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STRATEGIES OF AUTHORITARIAN STATES IN THE UN HUMAN RIGHTS SYSTEM

A CLOSER LOOK AT THE
UN HUMAN RIGHTS COUNCIL



Strategies of Authoritarian States in the UN Human Rights System: A Closer Look at the UN Human Rights Council

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List of Abbreviations

CERD	Committee on the Elimination of Racial Discrimination
CHR	Commission on Human Rights
DPRK	Democratic People's Republic of Korea
DRC	Democratic Republic of Congo
ECOSOC	UN Economic and Social Council
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
EU	European Union
HR-Council	UN Human Rights Council
IBP	Institution-Building Package of the HR-Council (18 June 2007)
ICCPR	International Covenant on Civil and Political Rights (16 December 1966)
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965)
ICESCR	International Covenant on Economic, Social and Cultural Rights (16 December 1966)
IE	Independent Expert(s)
LMG	Like-Minded Group
MDGs	Millennium Development Goals (September 2000)
NAM	Non-Aligned Movement
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organisation of the Islamic Conference
OPT	Occupied (Arab) Territories (by Israel)
SDGs	Sustainable Development Goals (September 2015)
SR	Special Rapporteur(s) and Representatives,
SRSR	Special Representative(s) of the UN Secretary General
Status NGOs	Non-governmental organisations in Consultative Status with ECOSOC
UN	Organisation of the United Nations
UN Charter	Charter of the United Nations (25 June 1945)
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UPR	Universal Periodic Review
VDPA	Vienna Declaration and Programme of Action (25 June 1993)
WCHR	World Conference on Human Rights held in Vienna (June 1993)
WEOG	Group of Western European and Other States
WGAD	Working Group on Arbitrary Detention
WGEID	Working Group on Enforced Disappearances

I. INTRODUCTION

After the proclamation of the Universal Declaration of Human Rights (1948), it took years for the Organisation of the United Nations (UN) to elaborate and adopt legal instruments and control mechanisms. This resulted in a global human rights system, still far from perfect, but thanks to which concerns for human rights gradually emerged in international diplomacy. However, this system is currently under pressure from authoritarian States as never before.

This essay focuses on Charter-based bodies and mechanisms, and does not cover the system of 'treaty-monitoring bodies' established by several main human rights treaties. The essay opens with a brief survey on the achievements of the Commission on Human Rights and its Sub-Commission. Part II is devoted to the UN Reform process, which led to the replacement of the Commission by the Human Rights Council (2006), whose major developments are described in Part III. Finally, the strategies of certain hardliner States are discussed in Part IV, before a number of recommendations are offered in the concluding remarks.

II. THE CREATION OF THE UN HUMAN RIGHTS SYSTEM

1. The UN Charter

At the end of World War II, the priority of the Allied Powers was to maintain international peace and security in order to avoid the recurrence of such a disaster. Consequently, at the Conference of San Francisco, delegates from 50 nations focused on a security system with effective collective measures for the prevention and elimination of threats to peace. They decided that the UN would be based on the principles of prohibition of war and aggression, States' sovereignty and territorial integrity, non-interference, and international cooperation, and that the founding treaty, the UN Charter, would prevail over other international agreements, such as those founding global specialized institutions and regional inter-governmental organisations.¹

Hence, the original context was far from conducive to building a global human rights system. Yet, the Charter also included in the objectives of the UN the 'cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion'.² Chapter IX (on international economic and social cooperation), added that, to create conditions of stability and wellbeing for peaceful and friendly relations amongst nations, the UN would promote: '(...) c. universal respect for, and observance of, human rights (...) for all without distinction as to race, sex, language, or religions'.³ The UN Charter also empowered specific UN bodies to deal with human rights concerns. Besides the main organ of the Organisation, the General Assembly (UNGA), the Economic and Social Council ('ECOSOC') was empowered to 'make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all'⁴, and to 'set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions'.⁵

As the UN later considerably enlarged its membership by welcoming newly independent States, one should recall that the Charter also contained a Declaration regarding Non-Self-Governing Territories (Chapter XI) and an International Trusteeship System (Chapter XII), recognising that 'the interests of the inhabitants of these territories are paramount', and accepting 'as a sacred trust the obligation to promote to the utmost' (...) their wellbeing and: 'to ensure, with due respect of the culture of the

¹ UN Charter signed on 25 June 1945, Article 102 and Article 103.

² Ibid, Article 1,3.

³ Ibid, Article 55.

⁴ Ibid, Article 62, paragraph 2.

⁵ Ibid, Article 68.

peoples concerned, their political, economic, social and educational advancement, their just treatment, and their protection against abuses'.⁶

2. Standard-setting

One of the first organs established by ECOSOC was the Commission on Human Rights (CHR)⁷, which became a driving force behind the slow and gradual building-up of the UN human rights system. With the authorisation of ECOSOC, the Commission created in 1947 its Sub-Commission on Prevention of Discrimination and Protection of Minorities composed of individual experts.⁸

The first major achievement of the Commission laid in the field of standard-setting. At the request of the General Assembly and of ECOSOC, the Commission prepared an international bill of rights, comprised of a declaration, a convention and measures for implementation. It spent most of its first sessions on the drafting process, in which delegations and experts from all regions were actively involved.⁹ In 1948, the Commission finalised a draft Universal Declaration on Human Rights, which the General Assembly adopted on 10 December 1948.

However, establishing multilateral treaties took more time. The Assembly debated the Commission's draft articles and decided to have 'two Covenants on Human Rights'.¹⁰ From 1955 to 1966, its Third Committee examined the Commission's text article by article. Ultimately, on 16 December 1966, the Assembly adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).¹¹

Since the 50s, the Sub-Commission and the Commission undertook many studies on specific issues, and drew up most of the draft human rights minimum rules and principles, declarations, and treaties later adopted by the General Assembly. Their draft declarations covered a broad range of issues, such as: the elimination of religious intolerance, the right to development, the rights of persons belonging to ethnic, religious and linguistic minorities, human rights defenders¹² or indigenous peoples. Their bodies of principles concerned, for instance, the treatment of prisoners and prison conditions. The Sub-Commission and the Commission also contributed to many treaties. Ten human rights conventions have established committees of experts to monitor their implementation. The first convention to create a committee was the 1965 International

⁶ UN Charter, Article 73, letter a.

⁷ The Commission on Human Rights was created in 1946, first in 'nuclear form' by ECOSOC resolution 5 (I) of 16 February 1946, and as a full Commission by ECOSOC resolution 9 (II) of 21 June 1946. The Commission had 53 member States when it was dissolved in 2006.

⁸ Created in 1947, the Sub-Commission was originally composed of 12 experts. It was renamed 'Sub-Commission on the Promotion and Protection of Human Rights' (1999). When it was dissolved in 2006, the Sub-Commission had 26 members.

⁹ See Robin Ramcharan and Bertrand Ramcharan 'Asia and the Drafting of the Universal Declaration of Human Rights', Palgrave MacMillan, Singapore, 2019, 255 pages.

¹⁰ '... one containing civil and political rights, the other economic, social and cultural rights', General Assembly Resolution 543 (VI).

¹¹ General Assembly Resolution 2200 A (XXI).

¹² 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms'.

Convention on the Elimination of All Forms of Racial Discrimination (ICERD).¹³ This standard-setting process, which is still ongoing, as human rights defenders, experts and member States are trying to adapt the standards to emerging issues, has been slow. As an example, 41 years were needed to adopt a treaty on the rights of the child.¹⁴

3. Control mechanisms and procedures

Creating control mechanisms took even longer. Observers, particularly the media, victims or human rights defenders, often forget that the UN is an Intergovernmental Organization, and that most of its organs are composed of States' delegations. However, the role of civil society has been crucial in the development of the UN human rights system. Hence, the Commission and its Sub-Commission developed a system of cooperation with non-governmental organisation (NGOs) in Consultative Status with ECOSOC, and later, with victims, witnesses and human rights defenders.

3.1. The 'no power doctrine'

Not surprisingly, from the outset, States used various arguments and strategies to avoid scrutiny and condemnations. The UN Secretariat was receiving thousands of petitions and complaints. And the Commission's mandate was weak. In 1947, its Sub-Committee on the Handling of Communications found that the Commission had 'no power to take any action in regard to complaints regarding human rights'. This was endorsed in a distressing resolution of the Commission¹⁵, and ECOSOC rapidly concluded that its Commissions on Human Rights and on the Status of Women had 'no power to take any action in regard to any complaint'.¹⁶

This 'no-power' doctrine was the rule in the UN for two decades, until ECOSOC authorised public debates in the Commission and Sub-Commission on 'gross violations and consistent patterns' (1967)¹⁷, and created a confidential procedure for individual complaints 'revealing gross and reliably attested violations' (1970).¹⁸ This was the result of campaigns by NGOs, and initiatives from newly independent countries, who had obtained the creation of a Special Committee on the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. This Committee had invited the Commission 'to consider as a matter of importance and urgency the question of the violations (...) in all countries'.¹⁹ And the Assembly had called on ECOSOC

¹³ Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965. The convention entered into force 4 January 1969.

¹⁴ The Convention on the Rights of the Child was adopted by General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990.

¹⁵ Document E/CN.4/14/rev.2, paragraph 2.

¹⁶ ECOSOC Resolutions 75 (V) and 76 (V).

¹⁷ ECOSOC Resolution 1235 (XLII) of 6 June 1967.

¹⁸ ECOSOC resolution 1503 (XLVIII) of 27 May 1970.

¹⁹ Special Committee Resolution 1102 (XL) of 4 March 1966.

and the Commission to urgently examine how to improve the UN's capacity to end human rights violations wherever they might occur (October 1966).

3.2. The first country procedures

Other driving forces behind the process to take effective action were some international NGOs, the Sub-Commission's experts and the UN Secretariat. With resolutions 1235 and 1503 authorising public and confidential debates on violations, many concrete situations were mentioned in UN bodies. But States were worried about setting-up procedures that could affect them. Hence, the breakthrough came from exceptional cases, which were also initiated by the 'South', even before the end of the 'no power doctrine':

Firstly, in the General Assembly, the delegation of India had raised the situation in South Africa. This led to a Commission of three members 'to study the racial situation in the Union of South Africa' (1952)²⁰, and later to a Special Committee on the Policies of Apartheid (1962). Secondly, Arab States had raised the situation in the Palestinian territories, and a Special Committee was created to 'investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories' (1968). The 1973 military coup in Chile was another exception. In 1975, the Commission created an Ad Hoc Working Group of five of its members to inquire into the state of human rights in Chile.²¹ And then, in March 1979, Equatorial Guinea became the first country examined under the confidential procedure, whereby the Commission ended the confidential examination and appointed a Special Rapporteur to study the human rights situation there.

