

Democracy at the UN Human Rights Council? Yeah Right!

Introduction

The symbiotic relationship between human rights and democracy is highly debated in academic literature;¹ what comes first, democracy or human rights? However, the problem with using this democratic lens to view a body such as the Council is that democracy does not tessellate completely into the International Organisation level because of international politics and relations between states;² can there be democracy at the United Nations Human Rights Council? Designed to be democratic, the Human Rights Council mandate encompasses theories and principles of democracy. However, it can be seen that the democratic processes provided for in the Council mandate act as a gloss, giving democratic credibility to an organisation that in practice undermines democracy. In fact the extent of the manipulation by states of the democratic principle means that at present there is very little democratic decision-making taking place at the Council. The democratic lens teaches us that a human rights body should be democratic to give legitimacy to rights.³ The question to be asked is how the Council can be adapted to guarantee democracy. It will be shown that making slight changes to the role of the President or state contributions at sessions will not suffice, not least because there are states at the Council who do not practice democracy domestically. Imposing criteria for membership is far too controversial and would leave the Council open to ridicule. One radical suggestion would be to adopt the suggestions made at the time of the

¹ Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (Oxford: OUP, 2005), 66

² For arguments on whether democracy can ever be international see, Christoph Görg & Joachim Hirsch, 'Is international democracy possible?' (1998) 5(4) *Review of International Political Economy* 585-615; D. Held, *Democracy and the Global Order: From Modern State to Cosmopolitan Governance*, (Stanford: Stanford University Press, 2005); Gillian Brock, 'Global Governance: Some concerns about authentic democracy addressed' (2011) *Onati Socio-legal Series* 1-17; Cristina Lafont, 'Can democracy go global?' (2010) 3(1) *Ethics & Global Politics* 13-19; James Bohman, 'Introducing Democracy across Borders: from demos to demoi' (2010) 3(1) *Ethics & Global Politics* 1-11.

³ S. Besson, 'Human rights and democracy in a global context: decoupling and recoupling' (2011) 4(1) *Ethics & Global Politics* 19-50.

creation of the Council and have a Council of Independent Experts rather than state representatives.⁴ Certainly in its present state the Council is not truly democratic, but with state representatives as its membership it is doubted whether it could achieve democratic decision-making.

The period in the wake of the Arab Spring is an interesting time to consider democracy at the Human Rights Council because of the changes to state practice and the tactics used by political blocs. On the whole there was a diminution in the political bloc tactics used owing to the political turmoil members of the OIC states faced domestically, but also the impact on international relations as a whole. Although these particular changes can be seen to enhance democratic decision-making to some extent, the return to strength of the political blocs in more recent sessions shows the dominance of politicisation over genuine democracy.

(1) Democracy

Before any assessment of the challenges facing the implementation of human rights and democracy can be made, there should be some idea of what it is commentators are looking for when they ask for democracy. There is no single definition of democracy,⁵ in fact it can be considered as a principle, a system of processes and procedures, or both.⁶ Spanning such things as electoral procedures⁷ to protection of minority views,⁸ perhaps Beetham does capture the essence of 'democracy' in 'popular control' and 'political equality'.⁹ Certainly

⁴ See, T. G. Weiss, *What's Wrong with the United Nations and How to Fix It*, (Cambridge: Polity Press, 2008), 146-147 and P. Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council' (2006) 7 *Melbourne Journal of International Law* 185-224, 198.

⁵ G. Orwell, 'Politics and the English Language' (1946) in *Why I Write* (London: Penguin, 2004) 109.

⁶ S Marks and A Clapham, (n 1) 63.

⁷ *Ibid*, 62.

⁸ *Ibid*, 66.

⁹ D. Beetham, *Democracy and Human Rights* (Cambridge: Polity Press, 1999) 4-5.

this is arguably what makes democracy so attractive on the international stage, as geographic representation is a response to the Western imperialism imposition of values.¹⁰

However, the different notions of democracy are not only problematic when it comes to assessing whether a state meets a democratic standard¹¹ but it is also difficult to know which parts, strands, kinds of democracy should be woven into the structure of the Human Rights Council. There are different theories of democracy and some become particularly problematic if transported to the international level. One such theory of democracy is Meiklejohn's 'common good' theory.¹² In which he argues that processes are designed with a common good in mind. This notion is highly problematic at the Human Rights Council firstly because of the connotations of the Western imposition of values and secondly the connected underlying tension between advocates of universal rights, post-colonialists and cultural relativists.¹³ This and other principle based notions of democracy, such as liberal democracy which James Bohman suggests is the only viable alternative,¹⁴ are hard to transport into the international level where principles and values are different, and shaped by different cultures.

