Depoliticizing the United Nations Human Rights Council: Mixed Membership for a Brighter Future

by

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Abstract
The United Nations charter-based human rights apparatus has long been plagued by concerns of politicization. This pervasive issue first brought the demise of the United Nations Commission on Human Rights in 2006 and led to the creation of an entirely new entity, the United Nations Human Rights Council, in the hope of answering the concerns of the international community. Although major reforms were undertaken, politicization is now once again cited as one of the main issues of the new Council. In this essay, we identify the source of politicization as the intergovernmental nature of these human rights bodies, and suggest that mitigation of this issue is possible through the reform of the Council’s membership. The creation of a mixed expert-state body will allow for a more functional, depoliticized body in the protection and promotion of human rights.
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Introduction

As Jack Donnelly has stated: “the modern state has emerged as both the principal threat to the enjoyment of human rights and the essential institution for their effective implementation and enforcement.”¹ Donelly’s observation is borne out by the main Charter institution responsible for the definition, protection and enforcement of international human rights in the United Nations system: the United Nations Human Rights Council (the Council). The Council’s membership, as well as that of its predecessor, the United Nations Commission on Human Rights (the Commission), is composed strictly of state representatives, diplomats, and ministers.² When one considers recurring governmental sanction of human rights violations across states, one wonders whether we are not letting the wolves guard the sheep. Indeed, the powerful position of states within both bodies has endangered the cause of human rights by substituting state-centric concerns, a phenomenon known as ‘politicization’.³ The supremacy of state sovereignty and political power-plays brought about the Commission’s demise, and may very well bring the Council’s as well.⁴ After an assessment of its formative years, it has been shown that the Council “is failing to fulfil its mandate, particularly in terms of protecting human rights.”⁵

States, international organizations, experts, and others have proposed a myriad of different solutions to the issue of politicization. However, most of these proposals strive to find remedies to the effects of politicization, as opposed to tackling the source of the issue itself. This essay aims to remedy the issue of politicization that has plagued both the Commission and the Council by going back to the source of the problem: the composition of its membership. A modification of the Council’s state-only membership represents its best chance to stop the infiltration and progression of politicization. We suggest that the original proposal for the Commission should be revisited, which indicated that a United Nations human rights charter body should be composed

³ Politicization may more precisely be defined “as the introduction of unrelated controversial issues by countries seeking to further their own political objectives.” See Rosa Freedman, The United Nations Human Rights Council: A Critique and Early Assessment (New York: Routledge, 2013) at 11.
⁵ Freedman, supra note 3 at 297.
of human rights experts. These experts have had, and still have, a great influence over the content and the enforcement of human rights internationally, and they are seen as being in a better position to study, understand, promote, and uphold international human rights matters, as they are virtually unhindered by political and diplomatic concerns.

In order to understand the issue of politicization and to defend a new membership for the Council, it is first necessary to review the history and the shortfalls of both the Commission and the Council. This will allow us to understand what needs to be undertaken in order to establish change for the better. The second section addresses this question by considering the track record of states and human rights experts, and by revisiting the original proposal of the nuclear Commission, concluding that the Council could benefit from a greater involvement of politically independent voices to counter the shortfalls of a purely intergovernmental body, and that the solution to politicization ultimately rests in the creation of a more balanced membership, in a similar fashion to that of the International Labour Organization (ILO).

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Chapter 1
The Creation of Flawed Charter-Based United Nations Human Rights Institutions

In this first section, it is necessary to review the history of the United Nations’ main charter human rights bodies: the Commission and the Council. Their creation, evolution, and, in the case of the Commission, demise show the cause and the importance of the issue of politicization within these institutions. This descriptive and analytical account will allow us to determine a better course of action for the Council in the second section.

1 The United Nations Commission on Human Rights

1.1 The history of the Commission

As the Council’s precursor, the United Nations Commission on Human Rights exemplified the issues associated with sole state control over international human rights. In 1945, the idea of a commission on human rights was first put forward. This institution would be created to work towards:

- formulating an international bill of rights and recommendations for an international declaration or convention on civil liberties;
- discussing the status of women, freedom of information, the protection of minorities and the prevention of discrimination;
- considering any matter in human rights which would be likely to impair the general welfare or friendly relations among nations.

The very first incarnation of the Commission was composed of a number of experts, diplomats, and state representatives acting, for the most part, in their personal capacities, and was chaired by a well-known human rights activist: Eleanor Roosevelt. Though most of the members of this original Commission advocated for a permanent Commission on Human Rights “composed of individuals acting in their personal capacity” – not state representatives acting in the interests of their governments – it was ultimately conceived as a body of a diplomatic nature with a view towards the protection of international human rights. Indeed, “the Soviet member of the

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9 Ibid at 41-42.
11 Oberleitner, *supra* note 8 at 44.
12 Ibid.
nuclear body thought the members should represent governments; and when the matter came before the Economic and Social Council, the Russians argued that instructed representatives would be more qualified to develop practical solutions.”13 The membership of the Commission would ultimately be composed of fifty-three elected member states – experts holding no seats within the institution.14 A compromise was to be struck, however, in the election of representatives to the Commission through a two-stage process: in a first stage, member states would be elected to seats on the Commission, which would then present their selected representatives to the Secretary General.15 The chosen states would have to submit candidates who not only had their state’s interests in mind, but also had human rights expertise.16 This shows that states recognised the importance of human rights expertise within the membership of the Commission. In a second stage, the representatives would be confirmed if they truly represented a balanced position.17 Although this was the official stance on elections, the end result was that human rights expertise had no impact on the confirmation of elected representatives: the delegates were always confirmed, no matter their view on, or expertise in, human rights.18 Nevertheless, the Commission originally performed its mandate well, politics playing only a secondary role in its decisions.19

From 1947 to 1967, “the Commission concentrated on the development of international human rights standards”, which were adopted as United Nations General Assembly resolutions, or as international treaties.20 From 1967 onwards, the Commission was also entrusted with the monitoring, implementation, and promotion of human rights.21 As such, from creation to adoption, and, in the following years, enforcement, international human rights standards were ultimately in the hands of states alone.

13 Humphrey, supra note 6 at 17.
14 High Commissioner, Commission, supra note 2.
15 Humphrey, supra note 6 at 17.
16 Oberleitner, supra note 8 at 44.
17 Humphrey, supra note 6 at 17.
18 Oberleitner, supra note 8 at 44.
19 Humphrey, supra note 6 at 24.
21 Freedman, supra note 3 at 15.
1.2 The politicization issue of the Commission

The Commission was flawed in a number of ways, but the most scathing issue that plagued it towards the end of its life is, without a doubt, its politicization.\(^\text{22}\) The following paragraphs aim to describe this politicization in order to understand, in the next section, why the Council was created and how it intended to solve this all-encompassing issue.

Firstly, the membership of the Commission was problematic. As Sergio Viero de Mello stated in his closing statement to the Commission on April 25, 2003: “Most of the people [at the Commission] work for governments. That is politics. For some people in this room to accuse others of being political is a bit like fish criticising each other for being wet.”\(^\text{23}\) With political actors came political power-plays. As states dislike receiving criticism over their human rights records from their peers, those who sought membership to the Commission, even Western states, often did not truly wish to advance the cause of international human rights, but instead sought “to shield themselves [and their allies] from the very sort of international overview that the commission was intended to provide.”\(^\text{24}\) Other states sought membership to criticize their opponents.\(^\text{25}\) Election to one of the fifty-three seats of the Commission gave the chosen states authority over others for the duration of their appointment (three years, with possibility of re-election), and put them in a position to criticize their peers.\(^\text{26}\) Whether to shield themselves or to criticize others, the effect was that the Commission was impeded in its role to protect and promote human rights.\(^\text{27}\)

Secondly, the Commission’s electoral system permitted further politicization of the body. Thanks to the loose electoral criteria to gain membership, states were easily able to win seats within the

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\(^{23}\) Ibid at 452.


institution, no matter their motives.\textsuperscript{28} Representatives seeking election only needed to secure twenty-eight votes from the United Nations Economic and Social Council (ECOSOC), of which the Commission was a subsidiary, no other enforceable condition being attached to membership.\textsuperscript{29} It was thus easy for states, through backroom diplomatic tactics, to secure this minimal support, therefore effectively politicizing the electoral process itself.\textsuperscript{30} As such, Sudan, Sierra Leone, Uganda, and Togo – all known human rights abusers – were able to gain membership to the Commission in 2001 without strong opposition from Western democracies – typically the greatest defenders of human rights – who instead preferred to resort to diplomacy.\textsuperscript{31} These nominations were also made possible by resorting to the ‘clean slate’ tactic, which has been described by Amnesty International as “a ‘practice by which regional groups determine membership from their region by putting up the same number of candidates from the region as there are seats to be filled by that region’”.\textsuperscript{32}

Thirdly, politicization was pervasive of the Commission’s procedures because of their lack of transparency. As an intergovernmental body dealing with extremely sensitive issues, the Commission worked in an utmost confidential manner. The members of the Commission believed confidentiality fostered constructive dialogue between itself, states, and the individuals whose human rights were in jeopardy.\textsuperscript{33} According to the Commission, governments would not have been inclined to discuss their human rights records publicly.\textsuperscript{34} As such, closed-door dialogue was seen as the right approach to adopt within the Commission to encourage participation and compliance. In the end, however, confidentiality proved to be an enormous flaw as governments would hide behind the Commission’s procedures to avoid a public argument over their human rights records, preventing constructive dialogue and the advancement of human rights.\textsuperscript{35}

\textsuperscript{28} Davies, \textit{supra} note 22 at 452.
\textsuperscript{29} \textit{Ibid} at 450, 452.
\textsuperscript{30} \textit{Ibid} at 452.
\textsuperscript{31} \textit{Ibid} at 453.
\textsuperscript{33} McBeth, \textit{supra} note 20 at 212.
\textsuperscript{34} \textit{Ibid}.
\textsuperscript{35} \textit{Ibid}.
Finally, selectivity further politicized the Commission’s procedures. The Commission was very early on criticized for singling out states according to political biases: while human rights abuses of some countries were over-reported, those of others were entirely ignored. For example, from its very first session the Commission criticized the human rights violations perpetrated by Israel in the Israeli-Palestinian conflict, and the country would be cited regularly until the last year of its existence. However, the Commission would be incapable of action when faced with the Rwandan genocide, delaying the matter indefinitely due to political tensions. The involvement of the Commission was thus either biased, weak, late, or inexistent following diplomatic and political lines. The Commission was, in the end, the victim of a ‘game of majorities’, where blocs of states would pit themselves against others, meaning that, in practice, “some states [were] immune from scrutiny whilst others [were] persistently criticised.”

ECOSOC’s 1235 Procedure was plagued by selectivity. This 1235 Procedure was a public mechanism where the Commission could, “in appropriate cases, and after careful consideration of the information thus made available to it, […] make a thorough study of situations which reveal a consistent pattern of violations of human rights”. However, the choice of states to be examined was the result of intense political negotiations and of pressure from the stronger states, meaning that investigations were more an indication of the weakness of the investigated country and of its political allies, rather than of the significance of its human rights record. China would take advantage of the procedural flaws of the 1235 Procedure to avoid the adoption of resolutions in its case: although facing much criticism in 1989 due to the massacre of political protestors at Tiananmen Square, the country would succeed in thwarting all resolutions against it thanks to clever diplomatic and economic incentives, as well as the sheer weight of its voice.