The mandates on Chile and Equatorial Guinea made a difference. They were not cases of racism (South Africa), decolonisation or foreign occupation (Palestinian territories), but dictatorship, a problem prevailing in other countries. Both mandates were a first effort in the UN to deal with a situation on the spot, with the help of fact-finding and public reporting. Soon after, the Commission adopted several country resolutions: on Afghanistan, Guatemala and Cambodia in 1980; on Bolivia (with Special Envoy) and El Salvador (with Special Representative) in 1981; on Guatemala (Special Rapporteur) in 1982; and on Afghanistan and Iran (Special Rapporteurs) in 1984. The UN Special Procedures for countries had been set up.

3.3. Thematic procedures

A strong resistance from Argentina led to the creation of a first thematic procedure. Since 1976, experts, international NGOs and relatives of victims had denounced in vain the crimes committed by the military in Argentina. As no majority could be found in the

²⁰ General Assembly Resolution 616 A and B (VII) of 5 December 1952.

²¹ Commission on Human Rights, Resolution 8 (XXXI) of 27 February 1975. The Working Group on Chile was requested to report to the Commission, with a progress report to the Assembly. In 1978, the Working Group was replaced by a Special Rapporteur.

Commission to appoint a Special Rapporteur on Argentina, the Commission ultimately focused its 36th session (1980) on the main pattern of abuses committed in the country, and created a Working Group 'of five of its members, to serve as experts in their individual capacities, to examine questions relevant to enforced or involuntary disappearances of persons.'

After 1980, the Commission created many thematic procedures, starting with extrajudicial killings, torture, mercenaries, religious freedom, sale of children or independence of the judiciary, and arbitrary detention.²² Their annual reports to the Commission (now to the Human Rights Council) and to the General Assembly significantly impacted UN deliberations on violations, on new thematic priorities and on standard-setting. Together with the growing UN programme of technical assistance and advisory services, the basic architecture of the UN human rights system was built up.

3.4. The World Conference on Human Rights

The end of the Cold War was a major turning point. Glasnost and 'Perestroika', launched by Soviet President Mikhail Gorbachev, facilitated global negotiations, and many felt that it was the moment to hold a (second) World Conference on Human Rights (WCHR) to consolidate the system. The General Assembly convened the WCHR in Vienna.²³ But the preparatory process was hampered by deep differences of opinion: genuine demands from the South had been neglected during the Cold War, and they resurfaced. A global negotiation on the overall human rights system also provided an opportunity for everyone to challenge agreed principles and procedures that were affecting them. The Preparatory Committee had four sessions in Geneva and three regional preparatory meetings with their forums of regional NGOs coalitions in Tunis, San José de Costa Rica and Bangkok. The WCHR opened on 14 June 1993 with many contentious issues still to be resolved. On the last night, the Drafting Committee adopted the final outcome: the Vienna Declaration and Programme of Action (VDPA), endorsed by the Conference on 25 June.

The main VDPA provision is that human rights are universal, interdependent and indivisible. The document recalls that States have a duty under international law to uphold human rights. It reiterates the right to development, together with the respect for civil and political rights. It highlights the rights of indigenous people(s) and women. The UN Technical Assistance Programme shall be strengthened, and national action plans elaborated to implement human rights. It also proposes the creation of the post of High Commissioner for Human Rights, the establishment of a permanent forum on indigenous issues, and an increase to the UN budget. With such a consensus, it became possible to mainstream human rights within the UN.

²² As of October 2021, there are 45 thematic and 13 country mandates, see the list in the Appendix.

²³ General Assembly Resolution 45/155 of 18 December 1990.

3.5. The High Commissioner for Human Rights

The General Assembly adopted the VDPA and created the Office of the High Commissioner for Human Rights (OHCHR)²⁴, headed by the UN High Commissioner for Human Rights, who is the UN official with main responsibility for UN human rights under the supervision of the Secretary-General. The first High Commissioner was Mr. José Ayala-Lasso (Ecuador)²⁵, followed by Mrs. Mary Robinson (Ireland, 1997-2002), Mr. Sergio Vieira de Mello (Brazil, 2002-2003), Mr. Bertrand Ramcharan (Guyana, 2003-2004), Mrs. Louise Arbour (Canada, 2004-2008), Mrs. Navanethem Pillay (South Africa, 2008-2014), Mr. Zeid Ra'ad Al Hussein (Jordan, 2014-2018), and currently Mrs. Michelle Bachelet (since September 2018).

The OHCHR has expanded rapidly. Besides its headquarters in Geneva and its New York Office, OHCHR currently has 21 regional offices, 17 country offices, 12 human rights components of peace missions, as well as human rights advisors in 44 countries.

²⁴ General Assembly Resolution 48/141 of 20 December 1993.

²⁵ On 14 February 1994, the Assembly approved the appointment of José Ayala-Lasso (Ecuador), as first High Commissioner. He took office in April 1994 and soon visited Rwanda (ongoing genocide).

III. THE UN REFORM

1. The main challenges in the 90s

The Vienna consensus was soon to be tested by the challenges the UN faced in the 90s. Firstly, the end of the Cold War led to many local and regional conflicts, and peace and security had to be secured by the UN. In just a few years, the UN Security Council (UNSC) had to increase the number of its peacekeeping operations. In severe situations, the Security Council had to create Commissions of Inquiries and even Special Tribunals for war crimes and crimes against humanity (former Yugoslavia, Rwanda, Cambodia, Sierra Leone, Timor, Lebanon). Human rights gradually appeared on its agenda, first with informal briefings with Special Rapporteurs of the Commission, and newly created Special Representatives of the Secretary General (e.g., children in war, sexual violence in conflicts). The briefings became formal and periodic, concluded by resolutions and/or Chairperson's Statements. The UNSC held increasingly frequent high-level debates on issues such as: civilians and youth caught in conflicts; women; peace and security; missing persons in conflicts; the protection of persons with disabilities; the protection of schools during conflicts; the rule of law as a vital element of conflict prevention; or, poverty and underdevelopment as root causes that fuel conflicts. Its resolutions on women, peace and security changed the UN debates on women's rights.

Secondly, after the Cold War only one economic system prevailed, and it saw a rapid globalisation process. It was no longer possible to ignore the impact of economics on human rights, especially on the widespread extreme poverty and the increasing gaps in income distribution. The demands of Non-Aligned countries became more pressing.

Thirdly, the UN system was expanding exponentially with new tasks, programmes and entities, creating major challenges in decision-making, management and financing. For instance, there were many new peacekeeping operations in place before anything close to a 'Ministry of Defence' had been established. There were also duplicates of some UN bodies. In other words, the UN needed in-depth reorganisation.

2. The UN reform process

2.1. The initiative of Kofi Annan

It is in this context that the new UN Secretary General, Kofi Annan launched an ambitious reform of the UN²⁶ in January 1997. The Assembly endorsed most of the recommendations contained in his successive reports.

These included: 1) the reorganisation of the UN Secretariat into four sectors (peace and security; economic and social affairs; humanitarian affairs and development); 2) the merger of UN Geneva-based human rights entities into one single Office of the High

²⁶ See in particular the Report of the Secretary-General, 'Renewing the United Nations: A Programme for Reform' (A/51/950), 14 July 1997.

Commissioner for Human Rights (OHCHR), led by the High Commissioner (September 1997); 3) the creation of a Senior Management Group (with all sector coordinators, chiefs of regional commissions and Under-Secretary-Generals, including the High Commissioner for Human Rights); 4) the creation of a Department of Disarmament Affairs (January 1998); 5) the post of Deputy Secretary-General (March 1998); 6) and later, the strengthening of the national protection systems with the country teams (October 2004).

The UN reform process, together with several UN world conferences in the 90s (on development and environment, human rights, habitat, population, and women), led to major changes in the machinery of human rights. Under the impulse of Annan, High Level Groups of experts had been set up since 1977, such as the one on UN Peace Operations ('Brahimi Report', August 2000) and the one on relations with civil society ('Cardozo Report', June 2004).

2.2. The Summits of 2000 and 2010

This process was bolstered by the Millennium Summit.²⁷ Its landmark Declaration reaffirmed commitment to the Charter's purposes and principles, including 'respect for human rights and fundamental freedoms' (paragraph 4). In the Human Rights Chapter, member States committed 'to respect fully and uphold the Universal Declaration', and to strive for the full protection and promotion of rights for all, in all their respective countries. The Chapter on Development and Poverty Eradication contained the commitment to reach the 'Millennium Development Goals' (MDGs) by the year 2015.

Ten years later, after a broad consultation process, the Assembly held its Sustainable Development Summit²⁸ and adopted a Post-2015 Development Agenda.²⁹ It is a framework for global and national development action until 2030, covering 17 Sustainable Development Goals (SDGs) and 167 targets. The MDGs applied to developing countries only. The SDGs constitute a universal, planet-centred, human rights-based framework.³⁰

2.3. The 2005 Summit

After the Millennium Summit, Annan submitted his second major reform package in September 2002, detailing proposals, among other things, to align UN activities with the priorities of the Millennium Declaration, and strengthen human rights.³¹ In

²⁷ The Millennium Summit was held from 6 to 8 September 2000 in New York with 147 Heads of State and Government and 191 nations in total.

²⁸ Held in New York from 25 to 27 September 2015, with 170 Heads of States and Governments.

²⁹ General Assembly Resolution A/RES/70/1 of 25 September 2015).

³⁰ A High Level Political Forum on sustainable development (HLPF) meets annually as part of ECOSOC, and every four years at the level of Heads of State and Government (as part of the General Assembly). Regional meetings (convened by ECOSOC's regional commissions) prepare the sessions, together with Voluntary National Reviews and documents submitted by UN bodies.

³¹ Secretary-General's Report 'An agenda for further change', 9 September 2002, document A/57/387.