Marks and Clapham suggest that as long as the principles of 'popular control' and 'political equality' are understood the different manifestations of democracy are irrelevant.¹⁵ At the international level constituent instruments are heavily debated, including every procedure,

¹⁰ L. Rahmani-Ocora, 'Giving the Emperor Real Clothes: The UN Human Rights Council' (2006) 12(1) *Global Governance*, 15-20, 17 observes that proportionate geographic representation would stop any one region from dominating proceedings.

¹¹ Orwell, (n 5) states that all states claim to be a democracy which means that it is difficult to ascertain what a democracy looks like.

¹² Alexander Meiklejohn, *Free Speech and its relation to self-government* (New York: Harper Brothers Publishers, 1948) 14-15 cited in Martin H Redish and Abby Marie Mollen, 'Understanding Post's and Meiklejohn's mistakes: the Critical role of adversary democracy in the theory of free expression' (2009) 103(3) *Northwestern University Law Review* 1303-1370, 1351.

¹³ Howard Tolley, *The UN Commission on Human Rights* (Westview Press, 1987) 154, described Commission efforts at institutional developments as "largely futile" due to "irreconcilable differences between the blocs about both means and ends".

¹⁴ James Bohman, 'Introducing Democracy across Borders: from demos to demoi' (2010) 3(1) *Ethics & Global Politics* 1-11, 1.

¹⁵ S Marks and A Clapham, (n 1) 63.

process and rule. To marginalise the particular processes adopted by a body as irrelevant as long as they achieve the underlying principles is to ignore the importance of these different processes to different states.¹⁶ The preparatory work of GA Resolution 60/251 creating the Council shows that negotiations on democracy were very much centred on the processes of democratic decision-making, and in particular on discussion.¹⁷ Of course separating process and principle is an artificial distinction to draw, and in fact even if the Council had processes in place it would, surely, need to be aiming for an overall democratic vision such as ‘popular control’ and ‘political equality’.¹⁸ The Council’s mandate may look like it has the scaffolding in place to achieve ‘democracy’, but in fact these processes act as a gloss to disguise the undemocratic practice at the sessions.

There are theories that relate to the processes of democracy, such as Post’s participation theory of the ‘individual’s ability to participate in public discourse’,¹⁹ and discursive politics²⁰ or adversarial democracy²¹. For Redish and Mollen democracy is established through the conflicting opinions, values and statements of participants, they call this ‘adversarial democracy’,²² and Sunstein argues that ‘discussion and deliberation depend for

¹⁶ For example, the preparatory work shows a divergence of views on the place of NGOs at the Council. See in particular the view of Bolivarian Republic of Venezuela, UNGA Res A/60/PV.72, 72nd plenary meeting, 15 March 2006, available online: http://www.un.org/ga/search/view_doc.asp?symbol=A/60/PV.72 [last accessed 23rd Feb 2013].

¹⁷ UNGA Res A/60/PV.72, 72nd plenary meeting, 15 March 2006. See summary, ‘Acknowledging the mistrust and tensions that were so evident in today’s world, the language of the draft also sent a strong a uniting message on the need for dialogue and understanding among civilizations, ...’, Department of Public Information, News and Media Division, ‘Summaries of Statements made this morning to the General Assembly Plenary Meeting on the Human Rights Council’, 15 March 2005, available at: <http://www.un.org/News/Press/docs/2005/ga10449.doc.htm> [last accessed 23rd Feb 2013].

¹⁸ Smart and Clapham, (n 1) 63, argue that it is only by having a principle that we can understand where the processes are heading.

¹⁹ Robert C Post, ‘Equality and Autonomy in First Amendment Jurisprudence’, (1997) MICH L Rev 95, 1517-1559, 1524 cited in Martin H Redish and Abby Marie Mollen, (n 14) 1308.

²⁰ Cass Sunstein, ‘Beyond the Republican Revival’ (1988) 97(8) *The Yale Law Journal* 1539-1590, 1575.

²¹ Jane Mansbridge, *Beyond Adversary Democracy*, (Chicago: University of Chicago Press, 1980).

²² Martin H Redish and Abby Marie Mollen, ‘Understanding Post’s and Meiklejohn’s mistakes: the Critical role of adversary democracy in the theory of free expression’(2009) 103(3) *Northwestern University Law Review*, 1303-1370, 1306.

their legitimacy and efficacy on the existence of conflicting views'.²³ However, as the discussion on state practice will illuminate, these theories are not made for an International Organisation where politicisation reigns. These processes, even basic participation, are not currently being implemented correctly at the Human Rights Council. The question is whether or not they ever can be. To ascertain whether this is possible the mandate and state practice need to be examined.