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36 Ibid at 215.
38 McBeth, supra note 20 at 214.
39 Ibid.
43 Oberleitner, supra note 8 at 9.
The 1503 Procedure was created by ECOSOC in part to address the flaws of the 1235 Procedure.\textsuperscript{45} The 1503 Procedure was a confidential mechanism where the Commission could consider communications on consistent patterns of human rights abuses – not single occurrences – sustained by individuals or groups of individuals, and relayed by them or by NGOs to the Commission.\textsuperscript{46} Once a pattern was proven, the Procedure would engage automatically, thus mitigating the politicization that plagued the 1235 Procedure.\textsuperscript{47}

As the effect of the politicization of the Commission became more evident, calls for its reform started being heard and addressed. A number of changes were thus proposed and adopted in order to allow the body to accomplish its true purpose.

\subsection*{1.3 Reforming the Commission}

By the end of the 1990s, calls for major reforms were heard from many critics. Rosa Freedman noted, however, that “rather than recommending its abolition, [the High Level Panel on Threats, Challenges and Change’s report on the reform of the United Nations] called for reform of the Commission.”\textsuperscript{48} This section cites and describes some of the most common reforms proposed to save and improve this human rights body.

On the one hand, the composition of the Commission quickly attracted criticism, and was often cited as the reason behind the body’s failures.\textsuperscript{49} As such, much of the proposed reforms centered on the number of members, the creation of membership criteria, and electoral guidelines.\textsuperscript{50} Reforms on the number of members had already been undertaken in the past, expanding the Commission’s membership from eighteen to fifty-three, in a bid to give “greater democratic legitimacy to the commission”.\textsuperscript{51} It was soon evident, however, that this expansion also brought a measure of politicization through the appearance of regional and ideological alliances which defended its members from accusations, and through the multiplication of national agendas being
represented at the Commission. As such, new recommendations were made by a number of actors. Some, such as the High Level Panel, called for universal membership “in order to deal with the various criticisms regarding the body’s membership.” It was believed that universal membership would have put an end to the politicization associated with elections and would have represented the commitment of all states to the cause of human rights as described in the Charter. Others, such as then-Secretary General of the United Nations Kofi Annan, called for a smaller body, as it was thought that reducing the number of members would help focus discussions, thus allowing for more directed and complete treatment of human rights issues.

Most importantly for our cause, however, is the report on the reform of the Commission by the High Level Panel, which suggested that we reconsider the original proposal of the nuclear Commission on membership, indicating that the elected members should, in fact, choose their representatives from experienced human rights figures.

Another oft-heard proposal was to put selective electoral criteria in place in order to prevent human rights abusers to win seats on the Commission. Defining criteria for suitable members would prove to be a challenge, however. Some called for ‘negative criteria’, where states would be excluded if they did not conform to determined elements. One of these proposals consisted of using democratic criteria to determine suitable electoral candidates. However, defining ‘democratic’ and demonstrating that one fits that description would have been highly subjective and contestable.

Others called for ‘positive criteria’, thus putting emphasis on the actual commitments undertaken by states and their positive human rights records, rather than relying on exclusionary criteria.

Human Rights Watch suggested, for its part, a mix of positive and negative criteria for election which would cover the suggestions of many other critics: (a) ratification of core human rights treaties, (b) compliance with reporting obligations, (c) issuance of open invitations to United Nations human rights experts, and (d) lack of recent condemnation for human rights violations.

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52 Ibid.; Freedman, supra note 3 at 40.
53 Freedman, supra note 3 at 45.
54 Ibid at 48.
55 Ibid at 47.
56 Ibid at 45.
57 Alston, supra note 32 at 94.
58 Freedman, supra note 3 at 50.
by the Commission. The United States additionally suggested that any country having “been the subject of Security Council sanctions should not be permitted to be a member of the Commission.” As Philip Alston has stated, however, none of these criteria “would have operated to provide an effective filter that would ensure only countries with good, or at least relatively good, human rights records would be eligible for election.” Furthermore, the High Level Panel “regarded setting membership criteria as risking further politicisation”, as it would mean that members would mostly hail from Western states, leaving the universality of human rights up for debate. States themselves were mostly against the idea of electoral criteria, preferring instead voluntary pledges and commitments.

On the other hand, many believed stronger procedures were required to ensure further depoliticization. Indeed, as members were using the Commission to advance their personal agendas, there was soon a call to reinforce its procedures. Because of the flawed electoral process, and most notably the resort to the ‘clean slate’ tactic, reforms in this area “were proposed as another method for improving the credibility and work of the UN human rights body.” The main suggestion came from then-Secretary General of the United Nations Kofi Annan, who proposed that elections should be made at the General Assembly through a two-thirds majority as to ensure that members could not be elected on simple political and diplomatic affinities. Amnesty International believed that the Commission’s special procedures required strengthening. It argues that, in a politicized body, the special procedures offered a measure of independence and impartiality to the Commission. Their reinforcement would thus participate to further depoliticize the body, and refocus debates on the subject of human rights.

59 Alston, supra note 32 at 94; Amnesty International also believed that members should show ‘concrete expressions of commitment to human rights’, something that would be covered by criterion (a). See Amnesty International, 2003 UN Commission on Human Rights: A Time for Deep Reflection Background Briefing, 2003, IOR 41/004/2003 at 1. Ladan Rahmani-Ocora agreed that the exclusion of states “with recent human rights resolutions passed about them” would increase the credibility of the Commission. See Freedman, supra note 3 at 50.
60 Alston, supra note 32 at 196.
61 Ibid; See also Freedman, supra note 3 at 45.
62 Freedman, supra note 3 at 45.
63 Ibid at 50.
64 Ibid at 49.
65 Ibid at 43.
66 Ibid.
67 Ibid at 51.
68 Ibid.
69 Amnesty International, supra note 59 at 1.
70 Ibid.
Although a number of reforms were undertaken at the Commission with more or less success, their piecemeal and haphazard application participated to the body’s demise.\textsuperscript{71} Ultimately, the cumulative and blatant politicization of the Commission undercut its legitimacy and prevented it from adequately fulfilling its mandate, affecting its authority and its actions.\textsuperscript{72} Those who simply advocated for the reform of the Commission proved to be non-democratic states and known human rights abusers who preferred minor changes to a complete overhaul.\textsuperscript{73} Kofi Annan scathingly, but wisely, said: “We have reached a point at which the Commission’s declining credibility has cast a shadow on the reputation of the United Nations system as a whole, and where piecemeal reforms will not be enough.”\textsuperscript{74} Having polarized the members of the Commission in adversarial positions through its politicization, the institution became negligent of its responsibility towards international human rights promotion and protection, which led experts and states alike to call for its abolition, and for the creation of a new entity.\textsuperscript{75}

2 The United Nations Human Rights Council

2.1 The history of the Council

After six decades of work, the United Nations Commission on Human Rights was finally abolished and concluded its final session on March 27, 2006.\textsuperscript{76} Resolution 60/251, which established the United Nations Human Rights Council, was adopted by an overwhelming majority on April 3\textsuperscript{rd}, 2006.\textsuperscript{77} In order to give it a greater status than its predecessor, the Council was created as a subsidiary of the United Nations General Assembly.\textsuperscript{78} Because of the immense criticism the Commission had received about its politicization, the Council was intended to be built on depoliticized foundations.\textsuperscript{79} The goal was to create a forum where ‘friendly discussions’

\begin{flushleft}
\textsuperscript{71} Freedman, \textit{supra} note 3 at 42-43.
\textsuperscript{72} Redondo, \textit{supra} note 40 at 722.
\textsuperscript{73} Freedman, \textit{supra} note 3 at 45.
\textsuperscript{76} High Commissioner, \textit{Commission, supra} note 2.
\textsuperscript{77} \textit{Human Rights Council, GA Res 60/251, UNGAOR, 60th Sess, Supp No 49, UN Doc A/RES/60/251, (2006).}
\textsuperscript{78} McBeth, \textit{supra} note 20 at 218.
\textsuperscript{79} Davies, \textit{supra} note 22 at 449.
\end{flushleft}
would be fostered, marking a departure with the confrontational approach of the Commission.\(^\text{80}\) A number of changes were made to the Council’s membership and procedures in order to ensure that this new institution would answer the issues raised with its predecessor.

State representation at the Council and the electoral system itself were fundamentally changed in order “to defuse the tensions that had overwhelmed its maligned predecessor”.\(^\text{81}\) The Council thus first cut its membership from fifty-three to forty-seven seats.\(^\text{82}\) It was thought that this slightly restricted membership would participate in the depoliticization of human rights discussions and “enhance the effectiveness of the United Nations in the realm of human-rights promotion.”\(^\text{83}\) Elections to the Council are now made through a majority vote (interpreted as ninety-six votes) by secret ballot at the General Assembly, therefore allowing states to vote freely according to their conscience, and limiting diplomatic backlash from unhappy losers.\(^\text{84}\) The elected members are also limited to sit on the Council for two consecutive terms, an important development from the Commission on which it was possible, in theory, to sit in perpetuity.\(^\text{85}\) This would ensure that states would not enjoy permanent membership on the sole basis of their global power and influence.\(^\text{86}\) Because states were seeking membership to the Commission to avoid scrutiny, the Council has imposed review of the human rights situations of all those elected to it, making it impossible for them to avoid all investigation.\(^\text{87}\) States must also ‘commit’ themselves publicly to the cause of human rights, although this commitment is not legally binding.\(^\text{88}\) No other condition is imposed on membership, and there is thus still no tangible obstacle to election.\(^\text{89}\) There is, however, “a ‘clear expectation’ that states sitting as members of the council [will] adhere to high standards, as well as providing standards to use in comparing member-state behavior”.\(^\text{90}\)

From the outset, these electoral changes seemed to effectively improve the Council’s membership over that of its predecessor, as states with a strong commitment to human rights

\(^{80}\) Ibid at 450, 460.

\(^{81}\) McBeth, supra note 20 at 218; Davies, supra note 22 at 459.

\(^{82}\) Davies, supra note 22 at 449, 456.

\(^{83}\) Ibid at 449.

\(^{84}\) McBeth, supra note 20 at 219; Alston, supra note 32 at 198.

\(^{85}\) Davies, supra note 22 at 456.

\(^{86}\) Alston, supra note 32 at 199.

\(^{87}\) Davies, supra note 22 at 456.

\(^{88}\) Ibid.

\(^{89}\) Ibid.

\(^{90}\) Ibid.
easily earned seats, while those with a less-than-acceptable track record either did not stand for election or were defeated by better peers.\(^9^1\) For example, Iran and North Korea, two well-known human rights abusers, have, to this day, never been elected to the Council.\(^9^2\) A more comprehensive system of suspension of its members was further incorporated into the Council in a bid to ensure that only states with a true concern for human rights would be in an authoritative position. Indeed, a simple two-thirds majority in the General Assembly can suspend a member that does not uphold certain standards of human rights protection and promotion.\(^9^3\) Such a suspension occurred in 2011, when Libya was found in violation of the human rights of its population during the civil strife that affected the country.\(^9^4\)

The Council can thus claim that its membership has been improved thanks to stricter electoral guidelines, which should limit the impact of politicization associated with diplomatic tactics and national interests, and should ensure a membership that is more prone to human rights protection and promotion. These changes do not, however, ensure by themselves the depoliticization of this United Nations human rights institution. To complete the depoliticization efforts of the Council, new procedures needed to be adopted. One of these new procedures is the possibility to easily hold special sessions to investigate human rights issues on the ground.\(^9^5\) To overcome the ineffectiveness issue of the Commission and quickly address human rights violations, the Council may hold special sessions with the support of only one-third of its members.\(^9^6\) As such, although human rights abusers may have many allies, their chances of garnering over two-thirds of the members’ support, if their human rights situation is indeed dire, is limited. This complicates the diplomatic tactics of human rights violators and allows for a number of situations to come to light at the Council.