November 2003, he appointed a High-Level Panel on 'Threats, Challenges & Change'. The Panel considered all the reports of the reform and the outcomes of the UN conferences held in the 90s. Its December 2004 report³² set out a broad framework for collective security for the new century. The panel reaffirmed the UN human rights commitment and the task of the Commission on Human Rights, noting, however, that the Commission 'suffers from a legitimacy deficit that casts doubts on the overall reputation of the United Nations' (paragraphs 239).

The criticism against the Commission mostly concerned the way the Commission (and its Sub-Commission) dealt with situations of massive human rights abuses.

On the one hand, targeted States invoking non-interference to oppose scrutiny could not avoid a growing number of country resolutions and mechanisms to be adopted. So, they put increasing pressure on the Sub-Commission, whose power to adopt resolutions was gradually cut, and issued threats and reprisals against experts of the Sub-Commission, Special Rapporteurs and NGOs cooperating with the Commission and its mechanisms.

On the other hand, human rights defenders deplored the fact that the Commission did not act on serious cases of violation – particularly regarding China, as year after year, the Chinese delegation successfully tabled no-action motions, adopted by countries of the South. A 'Like-Minded Group' (LMG) emerged, denouncing what it considered as 'politicization', and 'partiality', and opposing any country resolutions. Many undemocratic States also got elected into the Commission to protect themselves. As a result, at the end of the 90s most of the States – those advocating for the end of country resolutions, and those appalled by the lack of action on main violators such as China - spoke of the 'discredited Commission'.

In his report 'In Larger Freedom', prepared for the 2005 World Summit³³, Kofi Annan endorsed the Panel's views and supported the creation of a Human Rights Council with a 'peer review' of the situation in all the member States, adding: 'Yet the Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticise others'. International NGOs shared the views 'of the Secretary-General that the Commission on Human Rights lacks credibility. For years NGOs have been exposing the shortcomings (...) including its inability to address many situations of gross and systematic human rights violations around the world'.³⁴

The 2005 Summit was to celebrate the 60th Anniversary of the UN and to review the progress made with the UN reform and the MDGs. Negotiations started in New York in March 2005. Adopted on 16 September 2005, the Declaration of Heads of States and

³² 'A more secure world: our shared responsibility'. document A/59/565, 2 December 2004.

³³ 'In larger freedom: towards development, security and human rights for all' (A/59/2005), Report of the Secretary-General, 21 March 2005.

³⁴ Statement dated 13 April 2005, signed by Amnesty International, Association for the Prevention of Torture, Baha'i International, Centre on Housing Rights and Evictions, Colombian Commission of Jurists, Franciscans International, Human Rights Watch, International Commission of Jurists, International Service for Human Rights, Lutheran World Federation, World Organisation Against Torture, Quaker UN Office and Rights Australia.

governments³⁵ contained innovative decisions: the future creation, by the Assembly, of a Human Rights Council to replace the Commission; the (immediate) creation of the Peace-Building Commission; the creation of a Central Emergency Response Fund, and of a Fund for democracy; strong wordings on the rule of law; development; and the responsibility to protect. At the last moment, the paragraphs regarding the Security Council reform and disarmament were deleted.

³⁵ General Assembly Resolution 60/1 of 16 September 2005, entitled 'World Summit Outcome'.

IV. THE HUMAN RIGHTS COUNCIL

The Millennium started off with one super-power: the USA. The terrorist attacks of 11 September 2001 and the counterterrorism response challenged human rights (violated in the war against terror, cf. Guantanamo) and multilateralism (unilateral war against Iraq). In the meantime, China was becoming a global power, the Kremlin was rebuilding Russian power, and regional powers emerged. North-South tensions increased, with the South demanding a new economic order. Democratisation movements were scratched (Myanmar, China, Eastern Europe, Arab States). And wars in Afghanistan, Iraq, Libya, Syria and Yemen, and the attacks of terrorist groups in other regions (in the Sahel) led to humanitarian disasters. This new geopolitical situation, later exacerbated by the unilateralism of the Trump Administration, seriously impacted debates in the UN human rights bodies. Moreover, since 2000, new burning issues came to the fore, such as the focus on racism (with the Durban Conference, 2001); climate change; religious freedom; the migration crisis; and, since 2019, the global COVID-19 pandemic.

1. Confrontational institution building of the Council

1.1. Assembly resolution 60/251

The creation of the Human Rights Council is the result of these efforts to re-shape the human rights system, and of this strong resistance against country debates and resolutions. A compromise was finally reached in New York, and the General Assembly subsequently created the Council in March 2006.³⁶ In conformity with the principle of geographical repartition, the new 47-member body was given a new majority, with 26 States from Africa and Asia. The Council became a main body of the General Assembly, with more regular meetings, an easier procedure to convene Special Sessions, provisions to secure qualitative membership, and the system of Special Procedures and expert advice – to proceed to a Universal Periodic Review (UPR), to deal with country situations³⁷, and to develop technical assistance.

1.2. Institution-building package

However, the same Assembly resolution also 'abolished' the Commission with a fixed date: 16 June 2006 - before the Council would hold its first session on 19 June 2006. This was a 'tabula rasa'. Indeed, the Council would 'assume, review and, where necessary, improve and rationalise all mandates, mechanisms, functions and responsibilities of the commission', but it had to 'complete this review within one year

³⁶ General Assembly Resolution 60/251 of 15 March 2006.

³⁷ 'Decides also that the Council 'should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon' (OP-3).

after the holding of its first session.³⁸ This enabled hardliner States to continue with their offensive of the 90s, and oppose existing mechanisms.³⁹ After one year of tough negotiations, the Council adopted its 'Institution-building package' (IBP) on 18 June 2007.⁴⁰

The IBP focused on the Special Procedures, the complaint procedure, and the new UPR, which many States from the South abusively considered at the time as a possible alternative to country resolutions. Thus, the main concerns raised in the negotiations focused on dealing with the violations ('situations') and on information submitted to the Council that could lead to measures against those with negative human rights records. Though the African Group opposed any country mandate, the IBP kept several countries on the list of existing procedures to be reviewed.⁴¹ Additionally, Non-Aligned countries imposed the 'Human rights situation in Palestine and other occupied Arab territories' as a fixed item on the agenda for each session.

The IBP contained new provisions for the Special Procedures: a Consultative Group (CG) to propose to the President a list of candidates for the selection of mandate holders, and a Code of Conduct⁴² to be respected by these experts. This Code was proposed by Algeria, imposed by the African Group, and highlights States' sovereignty. In doing so it mainly serves as a tool to reinforce the authority of States and the Council on independent experts, while for some States that systematically violate human rights, no Code of Conduct was introduced.

The IBP replaced the Sub-Commission by an Advisory Committee, 'to provide expertise to the Council in the manner and form requested by the Council, focusing mainly on studies and research-based advice. Further, such expertise shall be rendered only upon the latter's request, in compliance with its resolutions and under its guidance.'⁴³ Thus, it would not adopt resolutions. The problem of the former Sub-Commission had been solved.

During its second year, the Council confirmed each thematic procedure, one by one. It also created its mechanisms. Most of these mechanisms are no longer composed of independent experts, but are open to all member States. Their themes of study are generally established by the Council, and they may not adopt resolutions. As a main body of the Assembly, the Council became more than before States governed.

³⁸ Resolution 60/251, Operative Paragraph 6).

³⁹ Thus, during the negotiations on the future of the thematic procedures, the Algerian Ambassador Idriss Jazairy proposed to merge those related to enforced disappearance, torture and killings, arguing that most of those disappeared would have been killed after being tortured.

⁴⁰ Human Rights Council Resolutions 5/1 (Institution-building package) and 5/2, 18 June 2007.

⁴¹ The country procedures listed in the Appendix to the IBP concern: Haiti, Somalia, Burundi, Liberia, Congo-DRC, Sudan, North-Korea, Palestine and Cambodia. At the last moment, the procedures on Belarus and Cuba were deleted, probably to obtain that Cuba and Russia joined the consensus.

⁴² This Code is contained in Resolution 5/2, which was adopted separately, as the President of the Council did not accept to include such provisions in his institution-building package.

⁴³ Institution-building package, paragraph 75.

2. Thematic debates in the Human Rights Council

Since 2006, negotiations had essentially taken place between regional groups, with growing North-South tensions. It was time for the Non-Aligned Movement (NAM) to take the lead. The LMG and the Organisation of the Islamic Conference (OIC) dominated the debates, with the Europeans on the defensive. These trends marked the debates on thematic issues, briefly summarised hereafter.

2.1. Wide spectrum of themes

Like the Commission before it, the Council dealt with a variety of themes, including: the rights of the child (including birth registration); migrants; minorities; women and girls (including gender equality, early marriage, female genital mutilation, preventable maternal mortality and morbidity); indigenous peoples; human rights defenders or threats and reprisals against those cooperating with the UN; persons with disabilities; LGBTI rights; the safety of journalists; the rights to food, health, housing, education, and drinking water; the right to development; business and human rights; freedom of expression and of assembly; peaceful protests; enforced disappearances; torture; summary executions; transitional justice; trafficking in persons; governance or democracy and the rule of law.

2.2. New themes

New themes also emerged, such as: albinism; leprosy; climate change; cultural rights; counter-terrorism and human rights; the right to peace; human rights and arms (including civilian acquisition, possession and use thereof); digital technologies; harmful practices (witchcraft, ritual attacks); menstrual hygiene management; SGD and human rights; the responsibility to protect; the Council's role in prevention of violations; the right to a safe, clean, healthy and sustainable environment; the legacies of colonialism; COVID-19, recovery and the role of civil society.

In addition, the Council made significant progress on business and human rights. Having endorsed the UN 'Protect, Respect and Remedy' Framework proposed by its expert John Ruggie (2008), the Council unanimously adopted the Ruggie 'Guiding Principles on Business and Human Rights'. The Council also created a new mechanism, the Forum on Business and Human Rights, and a Special Procedure, the Working Group on the issue of human rights and transnational corporations, and other business enterprises.⁴⁴ This consensus broke when it created an intergovernmental Working

⁴⁴ Human Rights Council Resolution 17/4, 16 June 2011.

