing human rights issues in the AU. Additionally, the US and Russia conducted productive discussions concerning common interests including the promotion of international human rights.

Many pointed to South and South-East Asia as exemplary of positively changing political paradigms. Numerous Asian academics pointed to increased movement towards stronger democracies, and the implementation of human rights language into official statements from state representatives as a sign of some Asian governments adopting a “people-centric stance”. One academic stated that “a strengthened civil society and increased individual engagement” has led to many Asian governments who recognize that people are “becoming more interested in issues of human rights and human security and less concerned with the regional, political or religious alignment.” Historically, Asian governments at the Council have been scrutinized for being apathetic and passive. However, one Asian state representative noted that states which have historically adopted an approach of minimal involvement, namely India, Indonesia, Malaysia and Thailand, have displayed a significant increase in political will.

In order to capitalize on the given circumstances, it is important to understand that historically swing states have voted with regional, political and religious alliances. The tendency to consistently vote with alliances can be attributed to both solidarity stemming from a perceived

collective political identity, and marginal leadership. For instance, swing states from the “American Group” have sided with allies from the Non-Aligned Movement rather than the US and EU which can be considered both adherence to political solidarity and a response to US displays of exceptionalism. Thus, the promising trends displayed by swing states are a positive development in the evolution of the Council. However, when the weakening of absolute alliance solidarity, and the strengthening of swing states commitments to human rights are paired with the emergence of a potential leader at the Council, a framework for real change becomes evident.

### US involvement

The Obama Administration did not waste any time in renouncing the Bush Administration’s policy of disengagement with the Council, and dismissal of human rights standards in the name of national security. US Ambassador Rice proclaimed; “We do not see any inherent benefit as demonstrated by recent history in being outside the tent and simply being critical without having significant influence” (Rice, 2009). But, the question of whether or not the US is prepared for what lies ahead at the Council is undetermined. To date, the administration has taken steps towards alleviating its illegal practices surrounding the “War on Terror,” and has made efforts to reach out to the governments of the South. Regardless, the question remains, does Washington possess the political will and wherewithal to change the Council? In order to answer this complex question, it is important to understand exactly what the Obama Administration brings to the Council and international human rights, and why a renewed US commitment to the Council may fundamentally change the nature of the Council, and challenge traditional limitations of the body.

US re-engagement with the international human rights regime and the Council has a number of unique elements. While the US is a Security Council member and is considered by many to be the hegemonic power whose reach is limited to its own foreign policies, the US also finds itself at the top of many lists as one of the world’s most potent rights offenders. The violations surrounding the US led “War on Terror” have created a credibility deficit in which the legitimacy of US leadership is questioned. However, the US is being led by an administration which has expressed the desire to revamp the potency of the UN human rights architecture (McDonald, 2009). As Juliette de Rivero stated, “The most pressing and changeable issue at the Council is polarization and the lack of positive leadership.

The US turning its back on the Council gravely affected the Council. However, the US has the ability to contribute to changing the dynamics of the Council as it is not a EU

block state and it unilaterally yields significant influence.”

Given the dynamic changes in the international political environment, the behavior of the US takes on a new level of importance. While the US has publicly embraced human rights and emphasized their importance, in practice the US has maintained double standards. One African diplomat stated: “What we have seen is American arrogance. The US takes the international stage, demonizes governments the world over for their human rights records, sends people to Guantanamo and all over the world to be tortured, and expect countries to side with them.” While the renouncement of such actions is important, the US’s ability to actually realize its renewed commitment will determine whether creating change through action based leadership is realizable or rhetoric.

The manner in which the US behaves during its tenure at the Council will not miraculously right the wrongs of the body, but the US has the ability to set a precedent for future state behavior at the Council. In order to effectively change the way in which state approach the Council, the US’s involvement must possess certain characteristics. Given the US’s recent rights violations, a US delegation dedicated to shaming abusers may further divide the Council. Simply put, the US has the ability to change the nature of the Council by leading by example rather than actively demonizing states. State and non-state actors believe that the unique status of the US allows its delegation to act in a manner which puts the US in an exposed position. That is, while other states fight to ensure that they and their allies remain exempt from scrutiny, the US has the wherewithal to accept and even embrace criticism. If the US promotes an investigation of its own offenses, as well as legitimate examinations of its allies offences, namely Israel, the US creates leverage by which it can convince other states to take a pure and open stance on human rights. While such an initiative appears difficult, the US’s imminent performance at the Council determines the bargaining capabilities of the US at the 2011 review, which could greatly impact the overall usefulness of the review.

### **Making 2011 a success: Promoting viability**

Despite the many changes that have occurred since the founding days of the Commission, the international community has yet to conduct a comprehensive review of the body as well as an examination of where the Council could, should and is headed. The absence of a sufficient evaluation of the Council is reflective of the overall discourse surrounding the Commission and Council, which is fundamentally incomplete. The 2011 review can discuss and begin to realize the true potential of the Council. Speculation regarding the nature of the 2011 review exposes the recognition that very little about the process is fixed. This would suggest that there is ample opportunity to advocate for specifications, in terms of the

review’s venue, participation, content and control.