(2) The United Nations Human Rights Council

The United Nations Human Rights Council was created by UN General Assembly Resolution 60/251.²⁴ There are numerous provisions within this resolution and the Institution Building Package²⁵ that allow for democracy and democratic decision-making.²⁶ Designed with democracy in mind, the Council is premised on the idea of a 'forum for dialogue'.²⁷ On paper this forum is democratic, with elections²⁸, provision for removal of states with records of human rights abuses,²⁹ and allowing for NGO participation³⁰. No institution is perfect and there are slight problems with the number of NGOs that are allowed to participate being

²³ Sunstein, (n 20) 1575.

²⁴ GA Res. 60/251, 'Human Rights Council', 15 March 2006, UN Doc. A/RES/60/251.

²⁵ HRC Res 5/1, 'Institution Building of the United Nations Human Rights Council', 18 June 2007, UN Doc. A/HRC/RES/5/1.

²⁶ Other examples include; Institution Building Package, Part VI, para. 110 on Working Methods, 'The methods of work, pursuant to General Assembly resolution 60/251 should be transparent, impartial, equitable, fair, pragmatic; lead to clarity, predictability, and inclusiveness'; Institution Building Package, Rule 16 states that meetings should be public.

²⁷ GA Res 60/251, para. 5 'Decides that the Council shall (b) Serve as a forum for dialogue on thematic issues on all human rights'.

²⁸ GA Res 60/251, para. 7 'Council shall consist of forty-seven Member States, which shall be elected directly and individually by secret ballot by the majority of the members of the General Assembly; the membership shall be based on equitable geographical distribution, and seats shall be distributed as follows among regional groups:...

²⁹ GA Res 60/251, para. 8 'the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights.' The only state to be removed, by this procedure, is Libya. Their membership was suspended between 1st March 2011²⁹ and in October 2011.

³⁰ Institution Building Package, rule 7(a) provides for the participation of and consultation with observers, including NGOs, subject to the General Assembly rules.

limited due to time constraints.³¹ On the whole the forum nature of the Council is, at least in principle, a good model for the important information exchange function of the Council.³²

However, it is this forum that is the Achilles' heel of the Council. Firstly, discussion within the forum is not regulated. The Council is to *serve* as a forum for dialogue and although there is a President of the Council it is not their role to intervene during states representatives' statements. States can make wholly irrelevant statements.³³ One of the most controversial examples of irrelevant statements is found in the 4th Special Session on the Situation in Darfur on 12th December 2006 when Palestine draw attention to Israel.³⁴ Secondly, the very membership of the Council undermines its democratic potential. It has been noted that size undermines the ability to be democratic because where there are a larger number of participants there is a shift from genuine discussion to evocative rhetoric.³⁵ The webcasts available online document the alignments made by political bloc states and the repeated impassioned statements that are used to subvert the discussion process and divert attention away from other human rights abuses.

³¹ Rosa Freedman, *The United Nations Human Rights Council: An early assessment*, (Routledge, 2013) (forthcoming).

³² J. Goldstein, & R.O. Keohane, (eds.) *Ideas and Foreign Policy: Beliefs, Institutions and Political Change* (Ithaca, N. Y: Cornell University Press, 1993) 3-30.

³³ For example, 4th Special Session on the Situation in Darfur, 12th December 2006, Palestine draw attention to Israel; 6th Council Session, Monday, September 24, 2007, General Debate on the Resolution on Sudan, Algeria said the situation in Palestine requires specific attention by the council; 9th Council Session, 19th September, Agenda Item 9, Syria makes a comment about the occupation of Palestine; 19th Council Session, 28th February 2012, Urgent Debate on Syria, the OIC Secretary-General drew attention to the situation in Palestine. See, Human Rights Council, 'News and Media', available at: <http://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsMedia.aspx> [last accessed 23rd Feb 2013].

³⁴ International Service for Human Rights, 'Council Monitor: Human Rights Council 4th Special Session', 12-13 December 2006, available at: http://olddoc.ishr.ch/hrm/council/other/cmreports/specialsessions/Fourth_Special_Session.pdf [last accessed 23rd Feb 2013]

³⁵ R. Goodin, 'Democratic deliberation within' (2000) 29 *Philosophy and Public Affairs* 81-109, 83 cited in John Parkinson 'Legitimacy Problems in Deliberative Democracy' (2003) 51 *Political Studies* 180-196, 181.

In addition to its size, the ‘Council’s composure [of member states] contributes to its politicisation’ and consequently poses a challenge to democratic decision-making.³⁶ As paragraph 7 of the mandate shows state membership of the Council should be based on ‘equitable geographical distribution’ and resultantly the African Group have 13 seats, East European group 6 seats, GRULAC has 8 seats, Asia 13 seats and Western Europe have 7 seats.³⁷ As an inter-governmental organisation politicisation is not surprising.³⁸ However, regionalism – a strand of politicisation – where states group together in blocs to advance their own agendas is rife at the Council.³⁹ Owing to the sovereign equality between states at international level, smaller and/or developing states group together to create strong blocs.⁴⁰ One such bloc is the OIC, others includes the African Group, the Arab Group, NAM and G-77. Politicisation and regionalism are manifested at the Council through the tactics utilised by these political blocs to manipulate and dominate Council proceedings.⁴¹ Examples of the tactics most prevalent at the Council are alignments with the political bloc, repeat statements and bloc voting.