Group with the mandate to elaborate an 'international legally binding instrument on transnational corporations and other business enterprises'.⁴⁵

Another assessment that was widely considered positive lies in the field of indigenous peoples' rights. The principle of free, prior and informed consent, contained in the 2007 UN Declaration on the Rights of Indigenous Peoples, became widely referred to in many resolutions. And, following the World Conference on Indigenous Peoples (New York, 22-23 September 2014), the mandate of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) was significantly strengthened by the Council, which even authorised EMRIP to conduct (upon request) a 'country engagement mission'.⁴⁶

Industrialised countries opposed proposals from the South, often proposed by Cuban draft resolutions, on: the effects of foreign debt; the negative impact of the non-repatriation of funds of illicit origin; unilateral coercive measures; a democratic and equitable international order; human rights, and international solidarity. Non-Aligned countries continued to insist on the implementation of the right to development, and imposed a new Expert Mechanism and negotiations towards a legally binding instrument. The Cuban draft resolutions on the composition of the staff of the OHCHR led to a similar opposition.

The debate on racism evolved. On the one hand, the divergences of Durban persist regarding the demand for additional standards to the International Convention on the Elimination of Racism and Racial Discrimination (ICERD) to further limit freedom of opinion and expression. The experts of the ICERD themselves do not see the need for such an addition. ICERD is also not yet fully implemented in every country. On the other hand, actively involved in the issue, the African Group receives growing support for its proposals on people of African descent. After the murder of Georg Floyd in the USA, on 14 July 2021 the Council created an Independent Mechanism on Systemic Racism in Law Enforcement that was also deemed necessary by many observers and NGOs.⁴⁷ It should be remembered, however, that the issue cannot be limited to slavery and colonialism only; racism and racial discrimination infect every region, including Africa.

2.3. Regression of the standards

Over the last two decades, basic rights standards have been regressing. In counterterrorism, some forms of torture were suddenly justified again. Kidnappings and arbitrary killings of those called 'terrorists' became common. UN debates on racism and freedom of religion or belief led to undue attempts to limit the freedom of opinion and expression. Provisions were gradually introduced in several resolutions that limit other rights to domestic legislations, even when domestic laws are contrary to international State obligations. The most contentious issues in more recent times, however, concerned sexual orientation and women's rights.

⁴⁵ Human Rights Council Resolution 26/9 of 25 June 2014).

⁴⁶ Human Rights Council Resolution 33/25 of 30 September 2016.

⁴⁷ Human Rights Council Resolution 47/21 of 13 July 2021.

2.3.1. Sexual orientation

Sexual orientation is still provoking emotional exchanges within the Council. Though the Council decided to create the mandate of an independent expert on sexual orientation and gender identity, to focus on the protection against violence and discrimination of LGBTI persons⁴⁸, many States announced they would not cooperate with the expert. The African Group, which traditionally prepares the procedural resolution for the Third Committee of the General Assembly to adopt the Council's annual report, suddenly added one paragraph to its 2016 draft, by which the Assembly would postpone the Council's decision to create the Special Procedure on sexual orientation. At the last moment, an amendment by Latin American delegations to delete this paragraph was adopted by a small margin of 84 votes in favour, 77 against and 17 abstentions. Ultimately, the African draft was adopted as revised by 94 votes in favour, 3 against and 80 abstentions.

2.3.2. Women's rights and the 'rights of the family'

By creating its Committee on the Inalienable Rights, the Trump Administration fiercely supported the position of Muslim States and of evangelicals around the world. State Secretary Mike Pompeo convened a meeting of States during the 2020 UN (virtual) Assembly to reaffirm their support for the Universal Declaration. In fact, the participants had been gathered to support a 'Declaration on Promoting Women's Health and Strengthening the Family'. Whilst reaffirming the equal rights of men and women (paragraph 2), and the 'inherent dignity and worth of the human person' (paragraph 3), it stressed 'that in no case should abortion be promoted as a method of family planning' (paragraph 4). The co-signers committed themselves to 'reaffirm that there is no international right to abortion', and 'to support the role of the family as foundational to society and as a source of health, support and care'. 36 States were the first co-signers of the document, known as the 'Geneva Consensus Declaration' (October 2020).⁴⁹

The many amendments made by the Russian delegation to draft resolutions on women's rights have a similar objective. Not surprisingly, this delegation welcomed the initiative of Saudi Arabia to table a draft on the human rights of the family⁵⁰, ignoring the fact that, whilst in the UN human rights instruments the family is indeed seen as a strong nucleus that needs protection, all the members of the family, but not the family itself, have human rights.

⁴⁸ Human Rights Council Resolution 32/2 (June 2016). The mandate was renewed in June 2019 under Resolution 41/18.

⁴⁹ Reuters, 26 August 2020. The Declaration was submitted by American Ambassador Kelly Craft to the General Assembly in December 2020 under agenda item 131. President Biden removed the USA from the declaration on January 28 2021,

⁵⁰ Human Rights Council Resolution 35/13 of 22 June 2017, adopted by 30 votes, 12 no, and 5 abst.

2.3.3. Debates about traditional values

Alongside other hardliners, Russia was also behind the September 2009 resolution on 'traditional values of humankind'⁵¹, requesting the High Commissioner 'to convene, in 2010, a workshop for an exchange of views on how a better understanding of traditional values of humankind underpinning international human rights norms and standards can contribute to the promotion and protection of human rights'. The resolution omitted to reiterate that all States have the duty to protect and promote human rights.

2.3.4. Resolutions tabled by China

Three resolutions tabled by the Chinese delegation since 2017, and adopted by the Council, constituted a major political development in the UN.

The first one (June 2017) on 'the contribution of development to the enjoyment of human rights' is widely considered an attempt to establish a hierarchy of human rights, presenting development, not the right to development as defined in the 1986 UN Declaration, as a condition for the full realization of all human rights.

The second Chinese resolution, the so-called 'Win-win resolution' was tabled and adopted under the title 'mutually beneficial cooperation in promoting and protecting human rights'. It recalled that the work of the Council 'should be guided by the principles of universality, impartiality, objectivity, and non-selectivity for greater dialogue, cooperation, capacity building and technical assistance to build a new type of international relationship'. Though it only requested a study from the Advisory Committee on the role of technical assistance and capacity-building in fostering mutually beneficial cooperation⁵², it was a first step in dictating the approach that the Council should take when dealing with country situations. It would seriously hinder the work of the Special Rapporteurs. The follow-up 'Win-Win' resolution adopted by the Council during its 43rd (resumed) session⁵³ was already more concrete. It called 'upon all States and other stakeholders to undertake constructive and genuine dialogue and cooperation in the field of human rights, based on universality, impartiality, objectivity, indivisibility, non-selectivity, non-politicization, equality and mutual respect', and it convened a meeting on the role of poverty alleviation in promoting and protecting human rights, with the participation of senior officials from States to share information on good practices and experience in their countries: constructive and genuine dialogue and cooperation by all; poverty alleviation (not eradication, thus economic growth); sharing 'good practices' (thus, not speaking out about abuses) between senior Official of States (no experts, no NGOs) - this is a real 'Win' for China. However, this second 'Win-Win' resolution obtained a smaller (relative) majority (23 votes, 16 against and 8 abstentions).

⁵¹ Human Rights Council Resolution 12/21 of 2 October 2009, adopted by 26 votes, 15 no, and 6 abst.

⁵² Human Rights Council Resolution 37/23 of 23 March 2018, adopted by 28 votes in favour, 1 against (USA) and 17 abstentions.

⁵³ Human Rights Council Resolution 43/21 of 22 June 2020.

The negative impact of the legacies of colonialism was the third initiative (October 2021). It is an attempt to focus debates on the past, and on certain countries (colonialism, slavery, racism). An amendment by the United Kingdom added the dimension of past and current forms of colonialism.⁵⁴ The three new themes proposed by China are now on the thematic agenda of the Council.

3. Country resolutions at the Council

3.1. Ending some mandates of African countries

As expected by many experts, the offensive against country mandates continued in the Council, especially those mandates under item 4 of the standard agenda ('situations requiring the council's attention'). Immediately, the Group of African States took the lead on African situations and tabled its own drafts under agenda item 10 ('technical assistance'), requesting reports from the High Commissioner and/or OHCHR, and, in the worst cases, creating experts' mandates on technical assistance (with experts being African). These experts are part of the Special Procedures mandate-holders. The African Group obtained the termination of the expert mandate on the DRC, despite reports on millions of victims there (Council's 7th session, March 2008), and the limitation of the extension of the mandate of the Rapporteur on Sudan to six months, instead of the traditional 12 months (7th session, March 2008).

During the 9th session (September 2008), Egypt tried, in the name of the Group, to stop the procedure on Burundi. However, the Burundi delegation requested the continuation of the procedure, and the Council extended the expert's mandate.

The African Group then modified its position: it would henceforth support a country mandate under item 10, provided the country concerned would agree. These efforts against country resolutions had their limits. Having 13 votes out of 47, blocking was the main tactic used by the African Group. Moreover, unity was hard to maintain due to the worsening situation in many African countries, to the diversity in their foreign relations, and because some countries (e.g., Botswana, Namibia, Sierra Leone, Malawi) refused to systematically reject country resolutions.⁵⁵

3.2. Special Sessions

In the first years of the Council, Special Sessions were a tool for the Arab Group and the OIC to raise the issue of 'Palestine and other Arab Occupied Territories'. Seven of the first 21 sessions dealt with this situation (see Annex V).

The universality of this mechanism was slightly strengthened when other Special Sessions convened during 2007-2009, e.g., on Darfur (December 2006), Myanmar

⁵⁴ Human Rights Council, Resolution 48/7, 8 October 2021, adopted by 27 votes, none against and 20 abstentions.

⁵⁵ The voting on Resolution 11/10, by which the Council created the mandate of independent expert on Sudan (June 2009, 11th session), illustrates such African divisions. 20 member States in favour, including Mauritius, and Zambia; 18 against, including Cameroon, Djibouti, Egypt, Nigeria and South Africa; and 9 abstaining, including Burkina Faso, Gabon, Ghana, Madagascar and Senegal.

(October 2007), (East-) DRC (November-December 2008) and Sri Lanka. However, the 11th Special Session on Sri Lanka (26-27 May 2009) came as a shock to many. As the armed conflict in this country had come to an end, with thousands of civilians displaced, most of them held in camps, with reports of massive abuses (enforced disappearances; extra-judicial executions; torture), the majority of the Council supported the draft prepared by the Sri Lankan delegation, entitled 'Assistance to Sri Lanka in the promotion and protection of human rights', 'welcoming', and 'congratulating' the government. The text did not contain any mechanism for accountability and independent investigation.