\(^9^1\) Ibid at 457.  
\(^9^3\) High Commissioner, Past members, supra note 92; Davies, supra note 22 at 457.  
\(^9^5\) McBeth, supra note 20 at 228.  
Third parties, such as non-governmental organizations (NGOs) and individuals, are also allowed to participate to a certain extent in the procedures of the Council.\footnote{Office of the High Commissioner for Human Rights, \textit{NGO Participation in the Human Rights Council}, online: United Nations Human Rights <http://www.ohchr.org> [High Commissioner, \textit{NGO Participation}]; Office of the High Commissioner for Human Rights, \textit{Human Rights Council Complaint Procedure}, online: United Nations Human Rights <http://www.ohchr.org> [High Commissioner, \textit{Complaint Procedure}].} NGOs with consultative status at ECOSOC can participate as observers within the Council, which allows them to attend most proceedings, submit written statements, intervene orally, and “[p]articipate in debates, interactive dialogues, panel discussions and informal meetings”.\footnote{High Commissioner, \textit{NGO Participation}, supra note 97.} Victims of purported human rights abuses may also directly submit a complaint to the Council through the Human Rights Council Complaint Procedure, the successor of the confidential 1503 Procedure introduced at the Commission.\footnote{High Commissioner, \textit{Complaint Procedure}, supra note 97.} This new confidential complaint procedure, adopted on June 18, 2007 through Council Resolution 5/1, allows individuals, groups, and NGOs to submit claims of direct and reliable knowledge of human rights abuses.\footnote{Ibid.} It represents another attempt at depoliticization through the circumvention of diplomatic channels, allowing abuses to be reported directly by those affected to the Council’s Working Group on Communications or on Situations.\footnote{Ibid.} Building upon the previous 1503 Procedure, the new complaint mechanism is said to be more “impartial, objective, efficient, victims-oriented and conducted in a timely manner.”\footnote{Ibid.} The most important innovation is, without a doubt, the Universal Periodic Review (UPR). It is in this process “that the main drive to depoliticization, and thus persuasion, was housed.”\footnote{Davies, supra note 22 at 451.} Instead of having the same states continually sustain criticism, based solely on their dire human rights situation, all would now be reviewed periodically through this mechanism in order to solve the adversarial flaws of the Commission.\footnote{McBeth, supra note 20 at 231; Freedman, supra note 3 at 53.} The UPR, though still an intergovernmental process, would be grounded in concerns of transparency, non-selectivity, and constructive, non-confrontational and non-politicized dialogue.\footnote{Davies, supra note 22 at 457; Freedman, supra note 3 at 54.} Although the recommendations concluding the UPR impose no legal obligations on the inspected state, and although no compelling power or sanctions are available...
to the Council to pressure them to cooperate in human rights reforms, “they do contribute to the evolution of customary international law.”

With these procedural innovations, depoliticization was further encouraged, at least in the Council’s beginning. Although the reforms included in the new body would strive for the depoliticization of charter-based human rights protection, they have failed to create a system that is lastingly depoliticized. Many of the improvements made over the Commission were, at first, promising, but politicization has slowly seeped back into the Council, which threatens the promotion and protection of international human rights once more.

2.2 The politicization issue of the Council

Once again, the membership and procedures of the Council are imperilled by their politicization. Indeed, “within the first year of its existence, the council began to develop many of the traits that it was supposed to suppress.” This section analyzes how the new United Nations human rights institution is, in turn, slowly falling prey to politics and diplomacy, which will allow us, in the next part of this essay, to determine a proper course of action to stop the seeping of politicization within the Council.

The first element of the Council’s politicization is, as the Commission’s before it, its membership. Although states with poor human rights records were to be prevented from being elected to the Council, diplomatic power-plays have returned with a vengeance, preventing electoral safeguards from effectively working. The resulting process is still that of “back-room deals in regional groups to determine which states are elected to the Council, rather than multiple candidates facing the full UN General Assembly for election as intended, purportedly to be judged on human rights criteria”. As such, states with questionable human rights records continue to be elected to the Council’s membership, notwithstanding the immense changes brought to its electoral procedure. Amongst others, China, Cuba, and Saudi Arabia have all held seats within the Council, although they have all been known to violate human rights. Although there is the possibility of membership suspension, it is possible to doubt its efficiency. Securing a

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107 Davies, *supra* note 22 at 464.
108 Evans, *supra* note 51 at 152.
110 *Ibid*.
two-thirds majority of the General Assembly on such a sensitive subject, while avoiding political and diplomatic obstacles, will seldom be possible.\(^{112}\) Libya’s membership may have been suspended in 2011, but it took the General Assembly five years to agree to its suspension following growing and blatant human rights abuse on its territory.\(^{113}\) As such, human rights concerns cannot have been the only element taken into consideration when debating the suspension of the country’s membership.

As noted earlier, third parties have also been allowed to have their voices heard at the Council. However, their input is limited as victims can only have access to the complaint mechanism if they are confirmed as ‘parties’, and the abusive states can only be held accountable if the abusers themselves are deemed ‘agents of the state’.\(^{114}\) For NGOs to gain access to and participate in Council proceedings, they need to secure a ‘consultative’ status with ECOSOC.\(^{115}\) The requirements attached to this status are much more complex and comprehensive than those attached to states:

To be eligible for consultative status, an NGO must have been in existence (officially registered with the appropriate government authorities as an NGO/non-profit) for at least two years, must have an established headquarters, a democratically adopted constitution, authority to speak for its members, a representative structure, appropriate mechanisms of accountability and democratic and transparent decision-making processes. The basic resources of the organization must be derived in the main part from contributions of the national affiliates or other components or from individual members.\(^{116}\)

Additionally, in the case of national NGOs, ECOSOC will consult with the relevant state before handing out its approval.\(^{117}\) This politicizes the process of NGO involvement greatly, and thus limits the independent role which NGOs can play within the Council. National NGOs will undoubtedly have been filtered, which means that the organizations most critical of their governments diminish their chances of earning consultative status.

The second element of the Council’s politicization is its procedures. Although the Council has only been in place since 2006, its sessions and resolutions already show evidence of the

\(^{112}\) Freedman, supra note 3 at 68.

\(^{113}\) Ibid.

\(^{114}\) Oberleitner, supra note 8 at 14.

\(^{115}\) Ibid; High Commissioner, NGO Participation, supra note 97.

\(^{116}\) United Nations Department of Economic and Social Affairs, Introduction to ECOSOC Consultative Status, online: NGO Branch <http://esango.un.org>.

\(^{117}\) Ibid.
pervasiveness of external concerns, which endanger the true protection of core international human rights. The majority of the Council’s members may be democracies, but their votes do not represent the commitment they hold to human rights nationally. Repressive governments, for their part, have been able to convince their peers to support them on the basis of, for example, simple regional solidarity. The West has also held misplaced alliances and stuck to the bloc mentality endemic of the Commission. Repeatedly, states have chosen this solidarity over the fundamental human rights concerns which are meant to be the heart and soul of the Council, once again pitting states one against the other along geographical or diplomatic lines. For example, Human Rights Watch has noted, in its World Report 2010, that Israel has once again been repeatedly targeted as a human rights offender, while other important situations have been either neglected or downplayed. Even the UPR is not exempt from the effects of politicization. Indeed, “some states have manipulated the process to ensure that only soft questions or even praise are offered.” Additionally, the recommendations stemming from the UPR widely vary in quality, “with some falling below the standards of international law as articulated by treaty bodies.” A clear example comes from the UPR of Cuba in 2009. As a means to limit critical input, the country ensured that its allies would waste time by blandly speaking in its support, “reducing the opportunity during the limited time allocated for critics to take the floor.” As for NGO input, Cuba introduced a number of positive reports through associations organized by the government to discredit and dilute negative reports. Thanks to these positive submissions, the country denied holding political prisoners, restricting freedom of speech, etc. Because the

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118 Ramcharan, supra note 4 at 9.
120 Ibid.
121 Ibid.
122 Ibid.
123 Ibid at 22.
125 Ibid.
127 Ibid.
129 Ibid.
130 Ibid.
Council’s experts must have state consent to be allowed to directly study their human rights situation, “some mandates were considered to be more productive than others in terms of achieving positive human rights outcomes.” Indeed, proper review is only possible if the experts tasked with the review have access to the people and the information necessary for their inquiry. Moreover, the complaint mechanism is, once again, conducted in a confidential manner in order to foster cooperation from the investigated state, but these confidential proceedings only succeed in mitigating their own effects through their ‘diplomaticization’.

Although the Council has only been in place since 2006, issues are already being highlighted and addressed by states and experts alike. Calls for reform are already starting to be heard, which claim to limit or solve the issue of politicization.

2.3 Reforming the Council

Many different variations of the Council have been proposed which may or may not help deal with the issue of politicization. In this section, we explore the proposal of the United States, which encompassed membership and electoral procedures, and those of Rosa Freedman and Philip Alston, which advocated for stronger mechanisms.

From the outset, human rights champions such as Canada and the United States advocated for very different membership criteria and procedures. Indeed, the country would have preferred a smaller Council consisting of twenty to thirty members so as to limit the involvement of national agendas and streamline the body’s procedures: it would have preferred the exclusion of limits on consecutive terms; it would have imposed criteria to exclude human rights abusers; it would have required two-thirds majority elections to further impede their election; it would have allowed for suspension of rights violators with less than two-thirds majority, etc. However, unreceptive states attempted to further regulate the behaviour of independent experts and mandate holders

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130 Oberleitner, supra note 8 at 13; McBeth, supra note 20 at 228.
131 Oberleitner, supra note 8 at 13.
132 McBeth, supra note 20 at 231.
134 Alston, supra note 32 at 203; Rosa Freedman also supports the idea of a smaller body as a means to lessen the impact of politicization on the Council. See Freedman, supra note 3 at 300.
through a more strict review of their conduct.\footnote{International Service for Human Rights, supra note 133 at 9; Piccone, Catalysts for Change, supra note 94 at 16-17.} In the end, since some of these reforms were evidently favourable to the United States and other Western states, and since others were simply unfavourable to the cause of human rights, they were eventually all rejected.\footnote{International Service for Human Rights, supra note 133 at 9; Piccone, Catalysts for Change, supra note 94 at 17.}

Rosa Freedman has indicated that the procedures of the Council are inherently flawed, allowing states to hijack them in order to further their personal agendas.\footnote{Freedman, supra note 3 at 291.} As such, “[t]here is clearly a need to reform the body’s proceedings, and indeed its mechanisms, to ensure that discussions cannot be segued and can instead remain constructive and aimed towards protecting and promoting human rights.”\footnote{Ibid at 301.} Freedman has, in addition, considered a return to the original proposal of the nuclear Commission as a solution to the Council’s pervasive politicization, and her position will be more fully examined in the second part of this paper.\footnote{Ibid at 300.} Philip Alston has also argued that procedural reforms were necessary to tackle the shortcomings of the United Nations charter-based human rights bodies.\footnote{Alston, supra note 32 at 203.} The author proposed, for example, that governments should be called to publicly announce which UPR recommendations they have acknowledged and will respond to, and which they have rejected and the reasons behind this rejection, within a year of their presentation.\footnote{Ibid at 221.} This would prevent rights abusers from completely ignoring or rejecting these recommendations, forcing them to comment on their misconception, inappropriateness, or impracticability.\footnote{Ibid.}

Without reform, the mechanisms of the Council will surely be further misused, affecting its legitimacy and bringing it to the brink of extinction, as was the fate of the Commission.\footnote{Freedman, supra note 3 at 291.} It is important to note that although a five-year review of the Council was ordered for 2011 through Resolution 60/251, no measures were adopted to improve its membership and procedures, and address the issues that are now plaguing it, thus watering down the importance of human rights as it is now evident that politicization is a pervasive issue of the United Nations
The core criticism of both the Commission and the Council is that they are “inherently political bod[ies]. As long as states come to the Council with their own interests and agendas, politicisation of the Council’s agenda and some degree of selectivity is inevitable.” The creation of a new entity, the Council, was a step in the right direction, but it did not nearly go far enough in its reform of the Commission before it. The essence of the politicization aspect, and the aspect most in need of reform, is the strict governmental membership of both the Commission and the Council. Only by addressing this issue can we truly tackle the source of politicization itself.