(3) Politicisation and Bloc Tactics

A discussion on the political tactics employed by states shows how the political blocs manipulate the democratic procedures within the Council mandate to achieve their own political agendas. The period in the wake of the Arab Spring does show some changes in bloc tactics, with a suggestion of an enhancement of democratic decision-making. However, the

³⁶ Rosa Freedman, 'The United Nations Human Rights Council: More of the same?', *Wisconsin International Law Journal* (forthcoming, 2013).

³⁷ GA Res 60/251 (n 24).

³⁸ G. Oberleitner, *Global Human Rights Institutions*, (Cambridge: Polity Press, 2007) 47.

³⁹ Freedman, (n 31).

⁴⁰ T.G. Weiss, *What's Wrong with the United Nations and How to Fix It*, (Cambridge: Polity Press, 2008) 61.

⁴¹ G.M. Lyons, D.A. Baldwin, & D.W. McNemar, 'The "Politicization" Issue in the UN Specialized Agencies' (1977) 32(4) *Proceedings of the Academy of Political Science* 81-92, 81-82.

blocs regain their strength and in fact the assessment of political tactics shows that the democratic 'forum' nature of the Council can be easily manipulated by tactics so as to undermine genuine democratic decision-making; democracy could work at the Council, but that politicisation hampers its ability to adequately protect human rights.

a) Repeat Statements

Repeat statements not only waste time, but create an illusion of support and have the ability to skew perceptions of a situation.⁴² The weakness of the institution of the Council is that it allows for these repeated statements as there is not a true regulator to halt repeated and irrelevant statements and discussions. Bloc statements such as the ones made by the EU⁴³ not only hinder the negotiation and compromise process with the other states,⁴⁴ they also undermine the democratic process, as Sunstein's theory on competing statements shows, it is through different statements that democracy could be achieved. The effect can be seen on the response to human rights abuses in Darfur, the EU's neutrality meant that very little was done.⁴⁵ The EU member states often make individual statements that transgress from the common statement of the bloc.⁴⁶ It has been suggested that one of the ways in which the

⁴² For example, In March 2007 when the Human Rights Council was discussing the situation of human rights abuses in Darfur, the African Group supported Sudan, in particular Tunisia commended Sudan for its cooperation. See further, Freedman, (n 31).

⁴³ The Treaty of Lisbon requires EU Member States to seek and advance common foreign policies. Article 34(1) TEU, 'shall coordinate their action in international organisations and [...] shall uphold the common positions in such forums. European Union, 'Consolidation Version of the Treaty on European Union', reproduced 30 March 2012, 2010/C83/01. Title V.

⁴⁴ U. Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal*, (Cambridge: Cambridge University Press, 2008) cited in Freedman, (n 31).

⁴⁵ Freedman, (n 31).

⁴⁶ Human Rights Council, News Archive, 'Human Rights Council holds interactive dialogues on situation of human rights in Sudan and Belarus' 20th September 2011, available online: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11401&LangID=E> [last accessed 23rd Feb 2013]. The Netherlands asserted that the situation amounted to crimes against humanity, whereas France merely called on Sudan to implement the recommendations.

Council could be improve would be to introduce a procedural rule that states can only make statements that do not repeat the position of their political bloc.⁴⁷

If competing statements are the basis for democratic decision-making then practice prior to the Arab Spring of repeat statements by members of political blocs show that democratic discussion was undermined. However, looking at the practice of OIC member states in the wake of the Arab Spring there is a decrease in the number of repeat statements. On the 5th March 2012 at the General Debate on reports by Secretary General and High Commissioner for Human Rights the statements of the Arab States are not repeated.⁴⁸ Libya talks of environmental protection, Egypt talks of the report on sexual orientation, and Tunisia talks about the right to development. Although these statements are not ‘competing’ the different rights debated show that there is some discussion, and not just the presentation of a political bloc’s statement. In this period there is a lack of coherence within the OIC and the weakened position of the blocs during this period frees up the discussions between the bloc members and also between other states within the Council, allowing more democratic decision-making and as the number of resolutions on Syria show,⁴⁹ allowing for increased protection of rights. However this slight improvement in democratic decision-making was not prevalent throughout the Council’s agenda. Members of the OIC and Arab Group did not change their tactics in relation to Israel, their common position was manifested in the repeated

⁴⁷ Freedman, (n 31).