3.3. More country resolutions

Regarding this May 2009 decision on Sri Lanka, observers considered that the majority of the Council probably went too far. From that moment on, the Council started to adopt more country resolutions: in September 2009 (12th Session) on Honduras (coup d'état), Myanmar (Aung San Suu Kyi and other political prisoners), Cambodia and Somalia (extension of the mandates on technical assistance), and Sudan (independent expert); in March 2010 (13th Session) on Myanmar, North Korea (DPRK), and technical assistance to Guinea and the DRC (High Commissioner reports). Since 2010, the Council adopted resolutions on Somalia, Kyrgyzstan, Afghanistan, Ecuador, Cambodia, Haiti, Sudan, Iran (Special Rapporteur, March 2011), Ivory Coast, Libya, Central African Republic, DPRK, Myanmar, Mali, Belarus, Syria, Burundi, Tunisia (transitional justice with an OHCHR Office), DRC, South Sudan, and the Tigray region (Ethiopia).

3.4. Commissions of Inquiry and Fact-Finding Missions

Despite the position of hardliner States and of the African Group, the Council could not reasonably attend to some African situations, such as Darfur (Sudan), the Ivory Coast, Eritrea and Libya, under its agenda item 10, 'technical assistance'. These crises were amongst the first to be the object of official inquiries by the Council.

Over the years, Fact-Finding Missions (FFM) and Commissions of Inquiry (CoI) had already been established by the Security Council, the General Assembly, the Commission on Human Rights, the Secretary-General and the High Commissioner for Human Rights. The Council ultimately pursued this practice to respond to cases of serious international humanitarian law and international human rights law violations.

In its Special Session on Darfur (December 2006), the Council established a High-Level Mission on the situation of human rights in the territory.⁵⁶ Following the presidential election of November 2010 in the Ivory Coast, the Council created a CoI on the state of human rights in the country.⁵⁷ At the end of its 15th Special Session on Libya (February 2011), despite concerns expressed by China, Russia, Cuba, Ecuador, Bolivia, Venezuela and Nigeria (in the name of the African Group), it unanimously established a

⁵⁶ Human Rights Council Decision S-4/101 of 13 Dec. 2006.

⁵⁷ Human Rights Council Resolution 16/25 of 25 March 2011.

Col on the human rights situation in Libya and requested that the Assembly suspend Libya's membership to the Council.⁵⁸ After a first resolution tabled by African (neighbouring) States, the Council appointed a Rapporteur on Eritrea in 2012, and then a Col in 2014.⁵⁹ Other Cols were set up on: Syria (August 2011), the DPRK (March 2013), Burundi (September 2016), Myanmar (Rohingyas, March 2017), the situation in Kasai (DRC, June 2017) and a Group of Eminent Experts (GEE) on Yemen (December 2017).

Fact-Finding Missions mandated by the Council were set up and/or conducted by OHCHR, such as the FFM into the human rights situation in Mali (2013), Kenya (2008, regarding the violence following the presidential elections), Venezuela (September 2019) and Libya (June 2020). In the case of Sri Lanka, a second decision of the Council⁶⁰ requested the High Commissioner to prepare a comprehensive investigation 'into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka' (...), and to establish 'the facts and circumstances of such alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability, with assistance from relevant experts and Special Procedures mandate holders'.

In addition, the Council adapted its response to the grave situation in the newly independent South Sudan and sent a monitoring mission 'to improve human rights, accountability and reconciliation' (October 2015). In March 2016, the Council created the Commission on Human Rights (CHR) in South Sudan⁶¹ 'to determine and report the facts and circumstances of, collect and preserve evidence of, and clarify responsibility for alleged gross violations and abuses of human rights and related crimes (...), to ending impunity and providing accountability'. This Commission also works in the country, promoting rule of law and institution-building of the State.

Therefore, despite the hostile reluctance of many of its members to seriously deal with massive cases of violations, the Council's achievements have been significant.

3.5. Independent Investigative Mechanisms

An innovative proposal made by Liechtenstein gave rise to the General Assembly's decision to create the International, Impartial and Independent Mechanism 'to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011'.⁶² Commonly referred to as 'the Mechanism on Syria' (IIIM), its mandate is 'to collect, consolidate, preserve and analyse evidence of violations of international humanitarian

⁵⁸ Human Rights Council Resolution S-15/1 of 25 Feb. 2011, followed by Human Rights Council Resolutions 28/30 (27 March 2015) and 43/39 (22 June 2020) concerning OHCHR Investigation mission to Libya. On 1 March 2011, the Assembly endorsed Resolution S-15/1 and requested the International Criminal Court to investigate possible crimes against humanity.

⁵⁹ Human Rights Council Resolution 26/24 of 27 June 2014. The Col on Human Rights in Eritrea submitted its final report on 21 June 2016. The Special Rapporteur mandate on Eritrea was extended in July 2020 (Council's 44th session).

⁶⁰ Human Rights Council, Resolution 25/1 of March 2014

⁶¹ The Commission on Human Rights in South Sudan was created by Human Rights Council Resolution 31/20 of 23 March 2016. Since then, its mandate was extended every year.

⁶² General Assembly Resolution 71/248 of December 2016.

law and human rights violations and abuses and to prepare files in order to facilitate and expedite fair and independent criminal proceedings' in national, regional or international courts or tribunals that have, or may have in the future, jurisdiction over these crimes (Resolution 71/248, paragraph 4).

A similar independent investigative mechanism was created for Myanmar to 'collect evidence of the most serious international crimes and violations of international law and prepare files for criminal prosecution, making use of the information handed over to it by the Independent International Fact-Finding Mission on Myanmar' (September 2018).⁶³

3.6. Palestine and Arab Occupied Territories

The reluctance of many delegations to adopt country resolutions does not seem to apply to draft resolutions on item 7 of the agenda, devoted to 'Palestine and other Arab Territories occupied by Israel' (OPT). Year after year in its regular sessions, and in many Special Sessions, with the support of the vast majority of the Non-Aligned countries, the Council adopts dozens of resolutions tabled by Pakistan, in the name of the OIC, on human rights in Palestine and the OPT, including the Syrian Golan, the Israeli settlements in the OPT, including East Jerusalem, the military actions by Israel, and the right of Palestinian people to self-determination. The decisions often set up Fact-Finding Missions and commissions of inquiries, such as the high-level FFM to Beit Hanoun (2006), a FFM on the Gaza conflict (2009), an International FFM to investigate violations (...) resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance to Gaza (2010), an Independent international FFM to investigate the implications of Israeli settlements on the (...) rights 'of the Palestinian people' (2012), an Independent Col on the 2014 Gaza Conflict, a Col following the protests in 2018 and another one following the escalations in May 2021.

For years, there have been heavy debates over the need to keep this as a separate item on the agenda. The Trump Administration invoked this as a major reason to withdraw from the Council. Recently, some countries decided to no longer support action under item 7, whilst continuing to support proposals under item 4. The focus on item 7 finds its origins in the decolonisation process rooted in the UN Charter, which led many newly independent countries to join the Organisation. Contrary to other mandates, the Special Rapporteur on Palestine has a mandate 'until the end of the occupation'.

⁶³ The Investigative Mechanism for Myanmar ('Myanmar Mechanism', IIMM) was created by Human Rights Council Resolution 39/2. The IIMM became operational on 30 August 2019.

4. Offensives against the Special Procedures

Once the former Sub-Commission had been reduced to silence, many authoritarian states started to target the Special Procedures.

4.1. Under the Commission

Attacks against independent mandate-holders are not a new phenomenon in the UN. For instance, during the 80s and 90s, Sub-Commission member Dimitru Mazilu (Romania) was arrested and prevented from attending Sub-Commission sessions. Other experts were threatened. Cases of corruption were also noted. The Rapporteur of the Commission on Sudan, Mr. Gaspar Biro (Hungary), resigned after a 'fatwa' was issued against him. The Rapporteur on the independence of the judiciary, Mr. Dato' Param Cumaraswamy (Malaysia) faced a trial in his own country. The cases of Mazilu (1985 – 2000) and Cumaraswamy (1994 - 1999) led to landmark Advisory Opinions of the International Court of Justice. In both cases, the Court concluded that section 22 of Article VI of the UN Convention on Privileges and Immunities applied to the members of the Sub-Commission in charge of a study and to the Special Rapporteurs. Both had to be considered 'experts in mission'.⁶⁴

4.2. Institutionalisation of the Special Procedures

Since the 90s, the Special Procedures had been undergoing a process of institutionalisation. The World Conference had stressed their importance for UN human rights bodies. During their annual meetings⁶⁵, Special Rapporteurs, Representatives, Working Groups and independent experts had streamlined their methods of work, including urgent appeals and communications. In a bid to avoid duplications, they increasingly intervened together, issuing joint public statements to express serious concerns over urgent situations, and to demand action by the UN bodies and the States concerned. At their 2005 session, the experts had created their Coordination Committee (CC), composed of six mandate holders. This CC introduces the report of their annual meeting to the Council and presents joint statements during Special Sessions and other urgent Council meetings.

4.3. States on the offensive in the Council

In their comments on Special Rapporteur reports, many States systematically referred to the Code of Conduct (see 1.2.), whose mention had been introduced in all the renewed thematic mandates. All the proposals of the LMG highlighted the

⁶⁴ The Advisory Opinions of the International Court of Justice. See Mazilu case (1985-2000, Advisory opinion, Rôle général No.81, 15 December 1989). Cumaraswamy case (1994-1999, Advisory Opinion on the immunity of a Special Rapporteur, 24 May 1999). .

⁶⁵ So far, there have been twenty seven annual meetings of the Special Rapporteurs.

importance of the Code, and sometimes even crossed the red line of the delicate consensus achieved in the original IBP. Thus, in June 2009, the LMG obtained a resolution, recalling that 'Special Procedures mandate holders (had to) exercise their functions in full respect for and strict observance of their mandates, (...), as well as to comply fully with the provisions of the Code of Conduct'. The resolution requested OHCHR to assist the mandate-holders in respecting the Code.⁶⁶

Since 2006, experts have faced constant pressure and threats. Although it is not possible to describe all the offensives launched against the procedures in this brief overview, some examples may be highlighted:

In March 2018, President Rodrigo Duterte accused the Rapporteur on indigenous peoples, Mrs. Victoria Tauli-Corpuz (Philippines), of being a member of the Communist Party and of the New People's Army, both 'terrorist organisations'. This prompted High Commissioner Zeid Ra'ad Al Hussein to question the 'mental stability' of the Filipino President. At the same time, Hussein also protested the 'outrageous attacks' made by Duterte against the Rapporteur on summary executions, Ms. Callamard.⁶⁷

Several thematic reports provoked strong reactions. Such was the case with the January 2010 study on the secret detention of persons accused of terrorism prepared by four thematic procedures, the Rapporteurs on human rights in counter-terrorism and on torture, and the Working Groups on enforced disappearances (WGEID) and arbitrary detention (WGAD). The report exposed links between 66 countries involved in secret kidnapping and detention networks.⁶⁸ The African Group and the OIC accused them of overstepping their mandates.

