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# State Interests and the Creation and Functioning of the United Nations Human Rights Council

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## I. Introduction

In its final years, the United Nations Commission on Human Rights (CHR) came under increasingly intense criticism from multiple actors. These criticisms were rooted in diverse perspectives on the appropriate role of inter-governmental human rights institutions. Many Western states and non-governmental organizations, as well as some bodies within the UN system, were dissatisfied for a number of reasons with the capacity of the CHR to aggressively promote state compliance with human rights norms. First, the CHR’s membership commonly included states with poor human rights records; the procedure for elections even made it possible for such states to assume leadership positions. As noted by the UN’s High-level Panel on Threats, Challenges and Change: “standard-setting to reinforce human rights cannot be performed by States that lack a demonstrated commitment to their promotion and protection. We are concerned that in recent years States have sought membership... not to strengthen human rights but to protect themselves against criticism....”<sup>1</sup> Second, the CHR was greatly criticized for a

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<sup>1</sup> High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN GAOR, 59th Sess., UN Doc. A/59/565 (2004) 8 at para. 283 [High-level Panel].

perceived overall inefficiency, exemplified by the low number of sessions held annually, and its inability to call emergency sessions.<sup>2</sup>

On the other hand, the criticisms of many non-Western states were based in perceptions that the work of the CHR was motivated by the political interests of the most powerful. These states were frequently critical of what they saw as overt attempts to politicize the work of the body, and to selectively target states with which powerful UN member states had a disagreement. In particular, many developing states believed that the use of country-specific resolutions served to undermine the standard-setting function of the CHR.<sup>3</sup>

It was out of this context—one of dissatisfaction that was nearly unanimous, yet driven by several fundamentally different perspectives—that a strained compromise was forged, and a new human rights institution created. On 15 March 2006, the UN General Assembly resolved to abolish the CHR, and replace it with a new Human Rights Council (HRC).<sup>4</sup> The 170 states that voted in favour were opposed by a bloc of four members led by the United States.<sup>5</sup> There were three abstentions, and 14 states were non-voting.<sup>6</sup> The resolution was the result of months of negotiations among the various states that had agreed on little more than the need to reform UN human rights protection.

The structure and behaviour of the HRC is best understood in light of the diverse preferences that informed its creation. Like all human rights regimes, the HRC is an institutional compromise, a product of competition between the preferences of several blocs of states. For the purposes of parsimony, this article makes generalizations about the preferences and characteristics of groups of states; it should be recognized there is no uniformity within a particular bloc with respect to domestic political institutions, norms regarding human rights practice, or UN negotiating positions.

The argument in this article proceeds in three steps. The second section will rely on recent work in the liberal and constructivist literature to build an approach in which state preferences for the structure of human rights regimes are understood as a function of their perceived domestic and

<sup>2</sup> Paul G. Lauren, "'To Preserve and Build on its Achievements and to Redress its Shortcomings': The Journey from the Commission on Human Rights to the Human Rights Council" (2007) 27 Hum. Rts. Q. 307 at 327-329; Ladan Rahmani-Ocra, "Giving the emperor real clothes: The UN Human Rights Council" (2006) 12 Global Governance 15; Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All* (New York: United Nations Dept. of Public Information, 2005); Philip Alston, "Reconceiving the UN human rights regime: challenges confronting the new Human Rights Council" (2006) 7 Melbourne J. Int'l L. 185 at 187-188, 192; Nico Schrijver, "The UN Human Rights Council: A new 'society of the committed,' or just old wine in new bottles?" (2007) 20 Leiden J. Int'l L. 809 at 812-814.

<sup>3</sup> Alston, *ibid.* at 205-206.

<sup>4</sup> *Human Rights Council*, GA Res. 251 (LX), UN GAOR, 60th Sess., UN Doc. A/RES/60/251 (3 April 2006).

<sup>5</sup> The other three member states voting against the Resolution were Israel, the Marshall Islands, and Palau.

<sup>6</sup> The abstaining states were Belarus, Iran, and Venezuela. The states that did not vote on the resolution were Central African Republic, Chad, Cote D'Ivoire, Democratic People's Republic of Korea, Dominica, Dominican Republic, Equatorial Guinea, Eritrea, Georgia, Republic of Kiribati, Liberia, Republic of Nauru, Papua New Guinea, and Seychelles.

international interests.

In the third section, this approach will be used to explain the preferences exhibited by each bloc during the reform process, with respect to their support for the abolition of the CHR, and their specific preferences for the structure of the HRC. Many Western states, including the United States and the members of the Western Europe and Others Group (WEOG), sought a more interventionist organization with limited membership that would be able to issue resolutions regarding specific human rights violations. Other states, organized primarily in the G-77, thought that the HRC's ability to criticize individual states should be limited, emphasizing instead the development of common standards and the pursuit of a "cooperative" approach to human rights. It will be argued that the resulting institutional design—and particularly the decision to base representation on region without formal standards of participation—more closely reflects the preferences of those in the G-77.<sup>7</sup>

By comparing the first three and a half years of work of the HRC with the last three years of the CHR, the fourth section will explain how the HRC's behavioural outcomes reflect this underlying structural reality. This will be done by comparing the human rights records of states elected to the two bodies, the procedures for member elections, and the use of country-specific resolutions. The creation and functioning of the Universal Periodic Review (UPR) will also be analyzed.

The article concludes that the voting power of developing states allowed them to significantly shape the final structure of the HRC. Although the HRC is able to pass country-specific resolutions—a major goal of the United States and Western Europe—its institutional structure permits non-democratic states with poor human rights records to affect significantly the outcomes in the HRC. This influence is possible because the final size of the institution, 47 states, is not significantly smaller than the 53 that comprised the CHR, and the seats continue to be distributed regionally with no formal human rights standards serving to bar states with poor human rights records from participating. Given that the distribution of state type has changed very little in the transition from the CHR to the HRC, one should not expect the HRC to function differently than did the CHR, as both are fundamentally political institutions that reflect the will of their membership. The article's conclusion also suggests further avenues of research based on state type and engagement with the UPR.

## II. Explaining State Engagement with Human Rights Institutions

While a consensus did emerge that the CHR should be replaced, the type of institution that would replace it was subject to much debate. International Relations scholars have often had difficulty in determining the factors that shape state preferences toward institutions and how institutional design can shape outcomes. The following literature review focuses on four theoretical

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<sup>7</sup> On the regional distribution of seats, see Schrijver, *supra* note 2 at 815.

perspectives—realism neoliberalism, constructivism, and a domestic politics approach—to develop an explanation of why different states approached the negotiations regarding the formation of the HRC in the manner they did.

Realist theories view the formation of institutions as reflections of great power interests: institutions are viable so long as they correspond to these interests, but will fall by the wayside as the interests of the member states shift over time. Institutions themselves will rarely have a meaningful effect on state behaviour, and the institutions that do come into existence must be careful not to alter the existing distribution of power globally.<sup>8</sup> Yet these realist arguments fail to account for the formation of institutions that occurs without the input of major powers. For example, both the International Criminal Court (ICC) and the HRC were created despite the objection of the world's most powerful country, the United States. They also fail to explain the ability of many institutions to endure even after the alignment of interests underlying their creation has shifted.

In response to these perceived failures of realist theory, neoliberal scholars developed various theories for the formation and endurance of regimes that relied on the same basic assumptions as realist scholars. Neoliberals largely agreed with realists that the state system was anarchic and that cooperation in the international system was difficult; where the two differ was in their view of the possibilities of cooperation. Whereas neorealists believe cooperation is unlikely outside of temporary military alliances, neoliberals believe that greater cooperation is possible. Neoliberal theory emphasizes the role of institutions in helping to overcome the problem of distrust between states: by providing a mechanism to lengthen the time frame of inter-state relationships (according to neoliberal insights, a longer “shadow of the future” makes defection from an agreement less likely), a way for states to monitor and observe the actions of states with which they had agreements, and, in some cases, a formal mechanism to punish states that violated agreements.<sup>9</sup> Forming the institutions themselves was the initial challenge, and often depended on the presence of a hegemon willing to bear the cost of the initial regime formation. Once a regime formed and proved its usefulness in facilitating cooperation, it could take on a life of its own and no longer be dependent on the hegemon.<sup>10</sup>

The neoliberal account has two major failings in explaining state preferences toward the HRC. First, neoliberals, like neorealists, largely

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<sup>8</sup> See e.g. Kenneth Waltz, *Theory of International Politics* (Reading, MA: Addison-Wesley, 1979); John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: W.W. Norton and Company, 2001); John J. Mearsheimer, “The false promise of international institutions” (1994) 19 *Int'l Security* 5; J. M. Grieco, *Cooperation Among Nations: Europe, America, and Non-Tariff Barriers to Trade* (Ithaca: Cornell University Press, 1990).

<sup>9</sup> Robert Keohane, “The Demand for International Regimes” (1982) 36 *Int'l Org.* 325; Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984) [Keohane, *After Hegemony*]; Kenneth Oye, ed., *Cooperation Under Anarchy* (Princeton: Princeton University Press, 1986) (See especially chs. 1, 2, and 9); Robert Keohane, *International Institutions and State Power: Essays in International Relations Theory* (Boulder: Westview, 1998), ch. 1.

<sup>10</sup> Keohane, *After Hegemony*, *ibid.*, chs. 5 and 6.

believe that state preferences are uniform, regardless of characteristics internal to the state, such as the nature of the political system. The empirical evidence presented below suggests that such preferences are not.<sup>11</sup> Second, neoliberalism normally depends on the role of the hegemon in shaping new institutions. But in the case of the HRC, the primary hegemon, the United States, had little effect on the final institution, and the next most powerful block of states, the WEOG, was unable to create the institution as it desired.<sup>12</sup>

Both of these theoretical approaches failed to provide a satisfying endogenous account of state preferences. In an effort to fill this gap, the developing constructivist literature has focused on the diffusion of international norms, positing theories that explain phenomena such as the formation of international institutions;<sup>13</sup> the role of transnational actors;<sup>14</sup> the rhetorical and persuasive power of norms;<sup>15</sup> and, related to each of these, the use of tools such as “naming and shaming” to persuade states to meet international norms.<sup>16</sup> In a similar vein, Ryan Goodman and Derek Jinks have suggested that human rights institutions and treaties may have an acculturation effect that leads to a slow transition toward greater respect for human rights among member states.<sup>17</sup> Kathryn Sikkink, writing with both Margaret Keck and Thomas Risse, has provided perhaps the most prominent model of the constructivist view of the norm life cycle. They argue that after a norm emerges, it diffuses throughout the state system until a “cascade” occurs, in which the norm is widely adopted, followed by norm internalization, the process by which the norm moves from the realm of ideas into a meaning shared within a state or society. In the initial phases, norm adoption may be the result of domestic or international pressure, rather than sincere belief by the actor in the content of the norm. But ultimately, they argue, the norms alter state behaviour, and norm compliance emerges.<sup>18</sup> As will be discussed below, critics of constructivism

<sup>11</sup> *Ibid.* at 26.

<sup>12</sup> Neorealist scholars have a different critique of neoliberal scholarship. Neorealists argue that mistrust is not the largest obstacle to cooperation, but rather that fear of states achieving relative power gains from unequal distributions of benefits from cooperation are the major obstacle. This critique is the heart of arguments made by Mearsheimer, *supra* note 8, and Grieco, *supra* note 8.