⁴⁸ Human Rights Council, News Archive, ‘Human Rights Council holds general debate on reports by Secretary-General and High Commissioner for Human Rights’, 5th March 2012, available online at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11904&LangID=E> [last accessed 23rd Feb 2013]

⁴⁹ HRC 19/1, ‘The escalating grave human rights violations and deteriorating humanitarian situation in the Syrian Arab Republic’, 10 April 2012, UN Doc. A/HRC/RES/19/1; HRC Res 19/22, ‘Situation of human rights in the Syrian Arab Republic’, 10 April 2012, UN Doc. A/HRC/RES/19/22; HRC Res 20/22, ‘Situation of human rights in the Syrian Arab Republic’, 16 July 2012, UN Doc. A/HRC/RES/20/22; HRC 21/26, ‘Situation of human rights in the Syrian Arab Republic’ 17 October 2012, UN Doc. A/HRC/RES/21/26 and HRC Res S-16/1, ‘Situation of human rights in the Syrian Arab Republic’, 29 April 2011, UN Doc. A/HRC/RES/S-16/1; HRC Res S-17/2, ‘Situation of human rights in the Syrian Arab Republic’, 22 August 2011, UN Doc. A/HRC/RES/S-17/2; HRC Res S-18/1, ‘Human rights situation in the Syrian Arab Republic’, 2 December 2011, UN Doc. A/HRC/RES/S-18/1; HRC Res S-19/1, ‘The deteriorating human rights situation in the Syrian Arab Republic and the recent killings in El-Houleh’, 1 June 2012, UN Doc. A/HRC/RES/S-19/1.

alignments,⁵⁰ and similarly their common stance on sexual orientation rights was displayed at the Panel in March 2012. This shows that where politicisation is most systemic democracy fails to protect rights.

As an inter-governmental organisation the Council serves as a platform for a number of different functions,⁵¹ one of these will encompass fostering of international relations.⁵² On the 19th September 2011 the Council held an Interactive Dialogue with Commission of Inquiry on Libya where the states from the Arab Group, but also Japan and France repeatedly welcomed and congratulated the NTC in Libya.⁵³ The 'dialogue' is reduced to a welcome, any purposeful discussion on human rights abuses is sidestepped in favour of the international relations and political exercise. The unregulated forum nature of the Council permits this exercise, and in certain circumstances it is welcomed. However, the mandate's purpose is clearly protection and promotion of human rights.⁵⁴ It seems, therefore, that the mandate ignored the reality of an inter-governmental organisation where international relations are paramount, and forgot the other purposes of international forums. Exercises in international relations can be destructive to dialogue, hampering real discussion on rights abuses, and yet the mandate does not have provision to regulate such digressions.

⁵⁰ 17th Council Session, 14th June 2011, Human Rights Council holds general debate on Human Rights situation in Palestine and Other Occupied Arab Territories, Algeria aligned with the groups that they belong to; 18th Council Session, 26th September 2011, Human Rights Council holds general debate on human rights situation in Palestine and other Occupied Arab Territories; 19th Council Session, 2nd March 2012, Interactive dialogue with High Commissioner for Human Rights, Algeria supported the statements of the groups it belongs to when it spoke of the Israeli occupation; 19th Council Session, 19th March 2012, Human Rights situation in Palestine in Occupied Arab Territories, Algeria supported African Group, Islamic Group, NAM and Arab Group; 20th Council Session, 2nd July 2012, Debate on situation in Palestine and other Occupied Arab Territories, Algeria supports Arab Group and NAM; 21st Council Session, 24th September 2012, Debate on situation in Palestine and other Occupied Arab Territories, Algeria supports groups which they are members of.

⁵¹ P F Diehl, & C Du, *The Dynamics of International Law* (Cambridge University Press, 2010) cited in Freedman, (n 31).

⁵² J M McCormick & Y W Kihl, 'Intergovernmental organizations and foreign policy behaviour: some empirical findings', *American Political Science Review* 73(2) (1979) 494-504, 502.

⁵³ Human Rights Council, News Archive, 'Human Rights Council holds interactive dialogue with Commission of Inquiry on Libya', 19th September 2011, available online at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11394&LangID=E> [last accessed 23rd Feb 2013].