Another example is the Chinese initiative of September 2019. Soon after dozens of Special Rapporteurs issued a press release on Hong Kong, the delegation threatened to support a draft floated by Pakistan (in the name of the LMG), and to call for the creation of an open-ended working group on the Special Procedures. The draft was ultimately not tabled as the Chinese delegation noted that 'the Coordination Committee is working on procedural improvements and urged that concerns already expressed by States be addressed, with a tangible improvement 'programme' finalised by November'.

4.4. Russia in the lead

The Russian Federation has been a very active participant in the offensive against UN human rights procedures. In New York, it instigated a review process to 'strengthen the treaty monitoring bodies'. Within the Council, it tabled a draft in February 2020 on the 'methods of work of the Consultative Group'. Obviously, countries under examination try to be involved in the selection of the Rapporteurs, but despite the creation of the CG, they still cannot select the experts. The Russian delegation argued that the working methods of the Group lacked clarity, and that there was a lack of

⁶⁶ Human Rights Council Resolution 11/11, 18 June 2009 entitled 'The system of special procedures'.

⁶⁷ Press conference of High Commissioner Zeid Ra'ad Al Hussein, Geneva, 9 March 2018.

⁶⁸ 'Global practices in relation to secret detention'. Report A/HRC/13/42, 13th session of the Human Rights Council (1-26 March 2000).

geographical and gender repartition amongst the experts. There were many rounds of negotiations during the 43rd session, and the Council adopted decision 43/117, asking the President 'to conduct before the end of 2020 (...) open consultations (...) to formulate draft methods of work of the Consultative Group'. The draft had been tabled by Belarus, China, the Dominican Republic, Iran, Iraq, Myanmar, Qatar, Russia, Syria, and Venezuela. Several rounds of negotiations led to the adoption of a Statement by the Council's President on 7 December 2020, with the working methods of the CG in the Appendix.⁶⁹

The Russian and Chinese delegations were also behind two letters sent by several Ambassadors on 31 August 2020 to the President of the Council, accusing two Rapporteurs of not respecting the Code of Conduct. Both letters requested action and a separate discussion during the Council's 45th session of September 2020. The letter regarding Joseph Cannataci, Rapporteur on the right to privacy, was signed by Ambassadors of Burundi, China, North Korea, Myanmar, Russia, South Sudan, Syria and Venezuela. He had visited six countries and issued press releases, without submitting his reports on those visits. The CC and the Bureau of the Council pressed him to present these reports.

The second letter targeted the Rapporteur on summary executions, Ms. Agnes Callamard. She had submitted a detailed report on the assassination of Mr. Khashoggi in the Saudi Consulate of Istanbul. The co-signers of the letter, Ambassadors of Bahrain, Burundi, China, North Korea, Kuwait, Myanmar, Philippines, Russia, Saudi Arabia, South Sudan and Syria, argued she had not respected 'the national legislation and regulations of the countries' and article 8 (c) of the Code of Conduct (reports and conclusions of the Rapporteurs 'should have a non-judicial character'). Considering these allegations to be unfounded, the CC and the Bureau of the Council supported Ms. Callamard.

In February 2021, during the Council's 46th session, the Russian delegation announced its next offensive: a new draft resolution was to focus on 'reappointment'. Experts are elected for three years at a time, and it is common practice to extend their mandate for a second period of three years. Russia threatens to introduce an additional process whereby experts would have to re-apply for their positions. No follow-up has been made to this threat so far.

Faced with multiple LMG initiatives attempting to control experts, the CC had many meetings and exchanges with the Bureau of the Council to avoid further steps being taken against them, and slowly became the interface between the mandate holders and the Council. A major trend is that many States are inclined to support hardliners in their attempts to control experts, in order to prevent experts from making public statements, especially during their field visits.

⁶⁹ President's statement PRST OS/14/ adopted on 7 December 2020, during the Organizational session of Fourteenth Cycle of the Council.

4.5. Offensives in New York

Offensive initiatives were also launched against Special Procedures in New York. As discussed earlier, in 2016 the African Group unsuccessfully used its procedural draft for the Third Committee of the Assembly to adopt the Council's annual report, in a bid to postpone the creation of the thematic procedure on sexual orientation. The same occurred with some country resolutions adopted by the Council. Over the last five years, China, Russia and other hardliners have focused their offensive on getting the General Assembly Fifth Committee to cut posts in the human rights budget relating to Special Procedures and treaty bodies. The UN budget is the last and probably most effective tool for those trying to weaken the Special Procedures system.

4.6. Perspectives of the Special Procedures

Since its creation, the Council has created 16 additional thematic mandates, for example: on access to safe drinking water and sanitation (2008); cultural rights (2009); peaceful assembly and association (2010); and truth, justice, reparation and guarantees of non-recurrence ('transitional justice', 2011).⁷⁰ However, the budget for OHCHR is decreasing. The proliferation of new thematic procedures therefore affects the functioning of essential procedures, such as those on disappearance, torture, executions, freedom of expression, racism, violence against women, indigenous peoples, human rights defenders, extreme poverty and the rights to food, health, education and water.

Hardliner initiatives have also weakened the system by transforming Special Rapporteur mandates into (more expensive) Working Groups, and through new and questionable procedures such as international solidarity, new democratic and equitable order, even though such procedures may one day lead to useful reports (as has recently been the case with the report on international solidarity and climate change).

Whilst appreciating that groups of States and coalitions of NGOs focus on specific issues, and try to obtain additional mandates, it may be time to (re-)consider the overall situation before creating additional procedures. This proliferation of new procedures may soon lead to saturation, simply because there is no-one capable of carefully studying all the reports. The new procedure on climate change has been seen as a must. However, some mandates (e.g., leprosy, albinism) could have a shorter duration, such as five to ten years, to mainstream the issue into all the deliberations of the Council.

In some cases, even European countries have limited the wiggle room of Special Procedures. A recent example was the reluctant position of France in the debate on the CG's working methods. Whilst the Russian offensive on the methods of the Group illustrated an attempt to ensure the selection of new mandate holders who would be more inclined to support the view of the governments, the French delegation floated the idea that Rapporteurs should not take a stand on their own country. France was simply

⁷⁰ Cf. the list of the thematic procedures created by the Council, Appendix III.

irritated that the Rapporteur on human rights defenders (a French national at that time) supported a joint statement on the excessive use of force by the French police.

5. Attacks against NGOs

5.1. Under the Commission

As illustrated above, in the work of the Commission and its Sub-Commission, and during the WCHR and major UN (world) conferences, the role of civil society in the UN human rights system continued to grow. Thus, it did not come as a surprise that many States started to elaborate strategies during the 90s to control victims, witnesses and civil society organisations, with the aim of limiting their work of documenting and reporting on human rights abuses, and even of preventing them from cooperating with the UN system. Dozens of States adopted specific legislation against (human rights) NGOs, prohibiting foreign funding, limiting travel possibilities, and introducing new crimes in their domestic laws. Reprisals (after a speech at the Commission or after the submission of complaints to the UN procedures) became common. Repression increased (arbitrary arrests, enforced disappearances, summary executions). The adoption in 1998 of a UN Declaration on human rights defenders, after 17 years of negotiations in a Working Group of the Commission⁷¹, probably accelerated this move. Some authoritarian regimes (Iraq, Syria, Libya, Tunisia, Cuba) also created their own pro-governmental NGOs (the so-called 'GONGOs') to intervene in UN deliberations.

5.2. In the Human Rights Council

Since the creation of the Council, attacks against NGOs, victims, witnesses and human rights defenders have reached an unprecedented level in the UN. Denying reality, the main violators are more aggressive than under the previous Commission. It has become risky to speak in the Council, and many NGOs are even publicly called 'terrorist organisations'. Diplomats no longer hesitate to threaten them. In the conference room, NGO speakers are increasingly interrupted by 'points of orders'. Some delegations (more recently from China and Indonesia) have been called to order by the Chair and by the UN Security for having taken photographs of NGO representatives. There is little doubt that such material would be used in trials at domestic level.

Increasingly, NGO side-events are obstructed by diplomats. Representatives of pro-Chinese GONGOs (some with a diplomat badge) brutally interrupt NGO meetings, so much so that the UN Security has appointed guards to protect NGOs. Despite repeated reminders from the Presidents of the Council that the UN condemns all acts of intimidation or reprisal by States and non-State actors against individuals and groups

⁷¹ General Assembly. Resolution 53/144. 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms'. Officially known as UN Declaration on Human Rights Defenders.

seeking to cooperate, or having cooperated, with the UN, the annual report on cases of reprisals grows thicker each year.⁷² Instead of improving their human rights records, authoritarian States try to eliminate the messenger. This urgent need to protect witnesses, victims and human rights defenders is a clear sign that the main battle in the Council concerns the reliability of the information the Council receives.

⁷² Cf. The annual report of the Secretary-General, 'on alleged reprisals against those who seek to cooperate or have cooperated with the United Nations, its representatives and mechanisms, as well as recommendations on how to address the issues of intimidation and reprisals' is submitted to the Council during its September session by the Assistant Secretary General Ilze Brands Kehris. Cf her last report, doc. A/HRC/48/28, HR-Council, 48th session (13 September–1 October 2021).

V. STATES REACTIONS TO THE COUNTRY RESOLUTIONS

Many States resisted the building of a strong system to deal with human rights abuses. From the beginning, their main tool to counter allegations of violations has been to refer to the principles of the UN Charter, in particular State sovereignty and non-interference into domestic affairs. After all, the statements in the 70s and 80s of delegates from Uruguay, Argentina, Chile, Spain, Portugal, Greece, Cambodia and Uganda are similar to those heard today from representatives of Venezuela, Cuba, Belarus, Russia, Cameroon, Eritrea, Iran, Egypt, Syria, Myanmar, North Korea, Pakistan or China.