<sup>13</sup> Martha Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996).

<sup>14</sup> Martha Finnemore & Kathryn Sikkink, “International Norm Dynamics and Political Change” (1998) 52 *Int’l Org.* 887; Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998); Thomas Risse-Kappen, “Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War” (1994) 48 *Int’l Org.* 185.

<sup>15</sup> Thomas Risse, “‘Let’s Argue!’: Communicative Action in World Politics” (2000) 54 *Int’l Org.* 1; Darren Hawkins, “Explaining Costly International Institutions: Persuasion and Enforceable Human Rights Norms” (2004) 48 *Int’l S.Q.* 779; Alastair I. Johnston, “Treating International Institutions as Social Environments” (2001) 45 *Int’l S.Q.* 487.

<sup>16</sup> Alejandro Anaya, “Transnational and Domestic Processes in the Definition of Human Rights Policies in Mexico” (2008) 31 *Hum. Rts. Q.* 35.

<sup>17</sup> Ryan Goodman & Derek Jinks, “How to influence states: socialization and international human rights law” (2004) 54 *Duke L. J.* 621 at 638–655.

<sup>18</sup> Keck & Sikkink, *supra* note 14; Thomas Risse & Kathryn Sikkink, “The socialization of international human rights norms into domestic practices: introduction” in Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and*

argue that nominal adoption of norms in the diffusion/cascade phase does not necessarily translate into improved state observance of the norms. While the constructivist approach may be able to explain a state's initial decision to join human rights conventions without any intention to abide by them, it has yet to provide a persuasive, falsifiable explanation for the failure of norm internalization, or actions by states that serve to undermine the very norms they claim to be supporting.

In contrast to realists and neoliberals, who assume that all states are driven by similar interests, and constructivists who argue that states and state leaders internalize the norms with which they agree, several recent works have suggested that internal state characteristics, particularly the nature of the regime, will affect a state's decision to join international human rights treaty regimes. In a test of constructivist arguments regarding norm internalization, states acceding to human rights conventions frequently do not abide by the norms contained in those treaties. Further, this research finds, in contrast to the norm internalization expected by constructivists, that norm compliance does not markedly improve post ratification, though improved practice in the future cannot necessarily be ruled out.<sup>19</sup> What this body of literature suggests is that the decision to promote human rights regimes is driven not only by a desire to promote human rights, but also by a complex calculation that balances the domestic and international political gains resulting from the ratification of a particular international human rights convention, with the combined costs of compliance and of enforcement (domestic or international).

Each of the following works suggests that state type is a strong explanatory variable for the manner in which states will engage international human rights institutions, though each examines state type from a slightly different perspective. Andrew Moravcsik's work focuses on the incentives facing new democracies through an analysis of the creation of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. He argues that the need to lock in domestic political institutions in newly emerging democracies is the primary driving force for the formation of binding international human rights obligations, at least in the European context. These states desire to commit to rights protection at home, but lack adequate institutions to implement the necessary protections. The incentives of leaders in new democracies are shaped by their political context; their primary fear is a collapse of democratic institutions and efforts to undermine liberal democracy by opposition leaders. Committing to external human

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*Domestic Change* (Cambridge: Cambridge University Press, 1999) 1. On internalization, see especially Risse & Sikkink at 22, 29-45.

<sup>19</sup> Eric Neumayer, "Do international human rights treaties improve respect for human rights?" (2005) 49 J. Confl. Resol. 925; Oona A. Hathaway, "Do human rights treaties make a difference?" (2002) 111 Yale L.J. 1870 [Hathaway, "Difference"]; James R. Vreeland, "Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture" (2008) 62 Int'l Org. 65; Suzannah Linton, "ASEAN States, Their Reservations to Human Rights Treaties and the Proposed ASEAN Commission on Women and Children" (2008) 30 Hum. Rts. Q. 436 [Linton].

rights protection mechanisms enables these states to delegate their domestic protection of human rights to outside institutions. Moravcsik argues that this set of incentives makes newly emerging democracies even more likely than more established democracies to support the creation of strong external human rights institutions. He finds this argument to hold true in the creation of the *European Convention*, in which more established democracies were less likely to support the creation of a binding regional human rights commitment than less established democracies.<sup>20</sup>

Oona A. Hathaway has also sought to explain why states choose to ratify or accede to human rights treaties once opened for signature. Her work is driven by two core questions: which types of states join treaties, and whether or not states actually comply with them. Hathaway argues that in deciding to ratify or accede to a human rights convention, states consider the costs of compliance and the costs associated with enforcement of their obligations should they fail to do so. Enforcement of human rights treaties is most likely to occur on a domestic level, so in weighing commitment costs, the leaders of states are primarily concerned with whether or not they will comply, and in the absence of compliance, whether or not they will face a cost for non-compliance.<sup>21</sup>

Hathaway uses this framework to find empirical support for the argument that democracies with strong human rights records are more likely to join human rights treaties than democracies with relatively weak human rights records. The reason is straightforward. Democracies with strong human rights records are likely to face lower enforcement costs since they are consistently in compliance.<sup>22</sup> Democratic human rights violators, on the other hand, are more likely to be subject to enforcement measures and therefore their costs of compliance are higher.

The same logic suggests that dictatorships, which face minimal internal enforcement mechanisms, may not be reluctant to join human rights regimes that lack an external enforcement mechanism, even if human rights abuses are domestically prevalent. Indeed, “disingenuous ratification” by dictatorships may be a low-cost way of creating the “external appearance of improvement without the cost associated with actually improving human rights practices.”<sup>23</sup> In this way, joining a treaty provides a small benefit with little net cost, a benefit that would be foregone by not joining a human rights treaty. Hathaway further finds that joining a human rights treaty does not

<sup>20</sup> Andrew Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe” (2000) 54 *Int’l Org.* 217.

<sup>21</sup> Oona A. Hathaway, “The cost of commitment” (2003) 55 *Stan. L. Rev.* 1821 at 1836-7 [Hathaway, “Commitment”].

<sup>22</sup> Elizabeth Heger Boyle & Melissa Thompson, “National Politics and Resort to the European Commission on Human Rights” (2001) 35 *L. & Soc’y Rev.* 321, suggest that Hathaway’s argument could be incomplete by showing that more “open” societies – marked by a high level of individual freedom – are more likely than states with lower levels of freedom to face cases before the European Commission on Human Rights. These findings are probably specific to Europe, however, as no other region has a true intergovernmental human rights mechanism with enforcement power similar to Europe’s.

<sup>23</sup> Hathaway, “Commitment”, *supra* note 21 at 1839.

lead to better human rights practice, adding further credence to her argument and providing a test for the idea that human rights treaties lead to improved human rights performance.<sup>24</sup>

Adding nuance to Hathaway's argument, James R. Vreeland compares the likelihood of multiparty and single party dictatorships to ratify or accede to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). He argues that multiparty dictatorships are both more likely to torture *and* to ratify the CAT. This logic is based on two factors.<sup>25</sup> First, multiparty dictatorships are more likely to ratify because they are more likely to face internal pressure to do so by legally organized political parties. Even if they have no intention to abide by the agreement, the ratification may lead to small political gains at home. Single party dictatorships, on the other hand, face no such internal pressure to sign and have little incentive to do so. Ratification may actually lead to *more* pressure internally to liberalize.<sup>26</sup> In addition, multiparty dictatorships are more likely to torture because their political opponents are visible and operating within the purview of society. In a one party dictatorship, all dissent is likely to be punished. The fear of punishment means that individuals are less likely to engage in behaviour that will lead to punishment, meaning torture may occur, but is more likely to be infrequent. In contrast, in a more open dictatorship, not all dissent is punished, so more dissent occurs. Though punishment is selective, it is more frequent in such a regime.<sup>27</sup>

In summary, for Vreeland, internal dissent and pressure can lead states to ratify the CAT, but allowing internal dissent also leads to more punishment of dissent. While this is largely consistent with Hathaway's arguments (and those of Suzannah Linton) regarding the benefits gained by states that ratify human rights conventions, Vreeland's argument suggests that multiparty dictatorships also face some internal cost from doing so. That cost can lead to additional human rights violations. Nonetheless, the two arguments together suggest that state type affects the decision of whether or not to join a treaty. Though the creation of a new human rights institution is a different process than either the creation of a new treaty or the decision to accede to one once it enters into force, the research reviewed here does indicate that domestic political factors affect both the decision to support the creation of a new institution as well as preferences regarding the structure of that institution.

While the above scholars provide some guidance for developing an explanation for state preferences regarding the HRC, only Moravcsik deals explicitly with the creation of a new human rights institution, and his work focuses on the European, not global, context. Nonetheless, combining both

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<sup>24</sup> Hathaway, "Difference", *supra* note 19. See also Neumayer, *supra* note 19.

<sup>25</sup> Multiparty dictatorships are states where the formal leader may not be selected democratically, but competing political parties are allowed to exist and competitive elections occur for some seats in government, whether they be municipal and regional governments or a national legislature. Egypt would be a good example of a multiparty dictatorship.

<sup>26</sup> Vreeland, *supra* note 19 at 70-71.

<sup>27</sup> *Ibid.* at 69-70.



the constructivist and domestic political approaches surveyed does provide some guidance. Constructivist scholarship can help to provide an explanation for why states almost uniformly supported the creation of a new human rights institution. As noted above, the UN Secretary General, the UN's High-level Panel, and a growing number of member states were frustrated by the existing institution, as will be further detailed below. Though not a perfect analogue, the "norm cascade" phase of the norm lifecycle can help explain the snowball of support for a new institution; Hathaway's work, including her treatment of a state's incentive to at least appear to care about human rights—"disingenuous ratification"—provides a further explanation for why near universal support existed for creating a new institution.<sup>28</sup> In this case, the CHR began to be viewed by many as a problematic institution that needed to be replaced. The perception of the institution was that many of those states which were members of the CHR were simply protecting other human rights abusing states and had little interest in human rights promotion. As the World Summit in 2005 approached, the idea of replacing the institution took hold among UN Member States, leading to steady pressure to replace the institution. States may have perceived a reputation cost of not supporting a new institution. Given the widespread criticism, including comments by the UN Secretary General, advocating for retention of the CHR could have led a state to be branded as opposing the promotion of human rights.<sup>29</sup>

Constructivist theories tell us less about the institutional features that states would (and ultimately did) support in a new HRC. Here, the separate work of Moravcsik, Hathaway and Vreeland suggests that domestic incentives play a strong role in determining preferences toward institutions. In particular, Hathaway's work suggests that perceived compliance and enforcement costs are a driving factor in whether or not a state will join an institution. Where domestic and/or international enforcement of a commitment is unlikely, states are willing to ratify a treaty.

Though Vreeland's and Hathaway's works are specific to a) the decision of whether or not to become a member of a human rights treaty and b) whether or not joining a treaty leads to better human rights practices, their work can also inform the analysis of the creation of a new human rights institution, particularly when combined with the work of Moravcsik. The primary difference between preferences regarding the decision to join a treaty, and preferences regarding the creation of an institution, is in the state's ability to shape enforcement costs. When joining a treaty, particularly one that has been in force for some time, states will have certain expectations regarding the actual costs associated with a treaty. In creating a new institution, however, states will have direct input on the capabilities the institution will have to carry out enforcement, which in turn will impact the eventual enforcement costs on states. In doing so, if states have an expectation that a new institution will be created regardless of their input,

<sup>28</sup> See Risse & Sikkink, *supra* note 18; Hathaway, "Commitment", *supra* note 21 at 1839.