144 Human Rights Council, supra note 74 at para 1; International Service for Human Rights, supra note 133 at 9; Piccone, Catalysts for Change, supra note 94 at 16.
145 McBeth, supra note 20 at 243.
Chapter 2
Remedying the Issue of Politicization

In this second section, a solution is proposed in order to slow, and eventually stop, the spreading of politicization that has affected both the Commission and the Council. This can be achieved by going back to the source of the issue: their intergovernmental nature. Our hypothesis builds on the original proposal of the nuclear Commission: the Council should be a body of independent experts, but, because of the important role of states in human rights promotion and protection, and because neither states nor experts are infallible, our view is to create a mixed body, in the same vein as the ILO. It is thus necessary to analyze the role and reason of states and experts in human rights before we address our proposal.

1 States and human rights

As we will now see, states, although they have at times played a very positive role in the life of human rights, have plagued both the Commission and the Council with politicization, as it is an inevitable by-product of any intergovernmental body either because of the responsibilities of governments to their constituents, or because of the personal agendas of the ruling elites. Yet, the input of states is not all negative. It is thus necessary to review both the positive and negative aspects of states in human rights in order to understand their role in their promotion and protection within the Council.

1.1 Positive aspects

In the aftermath of the Great Wars, states clearly showed interest in the protection of their populations, as well as the will to avoid more atrocities like those lived by millions of people worldwide, and were thus willing to ensure the protection of human rights both nationally and internationally. The sole creation of both the Commission and the Council prove a commitment from states to the fight for human rights. Some representatives of the Commission were even allowed greater freedom from their governments, and were thus more independent from political and diplomatic concerns than others. These delegates were more than happy to support or sponsor progressive ideas on human rights, as they could then take credit for these

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146 Ibid at 222.
147 Davies, supra note 22 at 452.
148 Humphrey, supra note 6 at 17.
ideas. Even today, “an increasing number of members are joining coalitions composed of traditional protagonists like the United States and Europe along with emerging democracies from Latin America, Africa, and Asia that support more, rather than less, international scrutiny of rights violations.” They have also been at the head of a number of progressive international human rights agreements and resolutions.

1.2 Negative aspects

To these notable positive aspects correspond, however, a number of negative ones which have given states a bad name in the protection and promotion of human rights internationally. Although some would have preferred more substantive human rights provisions within the Charter, the majority of the states represented, including the major powers of the time, opted only for a vague mention of the concept of ‘fundamental human rights’ in its preamble, and for weak responsibilities towards their promotion and respect scattered within its text. The practices of states at the Council are evidence of their inability, generally speaking, to properly fulfill their commitments to international human rights, preferring diplomacy to constructive dialogue on, and proper enforcement of, these fundamental rights. States also show hypocrisy by heading treaties at the international level, while straying from their application nationally. For Hurst Hannum, there is “no doubt that politics will be the primary consideration for many countries”.

149 Ibid.
150 Piccone, Catalysts for Change, supra note 94 at 3.
151 For example, South Africa was a key player in “the adoption of the first-ever UN resolution on sexual orientation and gender identity”, “Argentina has consistently voted in a principled way to ensure scrutiny of human rights violators”, “Brazil consistently voted in support of resolutions addressing country situations,” etc. See Human Rights Watch, World Report 2012: Events of 2011 (United States: Human Rights Watch, 2012) [Human Rights Watch, World Report 2012] at 168, 210, 222. One should note that states were at the head of the adoption of Resolution 1503 which provided for the creation of a procedure which gave precedence to the importance of human rights violations themselves, regardless of the might of the state involved. See Tomuschat, supra note 42 at 121.
152 Out of its 111 articles, the UN Charter only mentions human rights at its preamble, and in articles 1(3), 13(1), 55(c), 62(2), 68, 76(c); See Charter of the United Nations, 26 June 1945, Can TS 1945 No 7; Humphrey, supra note 6 at 13.
153 O’Flaherty, supra note 7 at back cover. South Africa may have supported “the rights of lesbian, gay, bisexual, and transgender (LGBT) people worldwide, but [it] does not address the concerns of the LGBT community at home.” See Human Rights Watch, World Report 2012, supra note 151 at 168.
154 The fact that South Africa enacted progressive legislation on the matter does not ensure the protection of the LGBT community in itself; respect for human rights must also be instilled in the community and at the governmental level. See Human Rights Watch, World Report 2012, supra note 151 at 168.
simply states seeking to advance their agendas through the exploitation of economic, political, or social asymmetries. \textsuperscript{156} Diplomacy has been used by state representatives to “undermine established human rights standards”, “to minimise and refute criticism of their human rights record” and that of their allies, and “to achieve foreign policy goals not related to the promotion and protection of human rights.”\textsuperscript{157}

Generally speaking, the representatives chosen by states to represent them at the Council are more than likely foreign ministry diplomats, rather than representatives of justice or human rights ministries, showing that the UPR is treated “as a foreign affairs exercise rather than a national process for the examination and improvement of human rights protection and promotion.”\textsuperscript{158} Even though many state representatives may themselves be committed to the cause of human rights, they are rarely allowed to forget who their employer is and where their allegiances lay.\textsuperscript{159} This may not, in itself, be a problem, but it does reinforce the impression of politicization of the Council, and that the UPR is nothing more than another foreign policy forum.\textsuperscript{160} While typical ‘good’ countries will genuinely work on their national human rights record to keep their slate clean and their reputation up, others prefer to go through diplomatic shortcuts, addressing the source of the blame rather than the cause behind it.\textsuperscript{161} Even expected human rights defenders have failed to balance diplomacy with human rights, and have often bended against abusive governments.\textsuperscript{162}

\section*{1.3 Compliance}

Although human rights are sometimes preferred over economic and political concerns, it is exceptional for states to do so.\textsuperscript{163} One thus wonders what is at the base of state compliance or noncompliance with human rights. Many different considerations play a part in the reception of human rights within states, and their relative importance has varied through time.

\begin{itemize}
  \item \textsuperscript{156} See Laura K. Landolt, “(Mis)Constructing the Third World? Constructivist Analysis of Norm Diffusion” (2004) 25 Third World Quarterly 579, cited in Davies, supra note 22 at 459.
  \item \textsuperscript{157} O’Flaherty, supra note 7 at 1; Tomuschat, supra note 42 at 118.
  \item Davies, supra note 22 at 461.
  \item \textsuperscript{160} Ibid at 463-464.
  \item \textsuperscript{161} Tomuschat, supra note 42 at 124.
  \item \textsuperscript{163} Donnelly, supra note 1 at 163.
\end{itemize}
1.3.1 Sovereignty

Securing their sovereignty has always been a main concern of states. Traditionally, sovereignty was seen as being in tension with international obligations, such as human rights, as they tended to limit the range of national decisions available. Because governments typically consider human rights to be a primarily domestic issue, they have secured the legitimacy and the authority to limit the resources reserved for human rights. As corrupted and authoritarian regimes are more common within developing nations, countries possessing scarcer resources will often give human rights a lower priority. As Freedman noted, “[a]utocratic regimes often pay scant attention to human rights.” Additionally, governments abhor foreign intrusion into their national affairs. States thus sought to limit the Council by preventing it “to take unwanted or intrusive action in national jurisdictions.”

Nowadays, the international community seems to agree that sovereignty is not the absolute principle it used to be, and that it “can no longer be invoked to fight off accusations of severe human rights violations.” Ryan Goodman and Derek Jinks also believe that concerns over sovereignty interfering with human rights have been misspecified and are misleading. However, other authors, such as Lawrence Friedman, argue that although in decay, sovereignty is still jealously guarded by states. Because they still wish to keep control over their internal affairs, governments often sign human rights documents knowing that they cannot be enforced by the international community.

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166 *Ibid* at 10.
167 *Ibid*.
168 *Ibid* at 63.
171 Goodman, *supra* note 164 at 1785.
172 Friedman, *supra* note 169 at 139.
173 *Ibid*.
1.3.2 Identity

In order to further secure their sovereignty over their territories, states often relied on the concept of differing cultural identities. According to Thomas Risse, Stephen Ropp, and Kathryn Sikkink, the concept of state identity is at the heart of the conflicts on human rights, and has defined their reception to international human rights concepts.174 If their identity is receptive to human rights, it will conform to its precepts when it has the means to do so.175 In most cases, human rights norms are more likely to be respected and included in national practices if they represent current collective understandings of such norms.176 Problems arise in cases where different norms compete for supremacy and legitimacy, which normally hide political motivations.177 Repressive governments have often cited cultural and societal differences as reasons for non-compliance with human rights norms.178 Most do not solely violating these norms, but also deny them.179 This does not mean that states outright reject them.180 Instead, they claim national sovereignty trumps the issue as a more valid and widely recognised norm.181 They thus create categories of ‘us’ and ‘foreigners’ in order to secure their legitimacy domestically, even in the face of blatant disregard for good governance, which allows them to claim illegitimate intervention in their internal affairs.182 This denial period often lasts for long lengths of time, particularly in the case of “repressive governments [which] care little about international pressures”, such as Zimbabwe or North Korea.183 If states actively seek to remain outside the international community, they

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175 Risse & Sikkink, supra note 174 at 16.
176 Risse & Ropp, supra note 170 at 271; Freedman, supra note 3 at 93.
177 Freedman, supra note 3 at 93.
178 Ibid at 10, 99.
179 Risse & Ropp, supra note 170 at 272.
180 Risse & Sikkink, supra note 174 at 24.
181 Ibid.
182 Risse & Ropp, supra note 170 at 251; Risse & Sikkink, supra note 174 at 23.
183 Risse & Sikkink, supra note 174 at 24, 34; For example, Zimbabwe was the subject, for the first time, to Universal Periodic Review in October 2011. From the outset, the country rebuffed any and all “recommendations pertaining to investigating allegations of violations, combating impunity,” etc. See Human Rights Watch, World Report 2012, supra note 151 at 202. As for North Korea, it has failed to acknowledge “any of the 167 recommendations that it took under advisement from a HRC Universal Periodic Review session of its record in December 2009.” Human Rights Watch, World Report 2012, supra note 151 at 360. The country has simply decided to ‘live outside the mainstream’, having “discovered that a state of harmonious coexistence with all the members of the international community is not a necessary condition for their survival.” See Tomuschat, supra note 42 at 124-125.
will care little about their international reputation. Luckily, “[v]ery few norm-violating governments are prepared to live with the image of a pariah for a long period of time.”