1. The 'partiality' of the Commission on Human Rights

1.1. The growing number of country resolutions

This obstacle of national sovereignty and non-interference was overcome when newly independent countries demanded to make exceptions in the cases of South Africa, the Palestinian territories, Chile and Equatorial Guinea. With the end of the 'no power' doctrine, as ECOSOC resolutions 1235 and 1503 had authorised both the Commission and its Sub-Commission to debate all situations, both bodies had started to adopt many resolutions on a growing number of countries. For instance, the resolutions of the Sub-Commission concerned Mauritania (1982), Turkey, Pakistan, China (Tiananmen massacre, 1989), Canada (Indians Mohawks, 1990), Tibet (1991), Bahrain (1997), Congo-Brazzaville (1997), Mexico (1998), Nepal (Bhutanese refugees, 1998), Togo (1999), Indonesia (1999) and the USA (executions of Mexican citizens, 2002). At the same time, more countries were the object of resolutions under the confidential procedure. Since the beginning of the 80s, the Commission (and, since 2006, the Council) have adopted resolutions on more than 60 countries under their public procedure.⁷³

1.2. Countering the Commission and its Sub-Commission

Clearly, the tool of State sovereignty was not sufficient to prevent condemnation, and hardliner States elaborated new narratives and initiatives. Their first targets were the experts of the Sub-Commission. The pressure on them was so strong that they requested the right to vote by secret ballot on country resolutions. This had been accepted by the Commission and ECOSOC in 1991. But the Sub-Commission's resolutions, in particular those on China (1989) and on Tibet (1991) marked the beginning of a new campaign led by a majority of Asian and Eastern European States, with the aim of reducing the Sub-Commission to silence. In 1996, the Commission requested that the Sub-Commission not deal with situations already covered by

⁷³ The list of resolutions, decisions and Chairperson's Statements on countries, adopted under the public procedure 1235 by the Commission and by the HR-Council is given in the Appendixes.

resolutions of the Commission. In 2000, concluding years of negotiations on the review of its mechanisms, the Commission adopted a compromise, stating that the Sub-Commission should be able to discuss country situations, but 'should not adopt country-specific resolutions (...) and that it refrains from negotiating and adopting thematic resolutions which contain references to specific countries'.⁷⁴

Ultimately, hardliners targeted the Commission itself. Year after year, the EU resolution on the situation in China was defeated, as the Chinese delegation successfully tabled no-action motions every time. A 'Like-Minded Group' (LMG) emerged, protesting this targeting and 'blaming and shaming', and accused the Commission of being partial and politicized. With Cuba as conductor of the orchestra, many members of the Non-Aligned Movement joined this opposition. They were helped in 1997 (Commission's 53rd session) by France, Germany, Italy and Spain, who suddenly broke the common EU position. They prevented the Dutch delegation from tabling the EU draft resolution on China. At the same time, Chinese Prime Minister Li Peng was visiting these four European countries, which were involved in the Airbus consortium. The Danish delegation then tabled its own draft on China, whose no-action motion was again adopted. During the following year, many Asian countries boycotted Danish products. In 1998, the Danish delegation announced the new Danish policy of 'critical dialogue with China'. A clear sign had been given to China.

Attacks against members of the Sub-Commission and even Special Rapporteurs of the Commission had also increased in the 90s. Pressure and even reprisals also affected human rights NGOs cooperating with the Commission and its mechanisms. In the 90s, many States elaborated policies to control victims, witnesses and civil society organisations.

At the same time, human rights defenders deplored the fact that the Commission did not act on serious cases of violations, and that many hardliner States sought and obtained membership of the Commission to protect themselves. As a result, at the end of the 90s, most of the States, those advocating the end country resolutions, and those deploring the Commission's lack of action, spoke of the 'discredited Commission'.

2. The 'politicisation' of the Human Rights Council

2.1. General trends

In its first 15 years, the Council has been even more politicized than the former Commission. Whilst State authority declines at a global level, the Council's debates and decisions show a 'restoration' of the power of State(s), and a decrease in the impact of civil society.

As shown, the Council nevertheless assumed its mandate and, in a growing number of country resolutions, created Special Procedures, FFMs, Cols and independent investigative mechanisms. In the Council, country resolutions mostly depend on

⁷⁴ Commission on Human Rights, Decision 2000/109, 56th session.

European countries, though these countries no longer have a majority. Many of their drafts are submitted in the name of the EU. Without the Group of Western European and Other States (WEOG), in most of the flagrant cases of massive abuses no decision would be taken. The only exceptions are the initiatives of regional groups regarding urgent situations in their regions (e.g., the resolutions of the African Group on African countries under item 10; the initiative of Latin American countries on Venezuela, the OIC and the Rohingyas in Myanmar).

At the same time, the growing number of mechanisms created following cases of large-scale violations exacerbated polarisation in the Council. During the Council's first years, the hardliners and the LMG reiterated that, as every State was reviewed under the UPR, this new 'impartial' mechanism based on dialogue and cooperation with the State was the alternative to 'blaming and shaming'. However, this misleading view of the UPR did not convince the majority. UPR does indeed constitute a unique tool for implementation inside the country, but only if the country under review seriously cooperates. In the first three UPR cycles, about 30 States did not do so. Most of them are on the list of resolutions of the Council under items 4 and 10. Authoritarian States even took the risk of discrediting this new tool by misusing it.⁷⁵ It should also be noted that the UPR is a mechanism, but not a human rights procedure; it is based upon equality between the States, not equality between the victims.

Another feature was the debates on non-State armed actors, which States under examination often blame. Indeed, the Council cannot ignore the criminal acts of these actors, but these deliberations should not dilute the responsibility of the State. Two Special Sessions were devoted to abuses committed by terrorist organisations. At the end of its 22nd Special Session on the so-called ISIS, the Council requested OHCHR to urgently dispatch a mission to Iraq 'to investigate alleged violations and abuses committed by the so-called Islamic State in Iraq and the Levant and associated terrorist groups' (September 2014). And in its 23rd Special Session on the violations and atrocities committed by Boko Haram (1 April 2015), it called OHCHR to send a FFM 'to investigate atrocities committed by the terrorist group Boko Haram and its effects on human rights in the affected states' (Cameroon, Chad, Niger and Nigeria).

Regrettably, during the 31st Special Session on Afghanistan on 24 August 2021, the Council repeated the error of its Special Session on Sri Lanka (May 2009). The session had been convened by the Afghan delegation and the OIC. The Council received information on serious violations recently committed by the Taliban. The High Commissioner, the National Human Rights Commission of Afghanistan and the Afghan Ambassador himself called for a strong mechanism to be created. However, Pakistan controlled the process, and its draft was adopted with minor amendments. The text did express concerns, but did not even mention the Taliban. Instead, it called on 'all the parties' and, in view of the urgent situation, requested the High Commission to submit a report in March 2022. Additionally, the 32nd Special Session on Sudan (5 November 2021)

⁷⁵ During the first review of China, Cuba prepared the speeches for several Non-Aligned countries. It recommended to the Chinese delegation to increase the repression of those 'misusing' Internet.

ended with another weak compromise, namely a request to the High Commissioner to designate an Expert on Human Rights in the Sudan, until 'the restoration of its civilian-led government'.

Since 2006, many States have become more actively involved in new strategies to protect themselves. Several hardliners have pushed hard to avoid resolutions under both item 4 and item 10, and obtained alternative mechanisms under item 2 (entitled 'Report of the High Commissioner'). As a result, there are currently two competing procedures on Venezuela. The same hardliners, led by China and Russia, insist on the concept of 'reliable information', which they consider limited to the information provided by governments. In this context, it is particularly remarkable that the UN Administration in Geneva started to allow some States (recently China, Indonesia, United Arab Emirates) to make mendacious exhibitions in the Palais during the Council's sessions.

2.2. The block against country resolutions

Delegates from authoritarian States refer to the Council's principles of impartiality, objectivity, transparency and predictability, which they systematically violate. These regimes (China, Russia, Cuba, Egypt, Pakistan, Venezuela) constitute a block of systemic opposition to any country resolution. Time and time again, they invoke UN sovereignty and non-interference principles, accuse European States of neo-colonial undertakings, submit long lists of amendments and call for separate votes. They also disassociate themselves from item 4 resolutions approved by consensus (e.g., on North Korea, and often on Myanmar).

These hardliners have been joined by a group of States who traditionally oppose country resolutions in their foreign policies (e.g., Ecuador, India), by States affected by decisions under item 4 (Burundi, Eritrea), and by those 'at risk' of being 'shamed' (recently Saudi Arabia, Cameroon, the Philippines, Indonesia). More repressive States also campaigned to be elected to the Council to better protect themselves. Recent examples are the Gulf countries, Vietnam, Eritrea, Cameroon and Venezuela.

2.3. Like-Minded Group

The 'Like-Minded Group' (LMG) was soon reconstituted in the Council. It had already been active during the last years of the Commission under the leadership of Cuba. The first LMG Coordinators in 2013 and 2014 were Russia, China and Egypt. Claiming to have more than 50 member States, the Group strongly opposed 'political and economic pressures, as well as the role of the main gatekeepers in civil society, which on many occasions converge with the views of the powerful bloc led by United States and the European Union'.⁷⁶

⁷⁶ Amr Essam (Second Secretary at the Permanent Mission of Egypt in Geneva), 'The Like Minded Group: Speaking Truth to Power', in Universal Rights Group, 10 May 2016.

The backbone of this coalition is largely composed of authoritarian States, but they clearly enjoy the support of many developing countries in the increasing North-South divide. China does not hesitate to regularly intervene on behalf of LMG, as illustrated by the statement of its Special Representative for Human Rights on 27 February 2020, calling for the High Commissioner for Human Rights 'to heed the voice of developing countries and advance human rights governance in a balanced way'.⁷⁷ With its potential number of members, the LMG rapidly became an unavoidable partner in negotiations, not only against country resolutions, but also on thematic issues.

2.4. The Organisation of Islamic Cooperation

Formerly called 'Organisation of the Islamic Conference', and based in Jeddah, Saudi Arabia, the Organisation of Islamic Cooperation (OIC) is one of the largest Intergovernmental organizations, with 57 member states. Its main bodies are the Islamic Summit and the Councils of Foreign Ministers.