<sup>29</sup> This point will be further discussed below, in Section III.

they have an incentive to attempt to shape the eventual outcome whether they want a strong institution or not. The logic of Moravcsik, Vreeland and Hathaway can be applied to institutional formation to help determine what type of institution states with differing domestic structures will desire.<sup>30</sup>

In designing an institution, two key considerations of states are 1) the capabilities that the institution will have; and 2) who will have the authority to determine when to use those capabilities. In the context of a human rights institution, these two factors lead states to consider the powers of the institution to investigate and report on human rights abuses in individual states, as well as the size and composition of the council. On one end of the spectrum—imposing high enforcement costs on states—would be an extremely strong institution that could authorize investigations and report on certain states' human rights practices, and would have a small membership composed of states with strong human rights protections. Such an institution would entail higher enforcement costs for member states for two reasons. First, it would be able to act more efficiently, since institutions with smaller membership tend to be more efficient as fewer members must be consulted to reach a decision. Second, and more importantly, an institution that excluded human rights abusing states would be less likely to shield those states that do violate human rights. On the other end of the spectrum—imposing low enforcement costs on states—would be an institution that could pass only general resolutions regarding rights standards, with a membership not restricted based on human rights performance.

This logic leads to certain expectations regarding state preferences toward the design of human rights institutions. One could expect states with stronger human rights records to both be more supportive of an institution that could carry out human rights investigations of particular countries, and to support some restrictions on membership based on rights performance. As states with good human rights practices, they would not expect to be targeted by the human rights institution. They would be unlikely to face increased domestic enforcement costs, as states with strong human rights records normally have strong legal systems that provide sufficient avenue for redressing rights grievances. This would make appeals to international forums unlikely. Given sufficient domestic protections, the states would also not expect to be targeted by the international institution. Further, if having good human rights performance were not a sufficient safeguard against being targeted by the rights institution, then control of the body's agenda would serve as an additional check. Finally, the reputational advantage—both international and domestic—of being a rights supporting state would also weigh against any potential enforcement cost.

On the other hand, states with poor human rights records could be expected to support the creation of an institution with relatively weak (or no) authority to investigate particular countries, and to support a broad based

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<sup>30</sup> See also Linton, *supra* note 19.

membership that included states sympathetic to the view that the UN should not investigate particular violations of rights. The inability to investigate rights violations in individual states would serve the interest of those states with poor human rights records and, in the event that the body did have some ability to target individual states, the ability of any state to serve on the body would allow for additional influence on the decisions reached by the body, serving as a check on the exercise of power. Should such states be able to create an institution with at least a veneer of credibility, they would be able to benefit from improved reputation cost while simultaneously holding down enforcement cost.

This argument suggests a sliding scale whereby states with better human rights records should support a stronger human rights institution with limited membership while states with poor records should support an institution with weaker enforcement powers and a larger, more diverse membership. Applying this argument to negotiations surrounding the HRC does present some challenges in comparison to work done by Moravcsik, Hathaway, or Vreeland, however. Moravcsik's study benefited from a much smaller universe of cases: he studied 17 Western European Countries,<sup>31</sup> while Vreeland and Hathaway were able to use existing measures both of regime type and reports of rights violations, allowing for sophisticated quantitative methods. As will be discussed in the conclusion, the HRC will eventually lend itself to such methodology, but, unfortunately, it is not possible from the record of negotiations to reconstruct the exact positions of all member states of the UN regarding the HRC. Therefore, in applying the basic argument regarding preferences toward human rights institutions, this article focuses on groups of states that formed negotiating blocs in its analysis. Though not all negotiating blocs were uniform, groups of states can be considered to be more or less supportive of interventionist human rights institutions, and the positions that emerged tended to be held by many members of the blocks. Further, numerous speeches made by representatives of different groups will serve to test the validity of using this approach in examining the creation of the HRC.

### III. The Creation of the HRC

This section will test the above argument by analysing the negotiating positions of four major groups of states during the process that led to the creation of the HRC. It focuses on the positions of the United States, the WEOG, the G-77, and Latin American states. Though states in these groups did not have perfectly uniform positions, the groups do provide a useful way to organize the major positions that emerged during negotiations and some general statements can also be made about the average level of democracy in the regions.<sup>32</sup> Whereas the United States and almost all WEOG states rate

<sup>31</sup> Moravcsik, *supra* note 20 at 233.

<sup>32</sup> Martin S. Edwards *et al.*, "Sins of commission? Understanding membership patterns on the United Nations Human Rights Commission" (2008) 61 Pol. Res. Q. 390 at 397-398, find that states with more rights violations (as measured by physical integrity scores) were more likely to

highly on various democracy indices, Latin America and the G-77 contain more states with lower levels of democracy and more human rights abuses.<sup>33</sup>

As noted above, the creation of the HRC was ostensibly intended to redress several criticisms of the CHR. The CHR did do a great deal of work to establish human rights standards during its existence. Among its most notable achievements were the drafting of the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Political and Civil Rights*, in addition to several other core human rights treaties.<sup>34</sup> The body also implemented mechanisms to allow for the discussion of human rights violations in certain states. The 1235 procedure allowed for public discussion of a pattern of rights violations in a state, while the 1503 mechanism gave an avenue for individuals and NGOs to make confidential (though not anonymous) complaints about patterns of rights abuses in a particular country or region.<sup>35</sup> Finally, the CHR also employed the use of Special Procedures, which were *ad hoc* mandates given to individuals or working groups to study patterns of rights abuses or special human rights problems. Special Procedures had both thematic mandates looking at categories of rights as well as country-specific mandates.<sup>36</sup>

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be elected to the CHR than states with fewer violations. Further, this finding differed by region depending on the number of democracies in a region. As the number of democracies in a region increased, the human rights scores of states elected to the CHR increased as well. See p. 398 for a breakdown of levels of democracy in each region.

<sup>33</sup> Care should be taken in discussion of conceptions of democracy and human rights violations. However, many studies have concluded that states with more representative democracy frequently score better on human rights indices. On the relationship between rights and democracy, see especially Todd Landman, "Measuring Human Rights: Principle, Practice and Policy" (2004) 26 Hum. Rts. Q. 906 at 929-930. On the correlation of rights with democracy and the importance of democracy to the promotion of rights, see Christian Davenport, "Human Rights and the Democratic Proposition" (1999) 43 J. Confl. Resolution 92; Anthony J. Langlois, "Human Rights without Democracy? A Critique of the Separationist Thesis" (2003) 25 Hum. Rts. Q. 990; Vreeland, *supra* note 19; Hawkins, *supra* note 15. On criticism of the correlation between regime type and rights enforcement, see Zehra F. Arat, "Human Rights and Democracy: Expanding or Contracting?" (1999) 32 Polity 119; B. Todd Spinks, Emile Sahliye & Brian Calfano, "The Status of Democracy and Human Rights in the Middle East: Does Regime Type Make a Difference" (2008) 15 Democratization 321. For a discussion of the drawbacks of Freedom House's scoring system, see Landman at 928-929.

<sup>34</sup> See generally Makau Mutua, "Standard Setting in Human Rights: Critique and Prognosis" (2007) 29 Hum. Rts. Q. 547; Lauren, *supra* note 2.

<sup>35</sup> Christian Tomuschat, *Human Rights Between Idealism and Realism* (Oxford: Oxford University Press, 2004) at 117-124; Nigel S. Rodley & David Weissbrodt, "United Nations Non-Treaty Procedures for Dealing with Human Rights Violations", in Hurst Hannum, ed., *Guide to International Human Rights Practice*, 4th ed. (Ardsley, NY: Transnational Publishers, 2004) 65 at 65-77; Eric Cox, "United Nations Commission on Human Rights," in Neal Tate, ed., *Governments of the World: A Global Guide to Citizens' Rights and Responsibilities* (New York: Macmillan Reference, 2005) at 238.

<sup>36</sup> See generally Office of the High Commissioner for Human Rights, *United Nations Special Procedures: Facts and Figures 2008*, online: <[http://www2.ohchr.org/english/bodies/chr/special/docs/Facts\\_Figures2008.pdf](http://www2.ohchr.org/english/bodies/chr/special/docs/Facts_Figures2008.pdf)> (In reviewing the work of the CHR, the HRC decided to end the work of Special Procedures dealing with Liberia and the Democratic Republic of the Congo, two of the ten country-specific Special Procedures that had been established by the CHR. At the same time, the HRC maintained all of the thematic Special Procedures and added two additional ones (contemporary forms of slavery and safe drinking water), for a total of 30 thematic Special Procedures as of 2008.).

Despite these achievements, several factors brought about criticism of the CHR by UN member states, human rights NGOs, and members of the UN Secretariat. The first major criticism was directed at the membership of the CHR. In 2005, the CHR was composed of 53 regionally distributed member states, elected by the Economic and Social Council (ECOSOC) to three-year terms with no limit on re-election. In practice, ECOSOC (composed of 54 member states) basically served as a rubber stamp to decisions made by the various regional groups. According to critics, states with poor human rights records were able to lobby regional allies to nominate them to the body, leading to the election of several notorious human rights abusers to the CHR, including Libya (which served as chair in 2003), Sudan, Sierra Leone, Uganda, and Togo.<sup>37</sup>

A second criticism, related to the first, was that states would conspire to prevent meaningful action on serious human rights abuses. In essence, states engaged in a form of logrolling, coordinating to shield themselves and their allies from adverse resolutions. Powerful members like the United States and China worked to protect their allies. States such as Libya, Zimbabwe, Sudan, and Togo would also help to block resolutions aimed against human rights violations in their region, lest they also be singled out.<sup>38</sup> Paul G. Lauren notes that by 2003, the CHR had failed to pass resolutions against such abusers as China, Pakistan, Saudi Arabia, and Syria; the CHR had in essence become an "abusers club."<sup>39</sup> Several developing states shared a similar concern: that Western states, particularly the United States, selectively used human rights instruments in the UN to target smaller states in a manner that violated traditional notions of sovereignty.<sup>40</sup>

Third, the CHR was limited to meeting once a year for six weeks. In that time, it was expected to hear reports from treaty bodies concerning enforcement of their mandates, handle reports and recommendations from Special Procedures and create new ones, address human rights violations in specific countries, and receive input from member states and NGOs on all of the above. Critics argued that the six-week sessions proved insufficient to

<sup>37</sup> Lauren, *supra* note 2 at 328-329; Alston, *supra* note 2 at 188, 192.

<sup>38</sup> But see James H. Lebovic & Erik Voeten, "The politics of shame: The condemnation of country human rights practices in the UNCHR" (2006) 50 Int'l S.Q. 861 (Arguing that contrary to this frequent criticism, the post-Cold War period up to 2001 actually saw a decrease in the politicization of country-specific targeting through the public mechanisms of the CHR).

<sup>39</sup> Lauren, *supra* note 2 at 329. Though this criticism may be legitimate, the CHR did pass resolutions against several states in 2003, including Israel, the Democratic Peoples' Republic of Korea, Myanmar, and Belarus. This will be discussed further below.