However, governments have acted not only in accordance with their own selfish interests and particular culture, but also as a result of values and norms shared by the international community. Risse and Ropp indicate that human rights have now reached consensual, or prescriptive, status within the international community. It is thus impossible, in many cases, for human rights violators today to deny the existence of human rights norms in the justification of their actions. Idealists push the notion of common values and norms further, claiming that “human rights represent common interests among people, even if rights are perceived differently within different regions and cultures.” As such, states can be interpreted as ‘products of social processes’, whose actions are the result of “a socially constructed ‘logic of appropriateness.” Additionally, most states genuinely care about their reputation within the international community, further pushing them to conform to internationally recognised standards. They value their membership within international communities, and will thus prove to be vulnerable to pressure from their peers. The interdependence of states in a globalized world also means that they can hardly only consider their selfish interests anymore. Most states now view gross human rights violations not only as a threat to themselves and their own internal security, but also as a threat to the international community at large, its peace and security.

1.3.3 Instrumental interests

In many cases, governments’ reactions to international norms depend on rational calculations. For realists, states will base their actions on their own needs and interests. Human rights abusers will “make some concessions in order to increase their domestic and international room

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184 Risse & Ropp, supra note 170 at 245.
185 Freedman, supra note 3 at 93, 96.
186 Risse & Ropp, supra note 170 at 265-266.
187 Ibid.
188 Freedman, supra note 3 at 94.
189 Goodman, supra note 164 at 1752.
190 Risse & Ropp, supra note 170 at 245; Risse & Sikkink, supra note 174 at 8.
191 Risse & Sikkink, supra note 174 at 24.
192 Freedman, supra note 3 at 98.
193 Goodman, supra note 164 at 1780.
194 Ibid at 1751; Freedman, supra note 3 at 12.
to manoeuvre, to increase their legitimacy, or simply to regain foreign aid.”¹⁹⁵ These
governments were careful to ratify international conventions for which they could not be held
accountable by the international human rights community.¹⁹⁶ However, the public concessions
made on the international stage were often accompanied by heightened repression nationally.¹⁹⁷
According to Human Rights Watch, “[t]here is often a degree of rationality in a government’s
decision to violate human rights.”¹⁹⁸ Norm-violating states base their behaviour on the goals they
wish to reach or on the pressures they wish to alleviate, without regard as to whether or not they
believe in the validity of the international human rights standards.¹⁹⁹ For rights abusers, the
reasons normally stem from a fear that greater freedom for its population will mean a loosening
of the government’s grip on power, or from a realization that resources devoted to the protection
of human rights are not distributed amongst its ruling elite.²⁰⁰ Once these goals are reached, or
once national and international pressures subside, many will return to their repressive ways.²⁰¹
According to Risse and Ropp, this behaviour is prevalent in the early phases of human rights
transition.²⁰²

In an age where counterterrorism has taken center-stage in the international arena, Western states
are unlikely to condemn their allies, even in very sensitive areas.²⁰³ These states are blindly
accepting the representations made by repressive governments, and quickly give up on
generating pressure to comply with human rights standards so as not to harm interstate
relations.²⁰⁴ They instead prefer a diplomatic approach through confidential ‘dialogue’ and
‘cooperation’, which are softer approaches.

The concessions made because of instrumental interests, however, participate to structural and
identity transformations nationally, effectively internalizing human rights norms and allowing
the state to enter into the ‘community of human rights abiding states’.²⁰⁵ Once a true dialogue is

¹⁹⁵ Risse & Ropp, supra note 170 at 252; Risse & Sikkink, supra note 174 at 12.
¹⁹⁶ Risse & Ropp, supra note 170 at 250.
¹⁹⁷ Ibid at 246.
¹⁹⁹ Risse & Sikkink, supra note 174 at 12, 17.
²⁰¹ Risse & Sikkink, supra note 174 at 15, 25; Risse & Ropp, supra note 170 at 246.
²⁰² Risse & Ropp, supra note 170 at 258.
²⁰⁴ Ibid at 2; Freedman, supra note 3 at 27.
²⁰⁵ Risse & Sikkink, supra note 174 at 10; Goodman, supra note 164 at 1752.
put in place, repressive states will have difficulty backing out and will often bend to their own originally insincere discursive practices.\textsuperscript{206}

Compliance thus seems to be a balancing game between state sovereignty, which limits the application of international human rights norms, identity, which participates both in the diffusion of generally recognised norms and in their refutation, and instrumental interests, which range from economic, to diplomatic, to security concerns. States have therefore proven themselves to be flawed in their commitment to and compliance with human rights, although their presence has been essential to the development of this concept. A new player may, however, counterbalance their shortcomings.

2 Experts and human rights

In the previous section, we reviewed the role and reason of states in the protection and promotion of human rights. Since we cannot simply assume that experts are flawless in these areas, we must also review their track record in order to determine what role they should be expected to play within the Council.

2.1 Positive aspects

Generally speaking, experts are more easily divorced from individual contexts and allegiances, and are more prone to act on conscience alone than state representatives, as they are, in a sense, “a logical extension of the ideological basis for human rights.”\textsuperscript{207} Alston describes the main advantages of experts over governmental representatives:

In principle at least, an individual expert, even if nominated by a reprehensible government, does not necessarily come with all of the baggage, let alone the legal responsibility, of that government. Moreover, the process of election would potentially be more open-ended because it would be easier to reject an individual — even if strongly supported by his or her government — than to vote against that government itself in the context of an intergovernmental voting procedure. It would also be much easier to establish informal criteria for minimum expertise for nominees, in much the same way as has been done in recent years in relation to the election of judges to serve on the International Criminal Court.\textsuperscript{208}

\textsuperscript{206} Risse & Sikkink, \textit{supra} note 174 at 28; Risse & Ropp, \textit{supra} note 170 at 248.

\textsuperscript{207} Joanna Naples-Mitchell, “Perspectives of UN special rapporteurs on their role: inherent tensions and unique contributions to human rights” 15(2) Int’l JHR 232 at 244.

\textsuperscript{208} Alston, \textit{supra} note 32 at 190.
Freedman also notes that experts have a better grasp of human rights issues, and are more independent from their supporting government, which allows them to be more impartial than their governmental counterparts. Additionally, many investigations into human rights abuses would have been less politically charged had they been conducted by independent experts rather than by state representatives and ambassadors, whom may have their own interests in mind, and may position themselves in an adversarial position with the investigated state. Their role is thus generally viewed as an ‘antidote’ to the politicization of the Council, and to its domination “by many of the very abusers who should be the subject of Council action.” One also notes that although state representatives have supported and sponsored a number of progressive ideas, one must not forget that the majority of these ideas were put forward by experts at the Council.

The Council also employs a number of human rights experts to examine the reports submitted by states. Governments rely on their expertise on, and commitment to, human rights, their ability “to gather facts, identify problems, and make recommendations”, as well as their diplomatic skills and their good judgment within the Council to catalyze attention and promote action in order to protect human rights.

2.2 Negative aspects

Although human rights experts’ opinions may often represent the voice of reason, their input does not currently have the same weight as that of the state-members, and their status as third parties limits the benefits independent voices have in the mitigation of politicization. Experts may currently hold a consultative function within the Council, but they do not have the power to vote on Resolutions, to propose some of their own, or to participate in the UPR, amongst other things. Currently, third parties are limited mostly to “oral statements on the substantive agenda items within the Council”. As seen earlier, Council procedures and actions may be used to impede the participation of independent voices. Repressive governments have worked, together

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209 Freedman, supra note 3 at 20.
210 Humphrey, supra note 6 at 297.
212 Humphrey, supra note 6 at 17-18.
213 Tomuschat, supra note 42 at 140.
214 Piccone, Catalysts for Change, supra note 94 at 7.
215 McBeth, supra note 20 at 242.
216 Ibid.
or in parallel, to silence independent voices, attacking the credibility of anyone who opposes them.\footnote{217 Human Rights Watch, \textit{World Report 2010}, supra note 119 at 1-2.}

Experts are not devoid of flaws themselves. Alston noted, speaking of special rapporteurs and the special procedures during the Commission era, that these independent experts did “not go anywhere near ensuring the degree of integrity of process that most commentators would agree to be essential if consistency, effectiveness, and fairness [were] to be achieved”.\footnote{218 Philip Alston, “The Commission on Human Rights” in Philip Alston, ed, \textit{The United Nations and Human Rights: A Critical Appraisal} (Oxford: Clarendon Press, 1992) cited in Miko Lempinen, \textit{Challenges Facing the System of Special Procedures of the United Nations Commission on Human Rights} (Turku: Institute for Human Rights, 2001) at 26.} Since then, however, a code of conduct was created by the Human Rights Council to remind rapporteurs that they should act in an independent, impartial, objective, and non-selective manner in order to foster dialogue and cooperation on human rights matters internationally, thus enhancing their promotion and protection.\footnote{219 \textit{Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council}, HRC Res 5/2, UNHRCOR, 5\textsuperscript{th} Sess, UN Doc A/HRC/RES/5/2 at para f [Code of Conduct].} To prove their good intentions and support the commitments they are undertaking, these experts are also asked to adhere to a standardized solemn declaration in writing.\footnote{220 \textit{Ibid} at art 5.} Such a commitment, however, does not ensure that rapporteurs will uphold the highest standards in their work. In fact, even since the enactment of the code, rapporteurs have faced criticisms of having hidden agendas, and that their work is also politicized.

The most scathing recent example is that of the United Nations Fact Finding Mission on the Gaza Conflict, also known as the Goldstone Report. In their book \textit{The Legacy of the Landmark Investigation of the Gaza Conflict}, Adam Horowitz, Lizzy Ratner and Philip Weiss gathered different views of the Report from various circles, underlining the fact that the work of experts can face criticism.\footnote{221 See generally Adam Horowitz, Lizzy Ratner & Philip Weiss, eds, \textit{The Goldstone Report: The Legacy of the Landmark Investigation of the Gaza Conflict} (New York: Nation Books, 2011).} Halbertal, for example, felt that the Report gave an impression of partiality to the Palestinian cause, that it immediately condemned Israel as a ‘predatory state’, and that the document was itself biased, if not simply politicized, implying that the experts themselves may have had their own hidden agendas.\footnote{222 Moshe Halbertal, “The Goldstone Illusion” in Horowitz, \textit{supra} note 221 at 346.} The author also notes that the conclusion of the Report were based on partial information gathered mostly from Palestinian sources because of Israel’s refusal to cooperate with the inquiry, but that this fact, instead of being acknowledged as a
methodological and empirical problem, was deemed ‘Israel’s problem’. Experts are of course human, and as fallible beings one can expect their work to be flawed in certain ways. Their role, however, is to minimize impressions of bias by detaching themselves from their subject as much as humanly possible and identifying the relevant facts. The Goldstone Report seems to have fallen short of this aim. Chatham House, a British policy institute, having assessed the work of the Goldstone Mission, “identified aspects of the report that contributed to perceptions of bias.” Even more recently is the case of Richard Falk, the special rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, whose comments on the political and diplomatic causes of the Boston Marathon bombings cast doubts on his independence and impartiality in his mandate.