⁵⁴ GA Res 60/251, para. 4.

b) Bloc Voting

There is also use of bloc voting by political groups. Operating on a system of majority voting, the mandate allocates one vote per state, in an attempt to balance democracy and state equality. There is debate between Meiklejohn and Post as to the relative importance of voting within a democracy. For Meiklejohn, the freedom of speech and democratic processes are all geared towards ‘the collective “voting of wise decisions”’.⁵⁵ However, Post argues that the vote is ‘merely a mechanism for decision making’.⁵⁶ Redish and Mollen show that discursive politics and the vote cannot be mutually exclusive, for ‘if public discourse is to have any meaningful effect there must exist some mechanism by which the government may be required to internalize the public will that emerges from public discourse’.⁵⁷ In other words, there is no democratic decision-making if no decision or resolution is reached through a vote. This is highly troublesome, not only because the Council fail to agree on resolutions, but also because those resolutions that are adopted are often manipulated by State tactics to such an extent that they cannot be considered democratic.⁵⁸

By allocating one vote per state the mandate ignores the political bloc arrangements at the Council.⁵⁹ In order to assert their political agendas blocs will vote as a group. The systemic bloc voting at the Council shows that true democracy is being undermined. Early resolutions on Israel show bloc voting on the part of the OIC and Arab group.⁶⁰ During the months

⁵⁵ Meiklejohn, (n 14) 14-15.

⁵⁶ Post, (n 19).

⁵⁷ Redish and Mollen, (n 22) 1324.

⁵⁸ Moreover these negotiations often happen at informal meetings which are not public, see further Freedman, (n 31).

⁵⁹ Freedman, (n 31).

⁶⁰ See for example, HRC Res 16/17, ‘Human Rights in the occupied Syrian Golan’ 13 April 2011, UN Doc. A/HRC/RES/16/17.

surrounding the Arab Spring OIC state practice shows a decrease in bloc voting. There is a slight trend that can be highlighted in relation to voting on resolutions concerning other OIC members. Where the resolutions were on Sudan the states would vote against.⁶¹ By March 2011 and the resolution on Iran the states abstained, because of the political upheaval and the weakened bloc coherence.⁶² In April 2012 and the resolutions on Syria⁶³ and Iran⁶⁴ the states were voting for or abstaining. The change in voting records shows that there was, at least for a while, an increase in democratic voting. However, once the political blocs regenerate there is nothing within the mandate to prevent such bloc voting taking place and disrupting democratic decision-making.

c) Participation

The Council is designed for participation by state representatives. Theories on democracy show the importance of encouraging participation.⁶⁵ However, state practice at the Council has even challenged the very notion of participation, showing that potentially democracy at international level is not conducive to the achievement of protecting human rights. In March 2012, in accordance with Resolution 17/19 the member states convened for the first Panel on Sexual Orientation.⁶⁶ The OIC staged a mass walk-out of the Panel. With the OIC political bloc gone, the other states held a discourse which spanned from the definition of sexual orientation, to the abuses that were taking place worldwide. The decision was made to

⁶¹ HRC Res 15/27, 'Situation of human rights in the Sudan' 1 October 2010, UN Doc. A/HRC/RES/15/27.

⁶² HRC Res 16/9, 'Situation of human rights in the Islamic Republic of Iran' 24 March 2011, UN Doc. A/HRC/RES/16/9.

⁶³ HRC 19/1, 'The escalating grave human rights violations and deteriorating humanitarian situation in the Syrian Arab Republic', 10 April 2012, UN Doc. A/HRC/RES/19/1; HRC Res 19/22, 'Situation of human rights in the Syrian Arab Republic', 10 April 2012, UN Doc. A/HRC/RES/19/22.

⁶⁴ HRC 19/12, 'Situation of human rights in the Islamic Republic of Iran', 3 April 2012, UN Doc. A/HRC/RES/19/12.

⁶⁵ See, Post, (n 19); Joshua Cohen, 'Deliberation and Democracy Legitimacy' in Alan P. Hamlin, Philip Pettit, (eds.) *The Good Polity: Normative Analysis of the State*, (New York: Basil Blackwell, 1989) 17-34.

⁶⁶ HRC, Res 17/19, 'Human rights, sexual orientation and gender identity' 14 July 2011, UN Doc. A / HRC / RES/ 17/19.

continue to find ways of promoting and protecting sexual orientation rights. Although the objections from Mauritania on behalf of the Arab Group and Senegal on behalf of the African Group constitute the ‘conflict’ required by Redish and Mollen’s adversary democracy,⁶⁷ without the OIC states taking part in the discussion the Council faces accusations of undemocratic decision-making.

Of course this depends on what is meant by participation. Can non-participation ever be democratic? A state’s voluntary decision to absent themselves from the panel discussion is of itself a form of interaction and in the case of the sexual orientation panel an expression of cultural differences. Cohen’s formulation of democracy states; ‘outcomes are democratically legitimate if and only if they *could* be the object of a free and reasoned agreement among equals’ (emphasis added).⁶⁸ The Human Rights Council provided the opportunity for participation and arguably it is still legitimate. The positive outcomes of the panel discussions mean that it is troubling to have to find the process undemocratic.