<sup>40</sup> See generally Alston, *supra* note 2 at 205-206; Paimaneh Hasteh, "Should the UN general assembly approve the draft plan for a new HRC?" Reprinted in (2006) 4(5) Int'l Debates 149 at 149, 151, 153 (Statement by Iranian envoy to U.N.); *Statements for the Third Round of GA's Consultations on the Human Rights Council*, "Statement by H.E. Mr. Hamidon Ali, Permanent Representative of Malaysia to the United Nations at the Informal Consultations of the Plenary (on the Status, Size, Composition and Membership of the Human Rights Council)." (24 October 2005), online: <[http://www.reformtheun.org/index.php/government\\_statements/c464?theme=alt2](http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2)> ["Statement by H.E. Mr. Hamidon Ali"]. All speeches archived at <<http://www.reformtheun.org>> should be available permanently. If the specific links are broken, the speeches can be requested by contacting the organization through the primary website or by contacting the author.

complete all of the business it had before it.<sup>41</sup>

All of these problems led many observers to call for either reform of the CHR or the creation of a new body. As noted above, the High-level Panel argued in 2004 that the body needed major reform, including the expansion of its membership to include all UN member states (with the goal of eliminating the problem of selectivity) and the addition of a small advisory council of experts.<sup>42</sup> Secretary-General Kofi Annan called for abolishing the CHR altogether, and replacing it with a Human Rights Council composed of fewer members. Such an organization could either be a principal organ of the UN, or subsidiary to the General Assembly rather than to ECOSOC, with members elected by two-thirds majority rather than the simple majority in ECOSOC.<sup>43</sup> Finally, the 2005 World Summit called for the General Assembly to conduct open and transparent negotiations for the establishment of a human rights council.<sup>44</sup>

The criticisms directed towards the CHR created the strategic context for the creation of the HRC. Any state that wanted to at least appear as if it cared about human rights could not continue its support of the status quo and thus support shifted towards the creation of the HRC. In line with the theoretical argument presented above, states believed they would suffer a cost to their reputation for not supporting the new institution. However, different groups of states took very different stances on the powers and size of the HRC, how members would be elected, and which states would be eligible for election. In line with the argument presented in the previous section, groups of states with more non-democratic or human rights violating members were most likely to support a weaker institution with little ability to launch country-specific investigations, and a larger membership with lower thresholds for election. Negotiating groups containing a high percentage of states with strong human rights records supported a stronger institution with more discretion to identify human rights abusers and higher standards for membership. In short, groups of states more concerned about UN intervention were more likely to support an HRC with fewer powers to single states out.

As negotiations began, debate centred on how many members the new institution would have, how members would be elected, whether or not states with poor human rights records could stand for election, and the ability of the organization to pass country-specific resolutions. Early in the negotiation process, a new idea also emerged that would lessen states' fears of being singled out: a Universal Periodic Review (UPR) mechanism that would subject all states to the same general review process.

As noted above, four basic positions emerged during these negotiations: the United States; the WEOG; the G-77; and the larger Latin American

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<sup>41</sup> Rahmani-Ocora, *supra* note 2 at 16.

<sup>42</sup> High-level Panel, *supra* note 1 at paras. 285, 287.

<sup>43</sup> Annan, *supra* note 2 at 45.

<sup>44</sup> *Ibid.* at 39-41.

countries.<sup>45</sup> The United States was basically alone in its position. It wanted the HRC to be composed of no more than 20-25 members, elected by a two thirds majority of the General Assembly. It also called for a restriction that would prevent any country that currently had a human rights abuse resolution pending against it either in the GA or Security Council from serving on the HRC. Finally, the U.S. advocated for the HRC to be able to pass country-specific resolutions. At one point in the negotiations, the United States also demanded representation of the permanent five members of the Security Council.<sup>46</sup> In short, the U.S. conformed well to the predictions made above. Though the U.S. has been criticized for the abuse of prisoners captured during wars in Afghanistan and Iraq, overall it still has a strong human rights record, according to many different organizations.<sup>47</sup> As such, its advocacy of a strong organization with a limited membership, restricted to states who met some human rights criteria, was to be expected.

The European states were by and large concerned with having a body that would be more effective than the old CHR, but they did not believe that this could be brought about by insisting on fewer member states. The WEOG, led primarily by the EU, was also interested in an institution that would be effective in monitoring and improving human rights performance around the world. According to statements issued by EU member states and under EU auspices, EU countries did believe that a reduction in size would facilitate the promotion of human rights, but they also recognized that other institutional reforms were more likely to generate sufficient support to achieve passage. As such, EU countries largely supported an HRC of a similar size to the CHR, but one that would have several sessions each year (or meet in continuous session). They also wanted the new HRC to be able to consider country-specific resolutions, although to insulate the institution

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<sup>45</sup> Interviews conducted by the author, 2006 [Interviews]. I interviewed four diplomats involved in the creation of the HRC, each from a different region; three outside observers with strong connections to the U.N.; two U.N. officials; and two individuals from the U.S. government, one from Congress and one from the executive branch (neither of these were elected officials). This section relies in part on information drawn from these discussions, which served primarily to provide directions for research. Each interview lasted 30 minutes or more. All interviewees spoke with me in a personal capacity, not as representatives of the government, and their comments were not specifically authorized. They all spoke on the condition that I could disclose no identifying information. All information in this article was either confirmed by at least two independent sources or written sources; citations will indicate each point where information from an interview is used that was not available in published sources.

<sup>46</sup> See e.g. USUN, Press Release, 2(06), U.S. Ambassador John Bolton, "Statement on Creation of the Human Rights Council" (1 November 2006), online: <[http://www.reformtheun.org/index.php/government\\_statements/c464?theme=alt2](http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2)>.

<sup>47</sup> For critical examinations of the United States' human rights record, see Human Rights Watch, *United States of America*, online: <<http://www.hrw.org/united-states>>; Amnesty International, *2009 Annual Report for USA*, online: <<http://www.amnestyusa.org/annualreport.php?id=ar&yr=2009&c=USA>>. Two databases rating levels of democracy, Freedom House's Freedom in the World index and the Polity IV database, both give the U.S. the highest possible rankings. Their rankings are based in large part on observance of human rights. See Freedom House, "Freedom in the World – United States of America (2010)", online: <[www.freedomhouse.org/inc/content/pubs/fiw/inc\\_country\\_detail.cfm?year=2010&country=7944&pf](http://www.freedomhouse.org/inc/content/pubs/fiw/inc_country_detail.cfm?year=2010&country=7944&pf)>; Polity IV Project, "Polity IV Country Report 2008: United States of America", online: <<http://systemicpeace.org/polity/UnitedStates2008.pdf>>.

against charges of politicization in selectively applying human rights standards, the EU also supported the creation of a UPR that would periodically review human rights performance in every member state on a rotating basis. Finally, in regards to membership requirements, the EU supported subjecting members of the HRC to the UPR before other UN members.<sup>48</sup> As a working group comprising states that generally uphold strong human rights standards, EU support for an institution with strong mechanisms to consider country-specific reports and resolutions was expected, as was its advocacy of the UPR. The EU's stance on membership selection and size of the HRC, however, appear to have been driven by recognition of the need to compromise, as will be discussed below. Though the membership stance is a minor exception, the EU's view on the capabilities of the institution is consistent with the view that more democratic states would support a stronger institution.

The G-77 was led by a coalition that included Egypt and Pakistan, and included states such as China and Malaysia.<sup>49</sup> In general, these states stressed a "cooperative" approach, whereby human rights bodies would defer to the expertise of member states. This can be contrasted with a "confrontational" approach, which would target violations committed by any one state.<sup>50</sup> Many of them saw the creation of the HRC as inherently an imposition on state sovereignty, so the goal for the G-77 was to minimize the HRC's ability to single out particular countries. These states argued that the primary problem of the CHR was not its membership, but rather the politicization of human rights and the use of double standards.<sup>51</sup> They were therefore primarily concerned with creating a council with no restrictions on membership,

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<sup>48</sup> Interviews, *supra* note 45; United Kingdom of Great Britain and Northern Ireland: *Statements for the Fourth Round of the GA's Consultations on the Human Rights Council*, "Working Methods, Rules of Procedure, Transition: Statement by Sir Emyr Jones-Parry of the United Kingdom Mission to UN, on behalf of the European Union" (1 November 2005), online: <[http://www.reformtheun.org/index.php/government\\_statements/c464?theme=alt2](http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2)>; European Union: *Statement from first round of GA Consultations on Human Rights Council*, "EU Statement: Follow-up to the World Summit: Statement by the United Kingdom of Great Britain and Northern Ireland on behalf of the European Union" (11 October 2005), online: <[http://www.reformtheun.org/index.php/government\\_statements/c464?theme=alt2](http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2)>.

<sup>49</sup> As above, the G-77 here is used as a shorthand for a large and diverse negotiating bloc. Some members of the G-77 did push for a stronger rights body, but, in the main, G-77 states coalesced around the positions described here.

<sup>50</sup> Felice D. Gaer, "A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System" (2007) 7(1) Hum. Rts. L. Rev. 109 at 132-133.

<sup>51</sup> See, e.g. statements by the Thai Ambassador at the Informal Plenary Meetings on the HRC on the same topic. Thailand: *Statements for the Third Round of GA's Consultations on the Human Rights Council*, "Statement by H.E. Khunying Laxanachantorn Laohaphan, Ambassador and Permanent Representative of Thailand to the United Nations at the informal Plenary Meeting of the General Assembly on the Human Rights Council" (24 October 2005), online: <[http://www.reformtheun.org/index.php/government\\_statements/c464?theme=alt2](http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2)> ["Statement by H.E. Laohaphan", 24 October]; Thailand: *Statements for the Fourth Round of the GA's Consultations on the Human Rights Council*, "Statement by H.E. Khunying Laxanachantorn Laohaphan, Ambassador and Permanent Representative of Thailand to the United Nations at the Informal Plenary Meeting of the General Assembly on the Human Rights Council" (1 November 2005), online: <[http://www.reformtheun.org/index.php/government\\_statements/c464?theme=alt2](http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2)>. See also Statement by H.E. Mr. Hamidon Ali, *supra* note 40.



comparable in size to the CHR.<sup>52</sup> Some even called for it to be universal. By and large, these states also opposed anything more than a majority vote to elect members, and adamantly rejected any limitation based on Security Council sanctions or General Assembly Resolutions. They also wanted to ensure that seats continued to be allocated according to regional distributions, but that distribution would be more representative of Asia and Africa.<sup>53</sup> The G-77 states did eventually support the creation of the UPR, but opposed allowing the participation of NGOs or the High Commissioner for Human Rights, since both were perceived as representatives of the Western world. The UPR, with the opportunity to shape the process through the HRC, was seen as an alternative to country-specific resolutions. These stances regarding institutional capabilities and membership selection reflected the fact that member states of the G-77 are, on average, less democratic than the other major negotiating groups. Of the groups, the G-77 supported the weakest institutional features and the most open membership rules, all in keeping with the expectation that less democratic states prefer institutions with less capability to intervene in domestic affairs.