These two cases clearly show that the independence and impartiality of experts can easily be cast into doubt, and that their work is far from flawless. If so-called ‘independent experts’ are to be given full-membership within the Council, their flaws will need to be addressed so as not for this solution to backfire and simply add a new form of politicization.

2.3 Expert bodies

As we have noted earlier, experts already play a role within the Council’s apparatus: that of consultants. Two bodies are of particular interest in this case: the Advisory Committee and the special procedures. In order to understand why experts should be given seats on the Council’s membership, we first need to review the role the experts of these bodies play within the current human rights machinery.

2.3.1 Advisory Committee

Starting in 2008, the Council has had access to the expertise of the Advisory Committee. Composed of eighteen independent experts stemming from all parts of the world and holding different professional backgrounds, the committee “provides expertise to the Council in the manner and form requested by it”, and “may also propose within the scope of the work set out by

223 Ibid at 358.
224 Henry Siegman, “Discrediting Goldstone, Delegitimizing Israel” in Horowitz, supra note 221 at 387.
225 Ibid.
the Council, for the latter’s consideration and approval, suggestions for further research proposals.”228 Although these experts impart valuable information to the members of the Council, their position is solely advisory, and their mandate is limited to thematic issues.229

2.3.2 Special procedures

According to the Office of the High Commissioner for Human Rights, “[t]he special procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective.”230 Special procedures include special rapporteurs, independent experts, and working groups, who work independently from the Council.231 These rapporteurs are generally unpaid independent experts which accomplish most of their work from their home countries in order to ensure a greater level of independence.232 They can be nominated either by states, NGOs, United Nations organizations, or individuals.233 Once submissions are made for candidates, the president of the Council presents a list of potential rapporteurs to the Council’s members, following suggestions from a consultative group made up of diplomats hailing from each of the regional groups.234 In general, special rapporteurs hail from academic or legal backgrounds, and accomplish their mandates while withholding their professional positions.235 The criteria used in the appointment of special rapporteurs relate to their human rights expertise, their experience in and knowledge of the particular scope of the Council’s mandate, their relative independence, their impartiality and integrity, as well as their objectivity.236 According to Ted Piccone, “[t]his method has decreased the level of backroom dealing and manipulation that was evident under the old system and continues to generate, on the whole, an impressive and diverse group of candidates from every region.”237

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228 Ibid.
229 Evans, supra note 51 at 150-151.
231 High Commissioner, Special Procedures, supra note 230; Freedman, supra note 3 at 112.
233 Piccone, Catalysts for Change, supra note 94 at 8.
234 Ibid.
235 Ibid at 11.
236 Ibid at 8.
237 Ibid at 8.
Special rapporteurs are expected to fulfill their obligations without the interference of their home governments.\textsuperscript{238} The Council’s rapporteurs draw their independence from their position as professional volunteers, being only linked to – not employed by – the institution.\textsuperscript{239} Indeed, these professionals are not salaried employees of the Council, in a bid to reassure countries that their motives are genuine.\textsuperscript{240} These experts are trusted to gain accurate and reliable knowledge on particular issues or countries in order to report their findings to the Council, which can then pronounce itself on the compliance or non-compliance with international human rights standards of the investigated states.\textsuperscript{241} The choice of evidence to be collected stems solely from the rapporteur: no government may dictate what information will be gathered and reported to the Council.\textsuperscript{242} The experts’ fact-finding missions thus allows them to share information that is potentially damaging to certain countries with the Council.\textsuperscript{243} Although this can create diplomatic tensions, in cases where states are receptive, a genuine exchange of views is possible with experts, who will work with them to monitor and enhance their human rights situation.\textsuperscript{244}

Special rapporteurs face their share of criticism. It is highly difficult to have a global system of reporting on human rights situations that is constant from one mandate to another. The Council lacks the resources necessary to provide comprehensive training of its experts and rapporteurs, whom in turn will have “insufficient understanding of the local context for their work,” and will ultimately face a follow-up process on their recommendations which lacks systematicity.\textsuperscript{245} In addition to these flaws, the choice of rapporteurs itself is at times politicized, succumbing to backroom deals, and lacks transparency overall, even though the selection process is more strict, as was noted earlier.\textsuperscript{246} As such, the experts chosen for certain mandates are not necessarily the most competent or knowledgeable, making for a weak report on the subject they are charged with.\textsuperscript{247} Additionally, some states have demanded “that their favourite candidates be chosen, as was seen in June 2010 when the president of the council acquiesced to demands from the Africa

\begin{itemize}
\item \textsuperscript{238} Tomuschat, supra note 42 at 140.
\item \textsuperscript{239} Naples-Mitchell, supra note 207 at 234; Piccone, \textit{Catalysts for Change}, supra note 94 at 7.
\item \textsuperscript{240} Naples-Mitchell, supra note 207 at 234.
\item \textsuperscript{241} Tomuschat, supra note 42 at 122-123; Piccone, \textit{Catalysts for Change}, supra note 94 at 4.
\item \textsuperscript{242} Tomuschat, supra note 42 at 123.
\item \textsuperscript{243} Freedman, supra note 3 at 111.
\item \textsuperscript{244} Donnelly, supra note 1 at 134.
\item \textsuperscript{245} Piccone, \textit{Catalysts for Change}, supra note 94 at 18.
\item \textsuperscript{246} \textit{Ibid} at 8; Piccone, \textit{Catalysts for Rights}, supra note 124 at 38.
\item \textsuperscript{247} Piccone, \textit{Catalysts for Rights}, supra note 124 at 38.
\end{itemize}
and Asia bloc for particular appointees.” 248 In the end, experts must not necessarily be independent or objective; they need to be well-liked by the right states, which further politicizes their role within the Council. 249

Joanna Naples-Mitchell has also highlighted three types of tensions inherent in the position of special rapporteurs, which either allow politicization to seep into their role or complicates their work: “first, the tension between UN affiliation and independence; secondly, the tension between practical need for access to states and ethical obligation to criticise states’ human rights records; and thirdly, the tension between the global scope of thematic mandates and the logistical constraints that render that scope an impossibility.” 250 Because special rapporteurs need access to the United Nations channels of communication and to the support of its staff, they are, in a way, pressured to conform to official United Nations policies. 251 If rapporteurs distance themselves from official United Nations policies in their work, they may find it more difficult to deal with United Nations staff members, staff whose help rapporteurs desperately need in order for them to accomplish their mandates properly. 252 Experts have also had to stoop to the same lobbying tactics used by states within the Council, participating in the diplomatic backroom power-plays which are so common in an intergovernmental body. 253 They are thus susceptible to politicization criticisms to a certain extent. Indeed, rapporteurs need to balance their mandate to uncover the human rights situation of states with their need to have access to those states’ territory. 254 Although governments seeking membership to the Council make commitments to encourage and cooperate with the mandates of independent experts and special rapporteurs, and although these experts will undoubtedly rely on these commitments in hopes of fostering cooperation, they in fact primarily rely not on moral arguments, but on political pressure. 255 States are thus both partners and adversaries in the rapporteurs’ work, meaning that a certain amount of diplomacy plays a role in the outcome of their reports. 256 As Naples-Mitchell notes, “[a] harsh report after a country visit may impede further access, so the rapporteur must weigh

248 Piccone, Catalysts for Change, supra note 94 at 8.
249 Piccone, Catalysts for Rights, supra note 124 at 38.
250 Naples-Mitchell, supra note 207 at 233.
251 Ibid at 236.
252 Ibid.
253 McBeth, supra note 20 at 242.
254 Naples-Mitchell, supra note 207 at 236.
255 Piccone, Catalysts for Change, supra note 94 at 9.
256 Naples-Mitchell, supra note 207 at 236.
the merits and pitfalls of assigning government responsibility for abuses before moving toward condemnation.”257 For example, John Dugard, who was a rapporteur for the situation in the Palestinian territories, scathingly described the human rights situation in Palestine as equivalent to apartheid in a report penned in 2007.258 Although Israel would continue to cooperate with the investigation to a certain degree, the government would threaten not to support it further, which would give experts something to think about before publishing their reports.259 In many other cases, however, states have entirely refused to cooperate with mandate-holders, refusing them further access to the country.260 Because some states were receiving harsh criticism from special rapporteurs, a code of conduct was created as a means to achieve greater professionalism from these experts.261 This has had the effect of dampening the ability of independent experts to raise awareness of human rights violations internationally as member states of the Council have been attacking “certain mandate holders for allegedly stepping outside their mandates, a tactic some states use to avoid responding to the substance of the concerns raised by the Special Procedures.”262

Both the Advisory Committee and the Special Procedures have had positive impacts in the promotion and protection of human rights, and it is the positive role that their experts have played that leads us to believe their full membership is necessary within the Council. Although they are not full-fledged members of the Council as states are, special rapporteurs “have in fact played a pivotal role in the promotion and protection of human rights worldwide.”263 However, even though one can argue that experts are currently playing an integral part within the charter-based body, and although the experts of the special procedures provide high quality services, their impact has been deemed minimal.264 In order to give human rights experts a truly meaningful voice, we need to elevate their status within the Council. Experts would thus not only be allowed to share their expertise, but would finally have the opportunity to vote on resolutions based on their expertise. Although experts cannot be said to be entirely devoid of politicization concerns, it seems that their politicization stems most of all from the input states are allowed to

257 Ibid at 239.
258 Ibid at 240.
259 Ibid.
260 Tomuschat, supra note 42 at 123.
261 Piccone, Catalysts for Rights, supra note 124 at 34.
262 Ibid.
263 Naples-Mitchell, supra note 207 at 244.
264 Freedman, supra note 3 at 111.
have within the choice of rapporteurs, as well as from their power to refuse access to important
testimony necessary for the experts’ mandates. If independent human rights experts had a more
powerful position within the Council, such as being full-fledged members on equal footing with
states, they may be less vulnerable to certain kinds of governmental pressure, depending on how
they would be elected to their seats and how they could pressure countries into compliance with
expert requests. In the next section, we thus examine the idea of creating a balanced membership
within the Council in order to minimize the impact and the spread of politicization.

3 Revisiting the original proposal

Because of the Commission’s and the Council’s enduring politicization, it is necessary to
consider what has not changed in both these bodies: their intergovernmental nature. An
important suggestion of the past should thus be reviewed.

3.1 The original proposal

At the time of its creation, the experts of the nuclear Commission mostly agreed that the body
should be composed of international human rights experts and jurists appointed by ECOSOC
from a list suggested by member states of the United Nations in order to ensure independent and
impartial human rights protection and promotion. Acting in their personal capacities, these
experts would be less susceptible to politicization than governmental representatives. Alston
notes, however, that the “initial group did not seek to explain the rationale for its preferred
approach other than to say that since both the General Assembly and ECOSOC were composed
of government representatives, the composition of the Commission should be different.” The
end-result was therefore that of a strictly governmental membership. John Humphrey, an
original member of the Commission, believed that “[t]he decision that membership on the
commission would be at the governmental level was probably realistic and helpful, since, in the
early years in any event, its work was mainly of a quasi-legislative character. There would be no
point in preparing texts which would not be accepted by governments.” But Humphrey also
thought that, once these legislative bases were agreed upon and the Commission had become an

265 Ibid at 84.
266 Humphrey, supra note 6 at 17; Alston, supra note 32 at 189; Freedman, supra note 3 at 20.
267 Humphrey, supra note 6 at 17.
268 Alston, supra note 32 at 189.
269 High Commissioner, Commission, supra note 1.
270 Humphrey, supra note 6 at 18.
implementing body, the composition of the body’s membership should be fundamentally changed.\textsuperscript{271} Indeed, an important element of the implementation of human rights standards is the possibility of members to freely ask any question of the governments under review, whether embarrassing or devastating, which can be quite difficult in a body composed of governmental representatives because of political or diplomatic concerns.\textsuperscript{272} Having played its role in the creation and expansion of an international human rights legal framework, the Commission’s membership should have been changed in order to evade further politicization of the body, and thus avoid its demise.\textsuperscript{273}

The nuclear Commission and, particularly, Humphrey’s suggestions form the basis of our own proposal. In this next section, we therefore revisit these proposals in order to build a more depoliticized Council through fundamental changes to its membership.