However, the original meaning of ‘dialogue’ is a verbal interaction, active discussion and conversation. This must be read in light of paragraph 5 of the mandate and the ‘*chamber of peer review*’ (emphasis added) envisaged by Kofi Annan prior to the creation of the Council,⁶⁹ suggesting active discussion by states. It cannot be that the mandate on the Council considered that dialogue could be achieved by omission and therefore could be achieved without credible democratic decision-making. The example highlights that states cannot be

⁶⁷ Human Rights Council, Webcast, ‘Adoption of Resolution 17/19’, 17th Council Session, 17th June 2011, available online: <http://www.un.org/webcast/unhrc/archive.asp?go=110617> [last accessed 23rd Feb 2013].

⁶⁸ John S. Dryzek, ‘Legitimacy and Economy in Deliberative Democracy’ (2001) 29 *Political Theory* 651-669, 651 citing Joshua Cohen, ‘Deliberation and Democracy Legitimacy’ in Alan P. Hamlin, Philip Pettit, (eds.) *The Good Polity: Normative Analysis of the State*, (New York: Basil Blackwell, 1989) 17-34, 22.

⁶⁹ Kofi Annan stated that the Council should have an explicitly defined function as a chamber of peer review. In April 2005 speech to the Commission. Kofi Annan, ‘Addendum’, May 2005, A/59/2005/Add.1, ‘In Larger Freedom’ March 2005, A/59/2005, cited in James. H. Lebovic and Erik Voeten, ‘The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNHCR’ (2006) 50 *International Studies Quarterly* 861-888, 862.

forced to participate in a liberal democratic body. Some would argue that states should not be forced to be democratic,⁷⁰ but pragmatically this shows that the Human Rights Council has no way of forcing participation to achieve even the basics of democratic decision making. Furthermore this highlights the futility of democracy to protect human rights at an international level.

(4) Solutions

One solution would be to enhance the role of the President of the Council so that discussions can be regulated. Currently the role of the President is detailed in the Institution Building Package,⁷¹ they can open discussions but there are no provisions for regulating what is said by states. In theory there is nothing undemocratic about a regulator. In fact at the Sixth Session of the Working Group of the Universal Periodic Review the Chair reminded states that only discussions on human rights were appropriate.⁷² Meiklejohn's theory 'does not preclude the imposition of procedural regulations on the agenda or form of public discussions to ensure the quality of the public debate and to facilitate the voting of wise decisions'.⁷³ The problem with Meiklejohn's theory is that certain speech will be suppressed; it 'may censor the "boor" or the "public nuisance"'.⁷⁴ There is an uncertain divide, which states would be open to manipulate, between challenging speech on the grounds of irrelevancy and challenging grounds 'simply because he [the president] disagrees with the idea it conveys'.⁷⁵ Given that the states already use the language of 'universality' to attack the legitimacy of the

⁷⁰ For the views of cultural relativists, post-colonialists and Third Country theorists see, M-B. Dembour, 'Critiques', in D. Moeckli, S. Shah & S. Sivakumaran, *International Human Rights Law* (Oxford: Oxford University Press, 2010) 72-85.

⁷¹ HRC Res 5/1, 'Institution Building of the United Nations Human Rights Council', (n 25) Rules 9-13; Rule 19 'Quorum'.

⁷² HRC Res 13/7, 'Report of the Working Group on the Universal Periodic Review, Cyprus', 4 January 2010, UN Doc. A/HRC/13/7, see Freedman, (n 31).

⁷³ Redish and Mollen, (n 22) 1312.

⁷⁴ Meiklejohn, (n 14) 22-25 cited in Redish and Mollen, (n 22) 1312.

⁷⁵ Redish and Mollen, (n 22) 1312.

Council,⁷⁶ these states could also use the potential suppression of statements to challenge the Council's legitimacy. Similarly, any rules brought in to manage discussion,⁷⁷ such as states can only speak if they are going to say something different to the bloc statement, will hamper participation and make the Council vulnerable to accusations of selectivity.

Another solution that was debated at the time of the creation of the Council was introducing membership criteria for States.⁷⁸ The US proposed that only 'real democracies' should be given membership to the Council.⁷⁹ However, asking states to be democratic is highly controversial. Alston argues that such a membership criterion would leave a council that was made up of only liberal Western states.⁸⁰ Alston also argues that it would be counter-productive to impose this criterion as it would put some countries outside the reach of the Council, which is highly undesirable.⁸¹ Commentators have accepted the problem with requiring states to *be* democracies before gaining membership to the Human Rights Council. However, it has not been acknowledged that there is a similar problem in practice of asking autocratic and non-democratic states to act democratically when they participate in council sessions.

⁷⁶ At the Panel on Sexual Orientation and Gender Identity, Algeria 'reiterating the 'universality, indivisibility, and interdependence' of human rights', [...] stressed the importance of taking regional difference and traditional values into account', which are reiterated in the Preamble to Resolution 60/251. ISHR, 'Ground-breaking statement on sexual orientation and gender identity by record number of 85 states', 24 March 2011, available at: <http://www.ishr.ch/council/376-council/1033-ground-breaking-statement-on-sexual-orientation-and-gender-identity-by-record-number-of-85-states> [last accessed 23rd Feb 2013].