Bridging the gap between Europe and the G-77 were several Latin American states that strongly supported the creation of the HRC but were generally sympathetic to both sides. The range of views from Latin America was not surprising given the mix of stable democracies, democracies with mixed human rights records, and non-democratic states. Though there was not a single Latin American negotiating stance, the states did have fairly common positions on the new institution. Stressing a cooperative approach to human rights, these states wanted members of the HRC to pledge to support human rights, but did not want to create any human rights performance criteria for states seeking membership to the HRC. While some states in this group wanted only majority voting, others, particularly Argentina, initially supported a two thirds requirement to elect members.<sup>54</sup> They also supported the UPR as a means to avoid having country-specific resolutions, while also allowing for some form of review of human rights practices. In addition, many Latin American countries strongly supported

<sup>52</sup> As noted above, for the purpose of this article, states are grouped together by negotiating bloc. Within each bloc, individual states did, at times, take positions contrary to the majority of similar state-types. Similarly, states within each bloc vary on their human rights performance and level of democracy.

<sup>53</sup> Interviews, *supra* note 45; Statement by H.E. Mr. Hamidon Ali, *supra* note 40; "Statement by H.E. Laohaphan, 24 October, *supra* note 51; Assembly of the African Union, *Sirte Declaration on the Reform of the United Nations*, Assembly / AU / Decl. 2 (V) (5 July 2005); Nigeria: *Statement from Third Round of GA Consultations on Human Rights Council* (October 24 2005), online: <[http://www.reformtheun.org/index.php/government\\_statements/c464?theme=alt2](http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2)>. The Nigeria statement is interesting for two reasons. First, it does highlight that Nigeria supported both the African and G-77 positions regarding the HRC, but also noted that it would be willing to consider a smaller size for the HRC. This statement reveals that while groups of states did negotiate as groups of states, some states were willing to move beyond other group members.

<sup>54</sup> Argentina: *Statement from the Third Round of the GA's Consultation on Human Rights Council*, "Statement by the Argentine Delegation to the United Nations, Informal Consultations of the Plenary on the Human Rights Council 'Status; Size; Composition; Membership'" (24 October 2005), online: <[http://www.reformtheun.org/index.php/government\\_statements/c464?theme=alt2](http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2)>.

the issuance of an annual report that would analyze the global state of human rights. These states also generally supported lengthier and more frequent sessions to complete the work of the body.<sup>55</sup>

In achieving a final outcome, the G-77 wielded tremendous influence given the number of states that supported its position.<sup>56</sup> The United States was basically a non-actor as negotiations drew to a close. For the United States, automatic membership for members of the Security Council was an issue that was not open to compromise.<sup>57</sup> In fact, the United States came under a great deal of criticism for not making its bargaining positions clear. It was accused of not negotiating in good faith, and it frequently failed to attend negotiating sessions.<sup>58</sup> Though the United States did participate in negotiations, in the end its intransigence meant that, for the most part, its views were not reflected in the new institution. Unlike the United States, European states were more interested in compromising in order to ensure that something new was created. While the theoretical argument advanced in the previous section cannot account for the difference in willingness to compromise between the United States and Europe, it does explain why both wanted an institution that would be able to pass country-specific resolutions and have a slightly higher bar for membership than did the CHR. The G-77, on the other hand, appeared willing to relax some of its demands regarding institutional capabilities, particularly by agreeing to allow the HRC to pass country-specific resolutions and the UPR, in exchange for less stringent membership requirements than had been advocated by the United States and Europe. Finally, Latin American states helped serve as the bridge between these positions while then General Assembly President Jan Eliasson helped forge the final compromise agreement by drafting the final text.<sup>59</sup>

Ultimately, the G-77 position is most reflected in the membership of the body, including the size of the body, the manner of elections, and the regional distribution of seats without formal requirements regarding membership. The HRC is slightly smaller than the CHR—47 members as opposed to 53. Members are elected to three-year terms, and have to receive the votes of a majority of member states (not just a majority of those present and voting); further, the seats on the HRC are apportioned based on a

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<sup>55</sup> Interviews, *supra* note 45; Brazil: *Statement from first round of GA Consultations on Human Rights Council*, "'The informal consultations [sic] the Human Rights Council' Statement by Ambassador Ronaldo Mota Sardenberg 'Human Rights and the Rule of Law' Permanent Representative of Brazil to the UN" (11 October 2005), online: <[http://www.reformtheun.org/index.php/government\\_statements/c464?theme=alt2](http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2)>; Ronaldo Mota Sardenberg, "Should the UN general assembly approve the draft plan for a new HRC?" (2006) 4(5) *Int'l Debates* 140 at 140, 142 [Sardenberg, "Should the UN"].

<sup>56</sup> The G-77 has 130 members, though it should be noted that its membership includes several Latin American states and other states who did not support its position. Nonetheless, the size of its membership means it wields considerable influence in votes in the General Assembly.

<sup>57</sup> This is similar to how it had been with the negotiations for the ICC. Lauren, *supra* note 2 at 334.

<sup>58</sup> Interviews, *supra* note 45. See also Warren Hoge, "As Praise Grows at Home, Envoy Faces U.N. Scorn" *The New York Times* (23 July 2006) A1; Mark Leon Goldberg, "The Arsonist" *The American Prospect* 17:1 (January 2006) 22.

<sup>59</sup> Warren Hoge, "U.S. Isolated in Opposing Plan for a New U.N. Rights Council" *The New York Times* (4 March 2006) A4.

regional distribution: Asia–13 seats; Africa–13 seats; Eastern Europe–6 seats; Latin American and Caribbean–8 seats; and Western Europe and other States (e.g., Canada and the United States)–7 seats. States can be elected to two consecutive terms and then are ineligible for immediate re-election. Finally, while members of the HRC are required to take an oath to uphold human rights, no specific requirements for members were adopted.

The WEOG position is more reflected in the institutional structure of the body. The HRC is able to call special sessions, in addition to meetings held in several regular sessions throughout the year. Moreover, it is empowered to issue country-specific resolutions, but it also implemented the UPR that engages in periodic human rights reviews of every UN member state, starting with members of the HRC.<sup>60</sup> Although these institutional powers do grant the HRC the ability to impose stronger enforcement costs than the CHR, it appears as though states that were concerned about an overly strong institution had their fears somewhat allayed by membership rules that would grant them significant influence over how the HRC exercises its powers.

Reflecting that the final composition of the HRC was a compromise, many of the 170 states that voted in favour of it had major reservations. The EU's statement in support of the final draft resolution was hardly a ringing endorsement. It simply noted that "The EU considers that the President of the General Assembly's draft resolution meets the basic requirements for the establishment of the Human Rights Council. The EU could therefore accept this text as a compromise."<sup>61</sup> After voting in favour of the resolution, several Latin American states expressed reservations, particularly about the diminished number of seats available to Latin American states on the HRC as compared to the CHR (17% of seats as opposed to 21%) and the fear that the failure to include a global human rights report could lead to further politicization of the HRC.<sup>62</sup> China voted in favour of the resolution, but expressed several concerns:

The Chinese Delegation also wishes to indicate that [the final resolution] has failed to fully reflect the concerns of many developing countries, including China, over some issues. First, it does not provide [an] effective guarantee to prevent the political confrontation caused by the country-specific resolution, which has become a chronic disease of the Commission on Human Rights. Second, the universal periodic review to be developed by the Council may overlap with the work of human rights treaty bodies and special mechanisms, thus increasing report burdens for developing countries.<sup>63</sup>

<sup>60</sup> *Human Rights Council*, GA Res. 60/251, UN GAOR, 60th Sess., UN Doc.A/60/251 (2006) at para 7.

<sup>61</sup> European Union: *EU Position on Human Rights Council*, "Austrian Presidency of the European Union 2006: EU Position on the Human Rights Council" (1 March 2006), online: <[http://www.reformtheun.org/index.php/government\\_statements/c464?theme=alt2](http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2)>. Due to an error on the webpage, the link to the statement appears next to the date "1 March 2005".

<sup>62</sup> Sardenberg, "Should the UN", *supra* note 55.

<sup>63</sup> China: *Statement on Adoption of Human Rights Council Resolution*, "Statement by Ambassador Zhang Yishan, Permanent Representative of China to the UN, after adoption of the draft resolution on Human Rights Council" (15 March 2006), online: <[www.reformtheun.org/](http://www.reformtheun.org/)

Finally, the United States famously voted 'no' on the resolution, citing as its primary opposition the failure to adopt any membership criteria. Nevertheless, the United States did pledge to work closely with the HRC to help it develop over time.<sup>64</sup>

The HRC itself was a compromise between negotiation groups with different views of the role that a human rights institution should play. The G-77, dominated by states with comparatively poor human rights records, wanted a larger institution with fewer capabilities. European states, which have strong human rights records, initially preferred a smaller institution, but were willing to accept one similar in size to the CHR as long as it would have the power to issue country-specific resolutions and to implement the UPR. Latin American states, reflecting their mixed human rights natures, represented a compromise between the two groups. Finally, the United States desired a much smaller and more powerful institution than was ultimately created. The HRC as constructed does appear to have greater institutional powers. It meets more frequently than did the CHR, and the UPR is a potentially powerful mechanism. Nonetheless, as major decisions must still be made by its member states, and membership rules largely reflect the views of the G-77, the HRC should not be expected to take positions significantly different than those of the CHR, with the possible exception of the UPR.

The next section will evaluate the initial outcomes of the HRC to determine if a) they represent a break with the CHR and b) which state preferences they most closely mirror.

#### **IV. Human Rights Council Outcomes**

The HRC and CHR are similar in some respects and different in others. The basic size and regional distribution of member states changed only slightly from the CHR to the HRC. Election of member states was moved from the ECOSOC to the GA, but, as will be discussed below, regional groups still are the primary locus for determining who will sit on the body. Both bodies have a similar power to issue country-specific resolutions. The major institutional difference between the two bodies is the UPR. Given the similarity in membership and, presumably, preferences of the states on the HRC and CHR, one should not expect dramatically different outcomes between the two bodies. Just as decisions in the CHR were largely dominated by developing states of the G-77, so too should one expect HRC decisions largely to conform to the preferences of that group of states, as they hold more seats than the Western Europe and Other States regional group.<sup>65</sup>

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[index.php/government\\_statements/c464?theme=alt2](http://index.php/government_statements/c464?theme=alt2)>.

<sup>64</sup> USUN, Press Release, 51(06), U.S. Ambassador John Bolton, "Explanation of vote on the Human Rights Council Draft Resolution" (15 March 2006), online: <[www.reformtheun.org/index.php/government\\_statements/c464?theme=alt2](http://www.reformtheun.org/index.php/government_statements/c464?theme=alt2)>. The Obama administration subsequently decided to run for a position on the HRC, and the United States was elected to a three-year term in 2009.

<sup>65</sup> In bodies elected according to regional representation to which membership is not

This section uses both summative data from regular and special sessions of the HRC, held through August 2009, and qualitative analysis from primary and secondary sources, to compare the actions of the two bodies in order to determine if, as expected, the institutional outcomes reflect the interest of member states. This would suggest that state preferences become a better determinant of outcomes than the institutional changes made in the HRC. The evaluation of outcomes primarily focuses on the degree to which the HRC has reflected the preferences of member states, rather than a normative focus on the degree to which it has improved human rights practices. The section focuses on the election of members to the HRC, the nature of resolutions that have been passed, including certain unforeseen impacts of those resolutions on other UN bodies. It concludes with a discussion of the UPR, the one major break with the design of the CHR that could be less influenced by member state preferences, given the universal nature of the review process.