### 3.2 The original proposal revisited

The founding principles of the Council are meant to guide its work. The second principle demands the highest levels of professionalism and objectivity from the work of the Council, and that it guides its actions by human rights alone.\textsuperscript{274} As Piccone points out, “[t]he real challenge now is to figure out how the international system created since the end of World War II can be more effective in influencing states to promote and protect human rights for all.”\textsuperscript{275} Because the Council remains a ‘work in progress’, it is normal that changes must be made in order to attain these objectives.\textsuperscript{276}

Since it is our belief that the issue of politicization is the most important to counter in order to create a strong human rights United Nations charter body, we believe the most important step one can take to stop its advance is to create a mixed membership between states and experts within the Council. Our desire being to create a depoliticized yet enforceable system of human rights protection and promotion, neither a full intergovernmental or expert body will do.

\textsuperscript{271} Ibid.
\textsuperscript{272} Ibid.
\textsuperscript{273} Davies, supra note 22 at 450; Freedman, supra note 3 at 300.
\textsuperscript{274} Freedman, supra note 3 at 79.
\textsuperscript{275} Piccone, \textit{Catalysts for Change}, supra note 94 at viii.
\textsuperscript{276} Piccone, \textit{Catalysts for Change}, supra note 94 at 2.
3.2.1 Creating a smaller state presence

The form that the international human rights regime has taken ensures “that the sovereign state remains the appropriate actor for guaranteeing the rights and freedoms agreed by states.”\(^{277}\) It is the Council’s intergovernmental nature which gives it its legitimacy in the eyes of many governmental and non-governmental actors.\(^{278}\) As such, it is nearly impossible to completely eliminate the state from the Council. However, governmental representatives are in a conflicting position which undermines their own credibility.\(^{279}\) When decisions need to be taken on human rights issues which have an effect on their sending states, the representatives will side with their countries, as they can hardly be critical of their employers.\(^{280}\) Their accountability, after all, is to their national governments, not to the United Nations human rights machinery.\(^{281}\)

Kofi Annan and Freedman, amongst others, have suggested that a smaller body would limit power struggles and the advancement of national agendas, allowing for a better fulfilment of the Council’s mandate.\(^{282}\) Politics may not be completely eliminated from this eminently politicized body, but limiting the number of national agendas represented on the Council’s membership could limit their impact on the body’s procedures.\(^{283}\) The number of states represented should thus once again be reduced on the Council. However, it is also believed that a state membership that is too small would allow stronger states to take center stage in Council deliberations, exerting their influence over final decisions.\(^{284}\) As such, although we currently need a smaller state membership at the Council, we must be careful not to reduce it to the point where the political needs of one would trump all other concerns.

3.2.2 Including experts

As Freedman argues, there is a need for the legitimacy offered by state membership to be balanced with a more effective body, which means that “the Council’s form must be revisited, with a focus on whether a body consisting of independent experts, or indeed a different form

\(^{277}\) Evans, supra note 51 at 115; Donnelly, supra note 1 at 35-36.
\(^{278}\) Freedman, supra note 3 at 300.
\(^{279}\) Alston, supra note 32 at 216.
\(^{280}\) Ibid at 189, 216; Evans, supra note 51 at 146.
\(^{281}\) Ibid at 48, 300.
\(^{282}\) Ibid at 48.
\(^{283}\) Alston, supra note 32 at 198.
altogether, would be better equipped to protect and promote human rights.”

It is altogether unproductive to consider making the Council a purely expert body. Human rights will always retain an element of politicality, and it is thus normal that a human rights institution should reflect “the deep differences which divide nations and groups.” Moreover, human rights decisions which are likely to affect state sovereignty and autonomy “are unlikely to be allowed unless the states are directly involved in the process.” State sanction is thus necessary if we are to maintain an enforceable international human rights system. Governmental representatives therefore still have a very important role to play within the Council in the protection and promotion of international human rights. There is, however, a balance to be had through the inclusion of experts as equal peers within the membership of the Council.

In the current system, experts represent objectivity and systematicity in dealing with human rights, yet the decision-making is left to the mostly haphazard and unscientific approach of governmental representatives, tainting it with politicization. As the Council’s expert bodies provide only advisory services, it is necessary to give independent human rights experts a greater position as members in order to ensure that their voice is heard, and not simply considered and discarded. Indeed, the complexity of the issues dealt with at the Council necessitates the decisional input of experts. The presence of experts on the membership of the Council is also a necessity as the recommendations, declarations, and codes of conduct they develop are ultimately non-binding, and need the support of state in order to be implemented. Because states with a record of restricting expert input “actively seek membership and are overrepresented” at the Council, independent experts need a more permanent and powerful voice. Silencing independent voices would be more difficult if some of their peers were integral members of the institution. Moreover, experts do not hold the same loyalty to their home states as governmental representatives, and would thus not be bound by their countries’ policies in the way their governmental counterparts are. Adding experts would thus balance these

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285 Freedman, supra note 3 at 300.
286 Humphrey, supra note 6 at 25.
287 Freedman, supra note 3 at 116.
288 Alston, supra note 32 at 214.
289 Ibid at 189.
290 Freedman, supra note 3 at 75.
292 Freedman, supra note 3 at 21.
nationalist concerns with their independence. Indeed, it is prudent and productive, according to Donnelly, to control state power over human rights given their immense influence and reach. 293

One needs to make sure, however, that experts’ flaws are also addressed. In order to encourage independence, impartiality and objectivity, experts should first adhere to a similar code of conduct as that of the Council’s special rapporteurs. 294 As such, they should also, upon election, make a public commitment to these standards and to the Human Rights Council’s cause, just as states make a commitment to the protection and promotion of human rights upon their own election. 295 This alone is not sufficient, however, to guarantee the best participation from experts: they may still come with their own prejudices and preconceptions. In cases where heavy doubts have been cast on the capacity of elected experts to properly fulfill their mandate, a procedure should be available to suspend their membership, as is the case for states. Whereas the General Assembly, an intergovernmental body, decides whether or not to suspend a member, an expert body should make the final decision on the fate of expert members. As such, the Council could either rely on the service of the Advisory Committee to make that decision, or create an entirely new expert body charged with the overview of expert behaviour, and which could be called to take decisive action in suspension cases.

Would a mixed body truly be amenable? The example of the ILO can be enlightening on this subject, and we will now give a short account of its own mixed membership.

3.2.3 Validating the concept of a mixed body

As organizations that seek to advance “the respect for human rights by all actors in society”, comparisons can be drawn between the International Labour Organization and the Human Rights Council. 296 Since its creation in 1919, the ILO has participated to the evolution and implementation of the human rights of workers worldwide, being mandated to strive for the achievement of social justice. 297 The organization works directly with states, businesses, and trade unions in order “to promote and monitor the implementation of international labour

293 Donnelly, supra note 1 at 35.
294 See generally Code of Conduct, supra note 219.
295 Davies, supra note 22 at 456.
297 Ibid.
standards”, as well as to build their capacity and guide their behaviour towards labour-related human rights.\textsuperscript{298} Although their dynamics may be different, the ILO proves that mixed membership is possible, and should be encouraged, within international organizations which deal with human rights.

The ILO is a great example of a mixed institution, as its governing body’s membership is composed of fifty-six members, of which twenty-eight represent governments, fourteen represent employers, and another fourteen represent workers (a 2:1:1 ratio).\textsuperscript{299} When combined, workers and employers thus hold the same weight as states within the Organization.\textsuperscript{300} Of the twenty-eight states represented, ten have permanent seats because of their industrial importance, the other eighteen being elected every three years.\textsuperscript{301} As for the employer and worker representatives, they are elected in their individual capacities, a move that ensures a certain detachment from political concerns.\textsuperscript{302} Indeed, the workers’ representatives hail from free trade unions, which “are democratic, self-organizing institutions of working people wishing to advance their rights as workers and citizens”, while the employers’ representatives are simply “institutions set up to organize and advance the collective interests of employers.”\textsuperscript{303} The members of the ILO are thus not experts, but mainly stakeholders who represent their own needs; their views are not meant to be objective. This does contrast with our own proposal, as experts should be independent, impartial and objective in their role as Council members. However, they should also be seen as representatives of each and every one of us, serving the cause human rights generally just as workers’ organizations represent the cause of economic human rights, bringing balance to an organization which would otherwise probably strongly focus instead on the economy of human rights.\textsuperscript{304}

\textsuperscript{298} Ibid.


\textsuperscript{300} International Labour Organization, How the ILO works, online: International Labour Organization <http://www.ilo.org> [ILO, How the ILO works].

\textsuperscript{301} The permanent ten are: Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, the United Kingdom, and the United States. ILO, Governing Body, supra note 299.

\textsuperscript{302} Ibid.

\textsuperscript{303} International Labour Organization, Tripartite constituents, online: International Labour Organization <http://www.ilo.org>.

\textsuperscript{304} Manfred Nowak, Introduction to the International Human Rights Regime (Leiden: Martinus Nijhoff, 2003) at 141-142.
At the heart of the ILO lie the needs of working men and women internationally, yet states still feel the need to participate in good faith in its processes. The governing body is responsible for the adoption of ILO policies and of its draft programme and budget, as well as for the agenda of the International Labour Conference. The Organization has successfully created international labour standards through tripartite dialogue, developing policies and programs to protect and promote the rights of working individuals worldwide. Indeed, even though states representatives, worker delegates, and employer members may vote in diverging ways, many decisions at the International Labour Conference – the policy-making apparatus of the ILO – are adopted either anonymously or by a very large majority. Thanks to the successes of the ILO, states have come to understand and appreciate the importance of fostering cooperation between themselves and employers’ and workers’ organizations in order to achieve greater economic and social progress. Humphrey notes that the ILO “has a history of over half a century of achievement behind it. It has adopted well over a hundred conventions fixing international standards and also possesses machinery for the implementation of these standards, some of which could well be emulated by the United Nations”, particularly, in our case, the Human Rights Council. The ILO also contains a tripartite Conference Committee on the Application of Standards which reviews the annual report of the Committee of Experts on the Application of Conventions and Recommendations, calling onto cited governments to respond and provide further information on worrisome situations, drawing conclusions and making recommendations to those states in order to remedy those situations. As such, states, workers’ associations and employer groups all have the opportunity to criticize governments who fail in their commitments, and to suggest solutions for the future.

One must note, however, that the ILO has not been exempt from accusations of politicization. Indeed, Standing, in his essay *The ILO: An Agency for Globalization?*, highlighted a number of ways in which the ILO also suffered from this elemental flaw. He notes that the appointments to

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310 Humphrey, *supra* note 6 at 12.

certain positions within the Organization were eventually politicized, and that the “ politicizing of internal management had a potentially corrosive effect on the professionalism, objectivity and general competence of the Organization.”