State and non state actors shared concerns about this scheduled venue. Not only is Geneva the home of the Council, it is the de facto human rights capital of the world. Holding the review in New York eliminates the human rights element and ensures limited involvement from NGOs and other non-state stakeholders. Furthermore, there is reasonable fear that what will begin as ambitious reviews and reform discussions will quickly become divisive political negotiations. Holding the review in Geneva increases the involvement of non-state actors, which many non-state interviewees proposed, may assist in de-politicizing the negotiations.

In terms of participation and control, sources noted that in order to provide the necessary supervision, there needs to be the appointment of an autonomous supervisory body and a plainly worded regulatory document. One organization representative working in Geneva indicated that this supervisory document must clearly outline; “who will be involved, who will speak and when, what topics will be discussed and what topics will not be discussed, and what conduct is strictly prohibited.” These measures may assist in ensuring that the review does not fall subject to politicization, similar to that which was displayed at the Durban Conference. The competition created a hostile environment where maintaining civility was more important than producing outcomes (Rajkumar Interview, 3 June, 2009).

There is concern about this review recreating the protection gap which was the result of institution building efforts during the first years of the Council. The protection gap relates to a very important element of the review, its hastiness. One Western Ambassador exemplified a point which was emphasized by many when he described this review as a review where states can discuss reform without fearing instant implementation of proposals. The Ambassador went on to clarify that if the review is considered an attempt at quick fixes, all usefulness will be lost. However, as one academic interviewee provided, discussions must remain liberal and open, “it is too early to focus on the limitations of reform, we must remain simultaneously realistic and opportunistic.”

The manner in which state and non state actors approach the review may be more important than any procedural or structural element of the review process. A number of interviewees feared that the review could become yet another formality, which focused more on rhetoric than real change. Thus, those involved must recognize that minor victories in addressing structural weaknesses at the Council may have a formidable impact on the Council’s work. As R.J. Rajkumar noted, reform is the only means to explicitly adjust the path of the Council and neutralize, and potentially reverse, deficiencies.

This article has discussed the various issues which will likely be discussed at the 2011 review; however the question of what issues should be pursued in order to produce optimal outcomes from the review remains

unaddressed. Interviewees stressed the need to be selective when deciding which reform proposals to pursue. Instead of pursuing ambitious proposals during reform negotiations at the review, the optimal approach may be to advocate for conservative reform proposals, which are considered viable.

Addressing the apparent shortcomings of the Council's mechanisms, mandate and working procedures is a complex task. And, the various proposals which stakeholders pursue are dependent on different agendas and priorities. But, there may be a simple, comprehensive and feasible solution. During interviews a number of state representatives and members of civil society proposed the drafting and implementation of a frank "code of conduct" for states. This initiative seeks to impose more limitations and guidelines on state behavior at the Council as a means of fixing problems which go much deeper than the Council's mechanisms, working procedures or mandate. The code of conduct's main purpose would be to limit the ability of states to intervene and block discussions which may be considered threatening. This effectively ensures that discussions at the Council remain open and unrestricted. A state code of conduct is considered viable because it does not appear to fundamentally change the structure or capabilities of the Council. Further, a state code of conduct could be lobbied or promoted as a tool which would provide greater organization at the Council. While a state code of conduct would not fix all of the shortcomings which exist at the Council, such an initiative is exemplary of creative solutions which may be developed.

## Conclusion

The Council is presented with a convergence of circumstances which are conducive to creating change, making the approaching 2011 review all the more relevant. The type and intensity of change is dependent on how the Council's stakeholders utilize the provided window of opportunity. Each circumstance possesses a unique characteristic, which could contribute to change at the Council. The political landscape is such that states are increasingly willing to discuss difficult issues. Additionally, promising trends to transcend regional and political divides are evident. The Obama Administration of the US, along with many other Western governments, has rhetorically their commitment to human rights, and plans to adopt a leadership role at the Council. Finally, the scheduled 2011 review provides stakeholders with a provides a venue at which the international community unique opportunity to prepare for discussions. Because the 2011 review will address shortcomings of the Council's work and mechanisms, stakeholders have an opportunity to prepare propose potential reforms. Sufficient preparation will require an understanding of the shortcomings of previous reform efforts, and preemptive initiatives to ensure that the review itself possesses the

necessary features for productive reform discussions. How stakeholders attempt to capitalize on each of the discussed circumstances may vary. The article used the concept of proposing a state code of conduct to exemplify the usefulness of creativity and diplomacy when addressing the shortcomings of the Council. Thus, while there may be many limitations which make creating change at the Council difficult, there are also substantial opportunities, some of which have yet to be discovered or realized. What cannot be overemphasized is the notion that the current set of imminent and approaching circumstances is unprecedented, and the window of opportunity may close after the 2011 review is concluded.

The issues which need to be addressed at the Council may be more elaborate and complex than originally recognized. However, it is important not to forget what the Council is and what the Council isn't. The Council has never, and will never be close to perfect, nor is it meant to be. Dr. James Gomez pointed to the idea that there is much virtue in an inter-governmental body which, if nothing else, exposes the weaknesses of international human rights. The Council is the world, a mere reflection of the Member States, and even though presently it is dealing with some difficult times, it will always continue to experiment (Yeboah, 2008:94). The Council is still a toddler which is taking baby steps, sometimes in the wrong direction, but the Council is worth the trouble, and now is the time to point the Council in the right direction.

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