### 1. *Membership*

Kofi Annan, along with several member states, had been concerned with the membership of the CHR, in particular the inclusion of states with poor human rights records. However, the possibility of any meaningful restrictions on member states fell by the wayside during the negotiation process. The regional distribution of seats on the HRC even led to the possibility of a repeat of what had occurred under the CHR: regional groupings could come together to nominate states without regard for their human rights records and present just enough candidates to fill their regional quotas. This concern appears to have been validated. In the 2009 elections, only 20 states competed for 18 open seats. Most regions nominated exactly the number of states that were eligible under distribution rules, with the Asia and Africa groups being the exceptions. Latin American countries have largely agreed to rotate the seat among members. In the Western Europe and Other States group, Iceland withdrew from elections after the United States announced its candidacy to ensure that the U.S. would be elected.<sup>66</sup> Nonetheless, the elections have led to the defeat of some states considered by rights groups to be human rights abusers, including Azerbaijan, in 2009.<sup>67</sup>

Figures 1 and 2 present a clearer view of the membership of the HRC by comparing the numbers and percentages of free, partially free, and not free members of each year of the HRC, in comparison to the last three years of the

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automatically granted based on some other factor (such as permanent Security Council membership), the United States is grouped with Western Europe and Other States. This should not be confused with the US negotiating stance which has often been at odds with WEEOG, an informal negotiation group.

<sup>66</sup> Human Rights Watch, *UN: Lack of Competition Mars Vote on Human Rights Council* (12 May 2009), online: <[www.hrw.org/en/news/2009/05/12/un-lack-competition-mars-vote-human-rights-council](http://www.hrw.org/en/news/2009/05/12/un-lack-competition-mars-vote-human-rights-council)>.

<sup>67</sup> *Ibid.* For information on Azerbaijan's rights record, see Amnesty International, "Human Rights in Republic of Azerbaijan", online: <<http://www.amnesty.org/en/region/azerbaijan>>.

CHR. The ratings are from Freedom House’s combined score for Political Rights and Civil Liberties.<sup>68</sup> Freedom House’s scores have been subject to some criticisms for focusing too much on civil and political rights, for not being entirely transparent in their coding, and for exhibiting some bias toward countries with economic freedom. Further, the scores conflate democracy with rights practice, and vice versa.<sup>69</sup> However, for the purposes of this article, they still represent a reasonable method of comparing members of the HRC and CHR. First, they are comprehensive in their coverage of states and are updated on an annual basis. Second, their findings correlate well with other measures of human rights and, rather than focusing only on procedural democracy, examine civil and political rights to arrive at their conclusions.<sup>70</sup> Finally, though imperfect, the public accessibility of the data, the level of coverage and the production of disaggregated scores offer a common point from which to begin a discussion on rights.

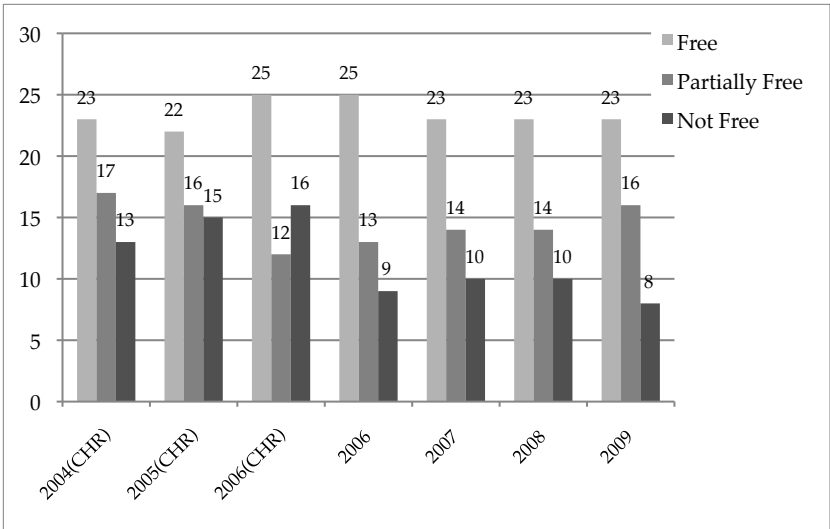


Figure 1: Number of Free, Partially Free, and Not Free States on the CHR and HRC.

For each year’s membership, the article uses that year’s Freedom in the World scores, which represent the status of the country in the previous year (e.g., 2006’s scores are based on 2005 conditions). By using that year’s report, the scores used here are based on information that would have been

<sup>68</sup> The reports can be found at Freedom House, “Freedom in the World”, online: <[www.freedomhouse.org/template.cfm?page=15](http://www.freedomhouse.org/template.cfm?page=15)>. As a check on the Freedom House scores, I also compared two years of information to the combined score that countries received in the Polity IV dataset. That scale produced similar numbers, with slightly more states being rated “democratic” than using the Freedom House Scale. The change in average score and change in numbers of states in different categories was similar, however.

<sup>69</sup> See note 33 for a discussion of the relationship between democracy and rights. For a discussion of the drawbacks of Freedom House’s scoring system, see Landman, *supra*, note 33 at 928-929.

<sup>70</sup> *Ibid.* at 920-921.

available to member states voting on members of the CHR or HRC.<sup>71</sup>

Looking at the data reveals that the high water mark to date for the number of free states on the HRC occurred in its first year, with a slight decrease after that. Similar numbers of states rated as “free” served on the CHR in its final three years (average of 23.3), as in the HRC in its first four (average of 23.5). The percentage of free states increased from 47.17% in the last year of the CHR, to 53.19% in the first round of HRC elections. The percentage then fell back to 48.94%. While this number is scarcely higher than the last year of the CHR, it is seven percentage points higher than the percentage of free member states on the CHR in 2005, and five percentage points higher than 2004. Similarly, the number of “partially free” states (15, on average, for the CHR and 14.3 for the HRC) has not significantly changed. The most important difference is in the number of states rated as “not free”. The CHR averaged 14.7 not free states, while the HRC has averaged 9.3. The drop in membership of six member states between the CHR and HRC, then, has come almost entirely at the expense of not free states. This is better reflected in the percentages of not free states. While the HRC has had between 17.02 and 21.28% of its member states categorized as not free, in its last three years of existence, the lowest percentage of “not free” states that comprised the CHR was 24.53%, ranging to a high of 30.19% in 2006.

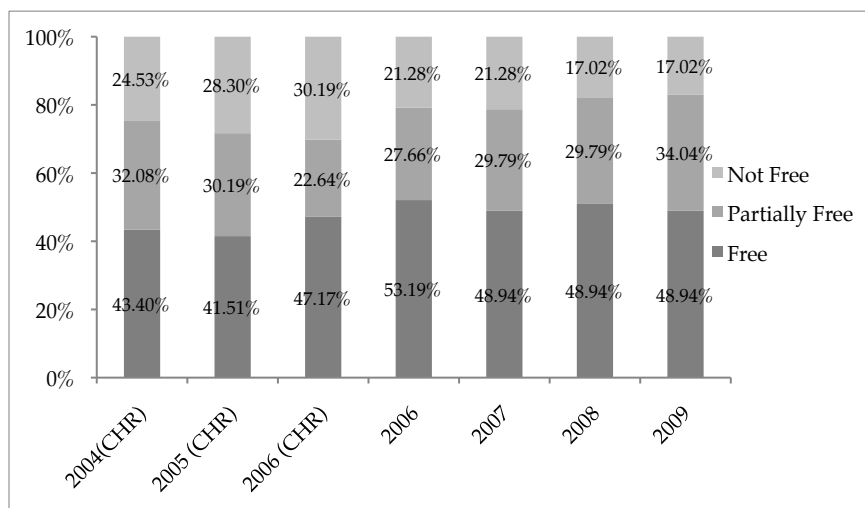


Figure 2: Percentage of Free, Partially Free and Not Free states on the CHR and HRC.

The result of this change has been that states rated as free and partially

<sup>71</sup> Freedom House has produced its own report card on the HRC: *The UN Human Rights Council Report Card: 2007-2009* (10 September 2009), online: <[www.freedomhouse.org/uploads/UNHRC\\_Report\\_Card.pdf](http://www.freedomhouse.org/uploads/UNHRC_Report_Card.pdf)>. This report presents data and analysis similar to that presented here, though all the tables and figures in this article were created by the author. Freedom House's report presenting similar data was released in September 2009, shortly after the initial presentation of this article at the American Political Science Association's annual meeting in Toronto, Canada.

free now constitute a higher percentage of member states than they did under the CHR. Perhaps this suggests a modest improvement in the human rights performances of elected states, although the percentage of states rated as “free” peaked in the first year of the HRC. Further, many of the states that were on the CHR have continued as members of the HRC. In the first round of elections, 29 of 47 elected states had served on the CHR in its last year of existence. In the 2007 round of elections, three additional states that had been members of the CHR in 2006 were elected to the HRC. In examining which states continued as members, no discernible pattern emerges as to why some states were elected and others were not. Some states with very poor records were members of both bodies. For example, states rated as not free, including Cuba, Pakistan, and Saudi Arabia, continued as members, as did states rated free, such as Canada, Finland and Mexico. Neither did the human rights performance of states that were members of both bodies change dramatically.<sup>72</sup>

This result does reflect the ultimate compromise on the HRC: the lack of membership conditions has not prevented some states with poor human rights records from being elected, but it has led to an overall improvement of the rights records of states on the HRC as compared to the CHR.

## 2. *Work Product*

The HRC has spent more time in session as compared to the CHR. As of August 2009, it had held eleven regular sessions and eleven special sessions to consider a variety of issues. Consistent with its mandate, the HRC has considered both country-specific resolutions, as well as a more general attempt to engage in new standard setting for human rights. Another portion of its mandate has been to review Special Procedures inherited from the CHR—including country-specific mandates.<sup>73</sup> Finally, it also created the UPR, which will be discussed in more detail in the next sub-section.

Early reviews of its work were somewhat critical, noting that the HRC had failed to take action against several states that had been highlighted as rights abusers by the CHR.<sup>74</sup> More concrete evidence also suggests that the HRC is avoiding the discussion of specific instances of human rights abuses, except in very limited circumstances. Through August 2009 (11 regular and 11 special sessions), the HRC had passed 234 documents that were not directly related to specific country reviews under the UPR. Of those, 46 can be categorized as administrative resolutions, including the specific rules regarding the UPR. An additional 135 deal with general human rights topics, including promoting new human rights standards and encouraging

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<sup>72</sup> Of these six states, only Saudi Arabia and Mexico experienced any change in Freedom House scores over the course of time. Saudi Arabia's Freedom House score improved from 7 (the lowest possible score) to 6.5 between 2005 and 2006, a rating it maintained at least through 2009. Mexico's score worsened from 2 to 2.5 between 2006 and 2007, though this score remains in the free range.

<sup>73</sup> See *supra* note 37 (A discussion of the disposition of Special Procedures as of 2008).