Politicization would further seep into the ILO, with even lower-level appointments being grounded “less on professional competence than on contracts and factional allegiances.”

Employer representatives are also often criticised as being little more than friends and supporters of national politicians.

The member states of the Council should have learned, from their experience at the ILO, that inclusive participation can have immense positive outcomes for them and for their populations. Whereas the ILO has been promoting and protecting the rights of workers everywhere with very positive results overall on a national, as well as international, level, the same could be accomplished with human rights through the Council. In fact, France, amongst others, thought United Nations human rights charter bodies should use a system analogous to that of the ILO.

Indeed, the ILO was seen as having greater scrutinizing powers to determine whether or not states “were living up to their formal commitments.”

The Council may have taken note of the Commission’s failure to review all states’ commitments to human rights through the creation of the UPR, but its membership being made solely of states, one can only expect criticism to be based partly on political or diplomatic concerns. If states are truly serious about their commitment to the promotion and protection of international human rights, they will surely consider further following the ILO’s example, and revisit the Council’s membership. Although that Organization is also permeable to politicization, it seems that its worker representatives have mostly evaded the issue, something which gives us hope when considering the possibilities of politicization of independent human rights experts at the Council.

3.2.4 New membership

As Humphrey believed, the membership of the Council should be changed now that the body is mostly an implementing one, as “the main human rights principles, protocols, and procedures have already been conceptualized and codified in customary international law and in treaties that

313 Ibid at 373.
314 Ibid at 380.
315 Alston, supra note 32 at 209.
316 Ibid.
317 See generally Standing, supra note 312.
have been signed and ratified by most governments. But what should this new Council membership look like? Building on the successes of the ILO, we must consider creating a membership that will be as balanced as possible. We are thus suggesting that a ratio of 2:1 between states and experts be implemented, in a bid to give these experts a more powerful and independent voice, while allowing states, at least at first, to ‘keep control’ over the Council, as an incentive for them to agree to this change.

The membership of states needs to be distributed in a geographically proportionate manner in order to ensure that the most powerful states do not control the proceedings. Although it is necessary to represent different regions equitably, there is no prescribed formula to determine the number of total seats on the Council, or even the number of seats per region. It is thus possible for us to distribute them how we see fit. In order to incorporate the new expert members, we suggest keeping the total number of elected members at forty-seven, where thirty-one members would be state representatives. This means that four of the five administrative regions would lose three members, while the remaining region would lose four. We suggest that the African bloc should lose the most seats as its population is approximately a quarter of the Asian bloc, and yet they currently have the same number of representatives. As such, the Asian bloc would have ten representatives, the African bloc would have nine, Latin America would have five, Western Europe would have four, and Easter Europe would have three. The remaining sixteen members would represent independent human rights experts chosen from around the world in similar proportions: five for the Asian bloc, four for the African bloc, three for the Latin American bloc, and two for each the Eastern and Western European blocs. Additionally to regional distribution, consideration should be given to creating diversity in the areas of expertise of the experts up for election (such as women’s issues, racial or sexual discrimination, religious discrimination, etc.). These two types of diversity combined – geographical and experiential – is, as Piccone has stated in the case of special rapporteurs, “an asset, as it makes it more difficult for hostile governments

318 Humphrey, supra note 6 at 18; Piccone, Catalysts for Change, supra note 94 at viii.
319 Freedman, supra note 3 at 51.
320 Alston, supra note 32 at 199.
to justify noncompliance by claiming that these [experts] are beholden to a regional group or individual sponsor.”

In order for the best candidates to run for election as expert members, the Council should begin its selection process early on and advertise in an accessible way the positions up for election in order to reach out to the widest network of independent experts possible. Civil society should also be allowed to submit qualified candidates for election as they are in a better position to assess their “track record of expertise in promoting and defending human rights”. Once a pool of candidates is set up, states at the General Assembly would vote for their top choices, in a similar fashion to the process already used for the election of states to membership of the Council, which is a majority election through direct and secret ballot. This will undoubtedly bring a measure of politicization into the process, as states will most assuredly negotiate the election of their favourite expert representatives, but its pervasiveness can be limited through an independent assessment and approval of the candidates by the United Nations Human Rights Committee or by the Human Rights Council Advisory Committee prior to their election, as they are both independent expert bodies, or by the use of a consultative group similar to the process, cited earlier, already in use at the Council in the choice of its rapporteurs.

Of course, the experts chosen to be part of the new membership of the Council should have as little political ties themselves as possible. Former diplomats tend to be more ‘politically correct’, while academics are typically more independent. Since these expert members do not need access to states in the same way as rapporteurs do, diplomacy should not be a necessity, and greater weight should thus be given to actual human rights expertise when choosing them. In fact, an adversarial situation between states and experts at the Council can be beneficial: while expert members will be “able to voice [their] concerns with more determination”, governmental

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322 Piccone, Catalysts for Change, supra note 94 at 10.
323 Piccone, Catalysts for Rights, supra note 124 at 38.
324 Ibid.
326 Office of the High Commissioner for Human Rights, Monitoring civil and political rights, online: Office of the United Nations High Commissioner for Human Rights <http://www2.ohchr.org>; High Commissioner, Advisory Committee, supra note 227; Piccone, Catalysts for Change, supra note 94 at 8.
327 Naples-Mitchell, supra note 207 at 240.
representatives will also be present, ensuring that the views expressed will “arrive in the capital of the country concerned, reaching there the responsible ministerial departments.”

Hopefully, the effect of introducing independent experts as members of the Council should mitigate the propagation and the effects of the politicization of this United Nations body. Generally speaking, experts are seen as the opposite of political entities, which leads us to believe the international community would have greater confidence in the independence of the work of the Council from politicization concerns if they were to play a greater role within this organization, particularly through their election to seats on the Council. Of course, even experts can fall prey to politicization in certain situations, but by putting them on equal footing with states, these concerns should be limited as experts will be less likely to submit to state pressure. For example, the ILO has, for the most part, avoided fundamental politicization concerns, and has proven that a mixed body is not only possible, but that it also is beneficial to its cause. If workers’ organizations have been mostly exempt from politicization, one can expect a well-regulated independent expert electoral system to achieve the same result. The Council’s new membership should satisfy both states and human rights experts as it leaves governmental representatives in charge, something they will surely not wish to relinquish easily, while giving experts a more important and secure role within the Council, allowing them to voice their concerns independently, giving more opportunities for important human rights situations to come to light when they would normally have been buried through diplomatic efforts. Overall, although this new membership is not itself devoid of all politicization concerns, it would still be an improvement over the current purely intergovernmental system. In any case, one can hardly imagine any solution which would not be pervasive, in one way or another, to politicization in any form, but we must still strive for the best international human rights system possible.

328 Tomuschat, supra note 42 at 143.
329 See Immanuel Kant, The Metaphysics of Morals (New York: Cambridge University Press, 1996); Kant believes that one should always strive for the best system possible, even if it is, in fact, unattainable. The same can thus be thought of the situation of the Council, and of the international human rights system generally.
Conclusion

International human rights have come a long way: from simple recognition to effective implementation and enforcement, our world has evolved to consider the notion as one of the most fundamental in the definition of a human being. It seems ironic, then, that it is not given the elemental place and utmost respect it deserves on the international scene. Reform was and is still needed in the United Nations human rights apparatus, particularly in the case of its charter-based institutions which have proven, time and again, to be fundamentally flawed.

The United Nations Commission on Human Rights may have survived for some sixty years, but its weak ability and efforts to mitigate the politicization of its membership and its procedures was ultimately its downfall. States were receptive, and were even at the head, of calls to proceed to its complete reform, showing that even the key players, the actors who had participated in the politicization of the institution themselves, could no longer support an entity that, while it purported to have international human rights at its heart, succumbed to diplomatic, political, and economical masquerades.

Thus the United Nations Human Rights Council was created, heralding a new age in the protection and promotion of international human rights. Much thought and effort was put into its reforms, tackling some of the issues plaguing the Commission before it, yet leaving itself open to politicization once more. Although having indeed complicated the progression of politicization, the membership and the procedures of the Council are, in turn, falling prey to it. Diplomatic pressure on the Council’s members and procedural strategies to perverse the Council’s actions bring both states and international human rights experts to question whether the reforms have gone far enough.

In fact, the reforms to the Commission have not gone far enough as they have not tackled the issue that is the root cause of the politicization of the two United Nations charter institutions: the pure intergovernmental membership. Although procedural reforms have and could further mitigate the effects of politicization, they would still be susceptible to further politicization as these solutions do not tackle the source of politicization.\textsuperscript{330} Per se, the involvement of states in international human rights is without doubt desirable. Their power on the international scene, as well as their control over their territories and their close involvement with their populations make

\textsuperscript{330} Freedman, \emph{supra} note 3 at 303.
them essential actors in the protection and promotion of human rights worldwide. Their inherently political nature, however, eventually brings them to incorporate political elements into their human rights decisions, colouring the Council, and the Commission before it, in a way that threatens a strong human rights system. As Freedman has stated, accepting that national agendas are present within the Council is entirely different from tolerating political conflicts to take much importance within the body.\textsuperscript{331} It is only when politicization prevents the Council from functioning properly that it is a problem.\textsuperscript{332} In order to mitigate this politicization, we must consider involving actors outside the typical diplomatic-political circles.

The experts of the nuclear Commission seem to have foreseen the issues associated with a pure intergovernmental human rights body, yet states would not heed them. Because of their position outside typical political circles, international human rights experts are seen as more dependable and most trustworthy with the defence and the direction of these fundamental rights. Their expertise on the subject is also an advantage which states have enjoyed as simple advice, but which should be given much more weight in the decisions of the Council. Experts are, however, still susceptible to politicization in a number of ways, but this can be limited through a comprehensive electoral system which will ensure that only the most independent and reliable candidates will be retained.

In order for politicization to be maximally mitigated, the best approach is thus to create a mixed body of states and experts which will hopefully work together towards limiting the pervasiveness of politicization, and thus towards a better implementation of human rights standards internationally. Membership will retain a ratio similar to the winning formula of the ILO: two parts states (thirty-one governmental representatives from different countries) to one part experts (sixteen with different geographical and experiential backgrounds). This new membership should balance the advantages and disadvantages of one group with that of the other, finally stopping the advance of politicization within the Council.

For states to readily accept this solution, it may be necessary to approach change in an incremental way, perhaps allowing for a tryout period where they could witness firsthand, and without committing themselves from the outset, the benefits of incorporating other human rights

\textsuperscript{331} Ibid at 119.
\textsuperscript{332} Ibid.
actors in their select membership. The membership proposed in this essay is not necessarily the most beneficial and will no doubt need to be perfected: maybe a 1:1 ratio of states to experts will be preferable, or maybe the inclusion of civil society or NGO representatives will also be needed. In that case, maybe a 2:1:1 ratio may be indicated between states, experts, and other third parties. After all, that is the winning combination of the ILO. However, we must consider the likelihood of states to agree to such a plan. A solution is only as good as its feasibility. We thus believe that the mixed body we have proposed in this essay is the most feasible for the moment, and that we may be able to convince states to adopt either a gradual or a temporary application of this solution.

A perfect human rights system may always be out of our reach, but it does not mean we should not strive for it. Human beings have been perfecting their lives, their technologies, their relations for as long as they have existed, and it seems impossible that they should stop perfecting something so important, so fundamental to the definition of decent human life as are basic human rights.
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