⁷⁷ Freedman, (n 31).

⁷⁸ Philip Alston, 'Promoting the Accountability of Members of the New UN Human Rights Council' (2005) 15 *Journal of Transnational Law and Policy* 49, 57.

⁷⁹ Ambassador Richard Williams, US Representative to the United Nations for Special Political Affairs, US Government Delegation to the 60th Commission on Human Rights, discussion on 'Item 4: Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights (2004)'.

⁸⁰ Alston, (n 78).

⁸¹ *Ibid.*

A much more radical solution would be to replace state representatives with independent experts.⁸² This would, in part, lead to the divorce of human rights and democracy at the Council. Such a divorce is not attractive, in theory.⁸³ However, as has been shown what may work for the protection for human rights at a domestic level does not work at international level. Brock argues that as long as there is a means to secure legitimacy, it is irrelevant whether or not this is democracy that is used to secure this.⁸⁴ One of the ways of achieving legitimacy would be objectivity in decision-making, and a Council of Independent Experts would be legitimate. Perhaps independent experts are the only way to *implement* human rights protection. For the Council of state representatives does, most of the time, work successfully as a talking shop. However, when issues are dominated by politicisation even the real exchange of ideas breaks down. Though free from politicisation, a Council of Independent Experts would face its own implementation problems as states will challenge the legitimacy, because it is not representative.⁸⁵ States seek in that sense representation, participation and democracy and yet this is not practiced at the Human Rights Council. States will behave as states; they cannot be forced to participate and yet they will be unwilling to accept values and principles generated by a Council of Independent Experts. It was perhaps too optimistic to assume that a solution that would inject true democracy into the Human Rights Council could be drafted in a single paper, but what these insufficient or principally problematic proposed solutions show is the need for radical change at the Council. The Council's mandate, it has been shown, fails to address the relations between states at international level. Either it is accepted that States will utilise the Council as a forum or

⁸² See, Weiss, (n 4) 146-147 and Alston, (n 4) 198.

⁸³ Because of the symbiotic relationship and because, as Besson (n 3) notes, democracy gives legitimacy to rights.

⁸⁴, 'Global Governance: Some concerns about authentic democracy addressed' (2011) 1(5) *Onati Socio-legal Series* 1-17, 13.

⁸⁵ Syria challenged the decision when they were not present, see, Human Rights Monitor Quarterly, 'Human Rights Council; Renewed challenges to independent voices amidst progress on country and thematic issues', Issue 3/2012, 4.

talking shop⁸⁶ which can at times be useful for information exchange but not for implementation of protection, or it has to be conceded that at present democracy is not the most effective model for the protection of human rights at an international level.

Conclusion

Convinced that democracy and human rights are intrinsically connected, each protecting the other, the Human Rights Council was designed to be democratic. However, the forum and voting procedures act as a gloss only, disguising the undemocratic practices that take place in reality. In fact it is the very processes, that are designed to be democratic (using tried and tested domestic methods), that allow for manipulation by states. Changes to state practice in the wake of the Arab Spring suggest that there is some potential for democracy to protect human rights at the Council. However, as politicisation is systemic at the Council unless changes are made to the framework states are not restricted from manipulating the democratic processes. Suggestions for change prove futile and problematic in principle. A radical overhaul of the Council structure is required and perhaps it may even require the re-conceptualisation of what democracy is at the international level.⁸⁷ Having a Council of Independent Experts is one radical way to do that. If in fact a less democratic organisation would be more effective this shows the futility of democracy when it comes to protecting human rights at an international level.

⁸⁶ For the realist perspective on international organisations see, H J Morgenthau, *Politics Among Nations* (Alfred A. Knopf, 1960). For a suggestion that politics and international relations cannot be ignored see, J P Humphrey, *Human Rights and the United Nations: A Great Adventure* (Transnational Publishers Inc, 1984).

⁸⁷ See, Christoph Görg & Joachim Hirsch, 'Is international democracy possible?' (1998) 5(4) *Review of International Political Economy* 585-615; D. Held, *Democracy and the Global Order: From Modern State to Cosmopolitan Governance*, (Stanford: Stanford University Press, 2005); Gillian Brock, 'Global Governance: Some concerns about authentic democracy addressed' (2011) 1(5) *Onati Socio-legal Series* 1-17; Cristina Lafont, 'Can democracy go global?' (2010) 3(1) *Ethics & Global Politics* 13-19; James Bohman, 'Introducing Democracy across Borders: from demos to demoi' (2010) 3(1) *Ethics & Global Politics* 1-11.

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