<sup>74</sup> Felice Gaer, "Human Rights at Risk? The Arbour years and beyond" (2008) 6 *The Interdependent* 22 at 22-23.



widespread adoption of other human rights standards. The remaining 53 resolutions were country-specific, nine of which were advisory in nature. These advisory resolutions can be thought of as more cooperative in that they are usually resolutions to establish some form of assistance to a country. Nonetheless, the 53 country-specific resolutions seem like a fairly impressive number, until the breakdown of countries covered is examined. Table 1 shows the number of documents mentioning a specific country since the creation of the HRC.<sup>75</sup>

<i>State</i>	<i>Number of Documents</i>
Israel	23
Sudan	9
Myanmar	6
Democratic Republic of Congo	3
Burundi	2
Liberia	2
North Korea	2
Somalia	2
Cambodia	1
Haiti	1
Kyrgyzstan	1
Sri Lanka	1

*Table 1: Country-Specific Documents in the HRC (June 2006–August 2009)*

Just under half of the country-specific resolutions have concerned Israel. While Israel has committed human rights violations, many other states almost certainly have as well. Egregious rights abusers do appear on this list, but the flaw is in its imbalance: just three states—Israel, Sudan and Myanmar—have accounted for 72% of all country-specific resolutions. This pattern has been fairly consistent over time. In the tenth session, nine country-specific resolutions passed, five of which were directed at Israel, including resolutions concerning the hostilities in Gaza in January 2009.

By way of comparison, in the last three sessions of the CHR, from 2003–2005, the body passed 258 total resolutions, 53 of which were country-specific. Of those, 24 were advisory or cooperative in nature (a higher percentage than under the HRC). Excluding Israel, 62% of the CHR's

<sup>75</sup> Data for the table were tabulated based on the Annual Reports prepared by the HRC: *Report of the Human Rights Council*, UN GAOR, 61st Sess., Supp. No. 53, UN Doc. A/61/53 (2006); *Report of the Human Rights Council*, UN GAOR, 62nd Sess., Supp. No. 53, UN Doc. A/62/53 (2007); *Report of the Human Rights Council*, UN GAOR, 63rd Sess., Supp. No. 53, UN Doc. A/63/53 (2008); *Report of the Human Rights Council*, UN GOAOR, 64th Sess., Supp. No. 53, UN Doc. A/64/53 (2009). These are available online: Office of the High Commissioner for Human Rights, <<http://www2.ohchr.org/english/bodies/hrcouncil/>>.

resolutions reflected a cooperative approach versus only 30% under the HRC. A lower percentage of resolutions targeted Israel: 14 of the 53 resolutions were specific to Israel or areas Israel occupies. No other state had more than three resolutions against it in that time period. One possible explanation for the greater focus on Israel under the HRC is use of military force in the 2006 war in Lebanon and the 2009 Gaza action, although this conjecture is not fully explored here.<sup>76</sup> Further, those states (other than Israel) with three resolutions against them under the CHR had one resolution passed in each session (or one per year). Table 2 presents information on the countries targeted by the CHR in its last three sessions.<sup>77</sup>

<i>State</i>	<i>Number of Resolutions</i>
Israel	14
Belarus	3
Burundi	3
Cambodia	3
Cuba	3
Democratic Republic of the Congo	3
Myanmar	3
North Korea	3
Sierra Leone	3
Somalia	3
Chad	2
Liberia	2
Turkmenistan	2
Western Sahara (disputed territory)	2
Afghanistan	1
Iraq	1

Table 2: *Country-Specific Resolutions in the CHR (2003–2005).*

Drawing specific conclusions about the differences in resolutions passed in the two bodies should be undertaken with care, as should discussion of the difference in approach between the two bodies. The trend in both bodies is that they largely reflect the preferences of those states that prefer to avoid country-specific resolutions. However, it is possible that the institutional changes in the HRC have had some effect, since it has passed more non-

<sup>76</sup> For the purposes of brevity, this article will not discuss the *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, UN Doc. A/HRC/12/48 (25 September 2009) (“the Goldstone Report”).

<sup>77</sup> Information on resolutions passed by the CHR is available online: Office of the High Commissioner for Human Rights <<http://www2.ohchr.org/english/>>.

cooperative resolutions both in absolute and percentage terms—even excluding Israel—than did the CHR. Despite this change, the HRC also reflects consistency in the states targeted, as well as in states that escape particular scrutiny. Of the twelve states the HRC has targeted with a country-specific resolution, eight were also subjects of resolutions under the CHR.

Also reflecting consistency in the states targeted is the fact that neither body has addressed human rights abuses in states such as China, Saudi Arabia or Zimbabwe. Both, however, have given Israel—a frequent target of developing nations—a disproportionate share of attention. Nonetheless, one can tentatively conclude that though states wishing to avoid confrontational language—reflected in the negotiating position of the G-77—have largely succeeded in the HRC, the HRC has appeared to be slightly more willing to be critical of rights practices in states it addresses. Why this shift may have occurred however, is not entirely clear.

Country-specific resolutions in the HRC have had an additional effect as well. Several states have adopted the position that the HRC, as a body that reports to the GA, is the appropriate venue for the discussion of specific human rights violations. Several countries, including Barbados, Uzbekistan, and Angola, argued against a 2007 GA resolution regarding the human rights situation in Myanmar. They specifically referenced the Human Rights Council as the appropriate venue to address particular rights concerns—either through the UPR or through country-specific resolutions. The representative from Barbados lamented “that the Council had not been afforded any real opportunity to establish itself and that a confrontational approach had persisted.”<sup>78</sup> Although the percentage of states voting in favour of country-specific resolutions in the GA did not change significantly from 2004–2007 (an average of 82 states voted for five country-specific resolutions in 2005; 81.25 for four in 2006; and 82.25 for four in 2007, and all 2006 and later votes occurred after the creation of the HRC), the creation of the HRC has given states an additional rhetorical justification to vote against such resolutions in the GA.<sup>79</sup> Moreover, Russia and Indonesia opposed a 2007 resolution in the Security Council regarding the situation in Myanmar on the grounds that the Human Rights Council was the appropriate venue for addressing country-specific rights concerns. Russia ultimately vetoed the

<sup>78</sup> *Summary Record of the 50<sup>th</sup> Meeting*, UN GAOR, 62nd Sess., UN Doc A/C.3/62/SR.50 (published 14 December 2007) at paras. 25, 11–31, online: <<http://documents-dds-ny.un.org/doc/UNDOC/GEN/N07/605/36/pdf/N0760536.pdf?OpenElement>>. The record of the debate regarding this resolution contains statements of the referenced states as well as those of several others.

<sup>79</sup> These data are from a database the author has compiled using data from the UN Bibliographic Information System on all U.N. General Assembly resolutions passed from 1990–2007. I ran a simple regression analysis on country-specific resolutions from 2000 to 2007. The independent variable is a dummy variable coded as “1” if the vote occurred during the existence of the CHR, or “2” if it occurred during the HRC. The dependent variable was percentage of states voting yes. The independent variable was not statistically significant. There was not a significant change in either the number of states voting in favour, nor the percentage of member states—either overall or calculated as a percentage of those actually voting—changed significantly.

resolution.<sup>80</sup>

A core objective of many G-77 states in creating the HRC was to ensure that the HRC did not become a body with sufficient strength to condemn individual rights violations. These states appear to have been successful. They appear to have achieved this primarily by establishing an HRC that was not significantly smaller than the CHR, and sustaining the regional distribution of seats, with no limitations on which states could be elected. Though the HRC has passed a limited number of resolutions aimed at specific countries—a higher percentage of which are critical in comparison to the CHR—a significant percentage of those have been aimed at one state, while several states with poor human rights records have escaped attention entirely.

Based on these initial outcomes, then, it would seem that members of the G-77 largely succeeded in their efforts to create an institution that would not represent a major change in practice from the CHR. In return for concessions on membership, however, European states and other members of WEOG pursued the creation of the UPR in an effort to hold all UN member states accountable for human rights practices. This article now turns to a discussion of that mechanism.

### 3. *Universal Periodic Review*

One of the first tasks of the Human Rights Council was to establish the procedure for the UPR.<sup>81</sup> The mechanism ultimately created by the HRC calls for all UN member states to be subject to review every four years. Countries under review provide an individual country report, while other stakeholders, including NGOs and other member states, provide information considered relevant to the review. Information submitted by stakeholders is summarized by the Office of the High Commissioner for Human Rights. The UPR working group, consisting of the member states of the HRC, then meets with representatives of the country under review.

The resulting dialogue can include other UN member states that choose to attend the review session. Interested stakeholders may attend, but may not participate in the dialogue. A troika of states randomly selected from the HRC serve as rapporteurs who manage the review session. The session is limited to three hours, the first portion of which is reserved for the state under review to make its presentation. The rapporteurs are responsible for preparing the final outcome document, which includes a series of recommendations to the state under review. That state has the opportunity to respond, formally accepting or rejecting the recommendations; both the recommendations and the responses are included in the final report.<sup>82</sup>

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<sup>80</sup> Yvonne Terlingen, "The Human Rights Council: A New Era in UN Human Rights Work?" (2007) 21 *Ethics & Int'l Affairs* 167.

<sup>81</sup> *Human Rights Council*, *supra* note 4 at para. 5(e) (Outlining the nature of the UPR, and providing that "the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session").

<sup>82</sup> Human Rights Council, *Institution-building of the United Nations Human Rights Council*, UN HRCOR, 5th Sess., Annex, UN Doc. A/HRC/RES/5/1 (2007); Allehone Mulugeta Abebe, "Of

Compiling final reports has proved somewhat contentious, with many African states in particular arguing that rejected recommendations should not be in the report, while European states have generally insisted that they be included. Ambassador Allehone Mulugeta Abebe of Ethiopia illustrates this point by reference to the review of Tunisia, in which Belgium objected to the exclusion of some of its recommendations from the final draft of the report. A working compromise to include specific recommendations, but to note which country made them, has settled the issue to an extent.<sup>83</sup>

To date, this process has had mixed success. Some countries have taken the process quite seriously, while others have been less engaged. In 2009, China, for example, rejected out of hand almost all recommendations to improve its rights record, and admitted almost no areas of concern in the country report it prepared for the committee.<sup>84</sup> As the final UPR report on China summarized:

The delegation thanked all countries who spoke positively of its efforts in human rights promotion and protection and for many important and interesting questions and recommendations. It noted with regret, and reject[ed] categorically, however, the politicised statement[s] by certain countries.<sup>85</sup>

Other states have been able to manipulate the speakers' list for the three-hour review session to limit the ability of those critical of their regime to speak, while highlighting those speakers who will praise them.<sup>86</sup> Still others have not submitted documents in a timely fashion: Jordan, for one, submitted its country report late.<sup>87</sup> Cuba and Malaysia also came under particular criticism after the 2009 process, for failing to take the review seriously, or politicizing it in a manner that shielded discussion of human rights abuses.<sup>88</sup> On the other hand, Amnesty International has praised

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Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council" (2009) 9 Hum. Rts. L. Rev. 1 at 8-15 (a more detailed description of the process, as well as the process by which it was negotiated); Office of the High Commissioner for Human Rights, *Basic Facts about the UPR*, online: <<http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>>.

<sup>83</sup> Abebe, *ibid.* at 15.

<sup>84</sup> Human Rights Watch, *UN: Nations Show True Colors at Rights Review* (13 February 2009), online: Human Rights Watch <<http://www.hrw.org/en/news/2009/02/13/un-nations-show-true-colors-rights-review>> [HRW, *True Colors*]; Amnesty International, *United Nations Human Rights Council: Universal Periodic Review: The Fourth Round of Reviews Yields Mixed Results* (9 March 2009) at 3, online: <<http://www.amnesty.org/en/library/asset/IOR42/001/2009/en/a41cc0d0-0cec-4f46-839b-b721e4b7fc53/ior420012009en.pdf>> [Amnesty International, *Universal Periodic Review*].

<sup>85</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review: China*, UN GAOR, 11th Sess., UN Doc. A/HRC/11/25 (2009) at para 60. According to the summary of the report, China proceeded to address specific criticisms by explaining them away, denying the problem, stating that the problem had been solved, or arguing that the criticism was the result of political disagreement between states.

<sup>86</sup> Gareth Sweeney & Yuri Saito, "An NGO Assessment of the New Mechanisms of the UN Human Rights Council" (2009) 9 Human Rts. L. Rev. 210.

<sup>87</sup> HRW, *True Colors*, *supra* note 84. Joe Stork & Christoph Wilcke, *A Missed Opportunity?* (10 July 2009), online: Human Rights Watch, <<http://www.hrw.org/en/news/2009/07/10/missed-opportunity>>; Amnesty International, *Universal Periodic Review*, *supra* note 84 at 2.

<sup>88</sup> Amnesty International, *Universal Periodic Review*, *ibid.*

several states, including Mexico, Russia, and Nigeria, for what it considered to be the care taken in the preparation of their country reports, their willingness to engage critics, and their willingness to at least formally accept their respective final reports' recommendations.

There has also been a widespread practice during review of regional blocs looking out for one another by rarely criticizing fellow members. Ambassador Abebe has noted that, "out of 65 statements during the review of Tunisia, 50 'favourable' statements were made, mainly by African and Muslim countries. ...Non-Western countries presented rather critical observations of the human rights situations in the UK.... But similar reaction towards reports by developing countries were absent."<sup>89</sup> Shortly before the U.S. election to the HRC in 2009, U.S. Ambassador Mark Cassayre specifically addressed this concern, stating that:

...we must be vigilant against the abuse of the UPR process to deny the existence of human rights violations. ...Practices such as lining up friendly speakers, facilitating the early sign-up of government-operated NGOs, and encouraging government-operated NGOs to submit reports in order to block dissenting opinions, have a particularly chilling effect on the purpose and spirit of the UPR. In doing so, states undermine the international community's aspirations for the UPR process.<sup>90</sup>

Evaluating the UPR at this early stage is somewhat difficult. At best, the results are mixed. The review is easily open to abuse by states that wish to do so. The state under review has much influence in crafting its own review process, including preparing an initial report, helping to shape the three-hour review session, and choosing which recommendations to accept or reject. This means that the mechanism will only be useful for those states that wish it to be useful.

Such a mechanism benefits those states most concerned with preventing UN intervention in their domestic affairs, at the expense of those that wish to more intensely promote human rights standards around the world. Though the WEOG held out hope that the UPR would be a powerful tool to hold states accountable for human rights practices, many, including G-77 countries, have already manipulated the process in order to avoid making major concessions regarding human rights. In this regard, it would again appear that G-77 states, while conceding to institutional design, maintained the status quo. The UPR is non-discriminatory in the sense that all nations fall under review, but early results suggest that not all reviews are created equal. Notorious human rights abusers, though subject to some criticism during the review process, have a substantial level of influence on what the HRC is able to produce. Though the UPR may develop into a mechanism that does affect state practice, as yet states with poor practice appear to be engaging the process only to the extent necessary to fulfill their official

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<sup>89</sup> Abebe, *supra* note 82 at 19-20.

<sup>90</sup> Mark Cassayre, *Statement by the delegation of the United States of America before the Human Rights Council, HRC, 11th Sess., General Debate, Item 6 (12 June 2009)*, online: United States Mission <<http://geneva.usmission.gov/news/2009/06/12/item6unhrc/>>.

obligations. As will be discussed in the conclusion, however, the UPR itself should provide an interesting avenue for further research regarding domestic and international incentives and human rights institutions.

## V. Conclusion

The process of creating the HRC was one of negotiated compromise. It fits well with recent arguments that the decisions of states to participate in human rights regimes involves complex cost-benefit calculations, in addition to (and possibly informed by) normative commitments to human rights. The impetus behind the creation of the HRC was the shortcomings of the CHR: its failure to engage human rights abuses around the world to a sufficient degree; its inclusion of human rights abusers among its members; and its production of politicized decisions.

Nevertheless, the HRC does not really address these issues. Outcomes of the CHR have so far been largely reflective of the interests of its member states, and of the interests of their regions more broadly. Those same states participated in the negotiation of the HRC, designing an institution that reflected the overwhelming desire of many states not to have an overly strong human rights enforcement body. In the final design, a state's human rights record was not a major impediment to membership on the HRC so long as it could gain enough votes, and the regional distribution of seats virtually ensured that some states with poor human rights records would be on the HRC. The size of the HRC also suggested that little would change in the voting dynamics between the two bodies.

As I have shown, little did change. While fewer states at the lowest level on Freedom House's scale have made it onto the HRC, there has not been an increase in the election of states rated as free. Finally, the HRC has addressed fewer states in country-specific resolutions than the CHR did in its last three years, and the percentage of those resolutions specific to Israel has increased.

The question thus arises: is the HRC a failure, and the UN fatally limited in its pursuit of human rights? Not necessarily. At this point, the HRC can do no more than mirror the preferences of its member states. If institutions are the results of bargains struck to reflect the preferences of their members, then the HRC has been particularly successful for the largest voting bloc in the UN: namely, developing states concerned with intervention in their domestic affairs.

This situation was not unforeseen in the creation of the HRC. One diplomat whom I interviewed summarized the creation of the HRC as "pouring the same wine in different bottles." This view is held by many observers of the UN as well. As Ladan Rahmani-Ocora noted prior to the finalization of the HRC's design: "an outstanding design for the structure of the new Human Rights Council will be meaningless without a firm foundation of state commitment."<sup>91</sup> It would appear that the outcome of the HRC was, in many ways, predetermined. Given the structure of preferences

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<sup>91</sup> Rahmani-Ocora, *supra* note 2 at 20.

at the UN, the new institution might not be expected to be dramatically different, yet member states engaged in a lengthy reform process. This apparent paradox raises the question: why create a new institution at all?

One explanation fits well with the argument presented here: reputation. The CHR was perceived as being ineffective at promoting human rights. To be perceived as caring about human rights, bolstering both international and domestic prestige required supporting a new institution. States satisfied with the status quo could support the creation of a new institution without any real fear that it would be effective, since they were able to shape institutional design and membership in a manner that would keep prospective enforcement cost low, while gaining a reputational benefit. Outcomes at the HRC as compared to the CHR support this hypothesis.

It is more difficult to explain the preferences of those states that desired a stronger institution. Given the distribution of preferences, the likelihood of creating a substantially more effective institution was not high. Why expend the cost in trying? The answer to this question may not fit well in the confines of this article's argument: hope. Though the structure of preferences at present may not be conducive to greater rights promotion, the states that advocated for a stronger institution – particularly the members of the WEOG – may have hoped that a redesigned human rights body could have a stronger constitutive effect on states. They may have hoped that a new institution could facilitate global processes of change.

This argument may not be entirely farfetched. While those who had hoped the HRC would be a dramatic departure from the CHR may be disappointed at present, there is research suggesting that the HRC *could* lead to improved human rights performance. Goodman and Jinks, for example, have argued that coercive institutions are ultimately less effective at improving human rights practices than institutions that use a cooperative approach, one that attempts to acculturate states into an acceptance of rights norms.<sup>92</sup> If this insight is true, the HRC may become more effective at facilitating change than a more coercive institution. Such views about the diffusive effect of the HRC's largely non-confrontational work are common within the transnational human rights community: former vice president of the HRC Ambassador Blaise Godet, for example, believes the transmission of testimony about human rights conditions during the UPR process could lead to changes in state practice over time.<sup>93</sup>

Along that vein, the HRC will continue to be an interesting subject for research, particularly in terms of how states use the UPR. Based on work by Hathaway and Vreeland,<sup>94</sup> we should be able to make predictions about the manner in which states will engage the UPR. States have little choice but to participate, but will have several choices to make in regard to how they

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<sup>92</sup> Goodman & Jinks, *supra* note 17.

<sup>93</sup> Owen Barron, "Reforming Human Rights" (2008) 29:4 Harv. Int'l Rev. 74 (An interview with Ambassador Godet).

<sup>94</sup> Hathaway, "Difference", *supra* note 19; Hathaway, "Commitment", *supra* note 21; Oona A. Hathaway, "Why Do Countries Commit to Human Rights Treaties?" (2007) 51 J. Confl. Resolution 588; Vreeland, *supra* note 19.



participate. The process can be broken into three stages: the production of the country report; interaction with the HRC and other stakeholders, including accepting or rejecting recommendations; and follow through on recommendations. At each stage of the process, states can choose to engage in good faith, or can attempt to block the work of the HRC.

The approach adopted in this article and in others gives some hints on what to expect. Broadly, democratic states, whether they have a history of rights abuses or not, can be expected to be forthcoming in their country reports by providing a tangible list of areas of improvement and be willing to engage critics and accept recommendations from stakeholders. Such states can also be expected to carry through (or at least actively engage) the recommendations prior to the next country appraisal. Both democracies with a history of rights abuses, and authoritarian states with some party competition and strong civil societies, would also be expected to be more forthcoming in the first two stages. Since failure to do so could lead to trouble at home with civil society and competing parties, participation can help to thwart domestic criticism. In terms of implementation, however, these states are less likely than democracies to undertake meaningful actions to improve their rights conditions, with the following caveat: the more democratic the state, the more likely it is to make changes. Finally, authoritarian regimes without meaningful internal mechanisms of dissent will probably be the least likely to be forthcoming in their country reports, the least likely to engage regime critics, and the least likely to make meaningful changes after undergoing the UPR process.

While this line of research into how states engage the process cannot be completely addressed until the first full UPR cycle is complete in 2011, Amnesty International's initial review of the 2009 process lends some credence to these arguments. As noted, Mexico and Russia, both states with a pattern of human rights abuses combined with meaningful electoral competition, engaged the process in a serious manner, while two states with far less electoral competition, Cuba and China, cooperated far less.<sup>95</sup> Only time will tell if other states follow this pattern, or if states like Russia will act on the recommendations contained in their final reports.

Ultimately, however, this article suggests that in terms of promoting human rights, the institutions of the UN will continue to be a reflection of the preferences of member states. The UN will not be able to have a truly powerful human rights body until a sufficient number of its member states desire it – an outcome which is unlikely to happen until enough states have improved their human rights records to the point where they are no longer threatened by a powerful HRC. Just as the process of standard-setting in the CHR took many decades, so too can we expect that it will take time for change to occur both within the HRC and as a result of its work.

<sup>95</sup> Amnesty International, *Universal Periodic Review*, *supra* note 84.