For years now, Pakistan has coordinated OIC initiatives in UN human rights meetings and introduced most of the draft resolutions on 'Palestine and the Arab Territories occupied by Israel'. With its campaign against 'Islamophobia', the OIC played a major role in the debates on freedom of religion, racism and freedom of expression (to prevent hatred). Any criticism against Muslim States could be considered by them as a kind of 'Islamophobia'. This focus was also a useful tool to protect them from scrutiny regarding their human rights abuses, in particular concerning the treatment of religious minorities.

Alongside Pakistan and Saudi Arabia, the OIC has been associated with most of the LMG initiatives, especially in this rejection of country resolutions - with the exception of Palestine. In March 2017, the OIC made one exception, and tabled its first draft resolution on the situation of the Rohingyas in Myanmar. So far, the OIC has not shown any similar such solidarity with the Uyghurs facing Chinese repression in Xinjiang.

2.5. Non-Aligned countries and Cuba

Many members of the largest Group in the Council, the 'Non-Aligned Movement' (NAM), do not like country resolutions either. Their natural priority is to resist the adverse effects of globalisation and neo-colonial policies. They are therefore sensitive to the Cuban, Chinese and Russian arguments, and prefer focusing on the UPR and on the need to promote dialogue and cooperation. This explains the success of recent Chinese initiatives.

For years Cuba has been the de facto leader of the South in the Council, not only in opposing country resolutions, but also in proposing many thematic resolutions coinciding with the needs and concerns of the South. This is a major priority in Cuban

⁷⁷ 27 February 2020, HR-Council, 43rd session, statement of Ms. Liu Hua, Special Representative for Human Rights of the Ministry of Foreign Affairs of China, item 2 of the agenda ('report of the High Commissioner').

diplomacy, a tool to counter external pressure and boycotting, in particular from the USA. Cuba's credibility lies in its strong support for the decolonisation processes in Africa and Asia, including military support for liberation struggles. Delegations of NAM countries can also rely on Cuban expertise, as Cuban diplomats are particularly well trained, possessing a rare depth of institutional knowledge and expertise in UN procedures.

Maintaining the unity of the NAM movement is essential for Cuba, which is why its delegation often does not participate in votes on resolutions tabled by Muslim countries on issues which may undermine such unity (e.g., women's rights, 'islamophobia').

2.6. The Russian Federation

The Russian delegation is at the forefront of offensives against the Special Procedures and the treaty monitoring bodies system. The Russian delegation has a negative stand on almost all issues and proposals. It does not care for its reputation and expresses its hardline position bluntly. It does not only oppose all country resolutions, but also tables at each session dozens of amendments to be voted separately on the rights of women, the rights of the family, sexual orientation, and above all on the pre-eminence of domestic law. Russia's positions on these matters illustrate the close links between the Kremlin and the Russian Orthodox Church, which explain the promotion of the Church's positions on all gender issues, and the efforts to present Russian foreign policy in the Middle East as an endeavour to defend Christians there. The same goes for its initiatives on the 'traditional values of humankind', which constitute a challenge to the basic concept of universality.

2.7. Initiatives of China

The initiatives of China constitute a main new feature in the Council. During the 80s and 90s, Chinese diplomats were discreet, though actively involved behind the scenes in suppressing the Sub-Commission, after the Sub-Commission's resolutions on Tiananmen and on Tibet. In the Council, they became more vocal as they probably felt that LMG and NAM's proposals did not have enough impact on the Council's decision-making.

Thus, Chinese policy has changed. China no longer limits itself to dismissing criticism of the massive violations committed within its borders, but instead promotes its own vision of what human rights are about. The Chinese delegation was the first to refer systematically to the Code of Conduct, and to personally attack several Rapporteurs. In recent years, the delegation has reacted strongly to those raising China's dark past. Thus, the deteriorating situations in Xinjiang, Hong Kong and Tibet provoked strong reactions from the Special Procedures (e.g., an unprecedented appeal signed by 50 experts) and from groups of States (who made joint oral statements in both the Council and in the Third Committee of the General Assembly). The Chinese delegation

replied immediately with joint statements in Geneva and in New York, co-signed by dozens of countries, claiming that these were China's domestic affairs.

In the Council, China behaves as a main power, especially since the Trump Administration withdrew from the Council. In many debates, the Chinese delegation is the first to take the floor. From 2007 to 2020, it tabled ninety-six amendments to draft resolutions. Most of them aimed at giving more space and power to States when dealing with civil and political rights. For instance, its (rejected) amendments to the draft on the promotion and protection of human rights in the context of peaceful protests highlighted the importance of using national legislation as the legal framework within which protests are conducted, and stressed that protests should not constitute a threat to national security.

As laid out, taking advantage of the decreasing influence of the US, and of the Non-Aligned countries' urgency to have their demands taken seriously, the Chinese delegation has tabled since 2017 its own resolutions on development, 'mutually beneficial cooperation' and on the impact of colonialism:

The Chinese resolution on 'The contribution of development to the enjoyment of human rights' (June 2017)⁷⁸ is based on the White Paper on Human Rights, issued by the Chinese Government in 1991, which establishes a hierarchy of human rights, and describes the right to subsistence as 'the most important of all human rights, without which other rights are out of the question'.⁷⁹ For China, development is a condition for the full realization of all human rights. The aim is (economic) development (and growth), not human rights.

The 'Win-win' initiative, alongside its two resolutions adopted so far, introduces a new narrative. It not only aims to dictate the Council's approach when dealing with country situations. It also serves to hinder the work of Special Rapporteurs, the Secretariat and NGOs in the preparation and submission of reports as Resolution 43/21 of 22 June 2020 calls 'upon all States and other stakeholders to undertake constructive and genuine dialogue and cooperation in the field of human rights, based on universality, impartiality, objectivity, indivisibility, non-selectivity, non-politicization, equality and mutual respect'.

The initiative on colonialism (October 2021) places European countries on the defensive. This also forms part of a trend of focusing on the past to justify gaps in the present.

⁷⁸ Human Rights Council Resolution 35/21 of 22 June 2017, adopted by 30 votes, against 13 and 3 abstentions.

⁷⁹ White Paper on the Human Rights in China, published by the State Council Information Office of the People's Republic of China.

VI. CONCLUSIONS

1. Human rights constitute one of the most delicate matters in multilateral negotiations. With rapid globalisation and an overturning of international relations, new themes emerged on the Council agenda, often leading to serious divergences. Clearly, the impact of the economic system on human rights can no longer be denied, and industrialised countries have to reflect on how to examine and possibly address demands from the Non-Aligned countries for a more equitable world economic order. At the same time, economic problems cannot be invoked to justify violations; these new themes should not lead to a biased focus on certain regions and countries. Racism and racial discrimination occur everywhere; the economic system leads to gaps in income distribution not only between countries, but also within countries, and many oppressed peoples suffer from similarly abhorrent colonial practices inflicted by new colonisers (cf., the Uyghur).
2. One of the main worries is that debates on new themes paved the way for attempts by hardliners to introduce new concepts and narratives which are contrary to the fundamentals of human rights. The failed attempt of the Trump Administration with its 'Geneva Consensus Declaration' (of October 2020) was not just about abortion; it also challenges women's basic rights as guaranteed in the CEDAW Convention. The Saudi Arabia resolution on the human rights of the family aims at identical objectives. Omitting to recall that States have the duty to respect and ensure human rights, the Russian initiative on traditional values of humankind revitalises the offensive of Asian states against the concept of universality on the eve of the 1993 WCHR. And the Chinese resolution on the contribution of development to the enjoyment of human rights establishes a hierarchy in which development becomes a condition for the full realization of all human rights (to think that the Chinese authorities argue that they are developing Xinjiang).
3. The most contentious issue continues to be how UN bodies react to situations of violations. Contrary to the complaints of hardliners, of targeted countries and of delegations 'at risk', the problem is not the 'politicisation' of the council sessions, but rather the large-scale violations committed by many UN Member States in full contradiction of the legal obligations they have freely accepted. States do not like scrutiny, and use all the tools available to avoid naming and condemnations. Obviously, the replacement of the Commission with the Council did not change this paradigm.
4. On the positive side, despite the hostility shown by many of its members towards country resolutions, the achievements of the Council show that political obstacles can be overcome, and that the UN human rights system remains able to respond to emergencies at least in some cases. As the other regional groups do not act,

most country resolutions are initiated by the WEOG, which has only seven members out of forty-seven. Many drafts are submitted by the EU.

5. The opposition to country resolutions has increased. This is not only due to the stronger position of the LMG, but also due to the impact of the Russian-Chinese axis. Since 2013, both countries work closely together, including in New York, where they obtain cuts in the funding for human rights. In its efforts to re-build a stronger (autocratic) power after the breakdown of the Soviet Union, the Russian Federation actively promotes initiatives against treaty bodies and Special Procedures. But its impact remains relative, partly because in this endeavour it does not respect the territorial integrity of some neighbours (Ukraine, Moldova, Georgia). China's diplomacy has critically increased its position, obtaining many high positions in UN bodies and specialized agencies, developing its network with GONGOs, pro-governmental cultural centres and presence in almost every country. In the UN, China is now vocal, brutal in debates and pro-active in decision-making, aiming at weakening UN commitments to human rights.
6. In their attempts to break the silence on the violations they are suffering from, victims, witnesses and human rights defenders depend on the EU as a main channel, with all its limitations. A more flexible position of European countries on some macro-economic issues would probably lead to more support on country resolutions. The EU should give more priority to multiple cross-regional initiatives, instead of intervening as a bloc (in the names of its members, its Associate and Candidate countries), as it already does for resolutions on African situations, on torture, religious freedom, enforced disappearances and transitional justice. The influence of EU countries also depends on their perceived credibility and their own human rights records. Issues such as the assassination of journalists investigating corruption (Malta, Slovakia), campaigns and laws against LGBTI rights (Hungary, Poland) or restrictions on the rights of NGOs and individual freedoms in some countries are well-noted by other States. The same goes for European policies regarding migrants and asylum-seekers.
7. The Council obviously suffers weaknesses, the first being the absence of a real institutional expert advisory body, a strong sub-body, which could play the indispensable role of the former Sub-Commission. In this State-governed Council, the Special Procedures constitute a unique source of information and reflection to feed the debates and the decisions. However, the Special Rapporteurs are under attack. More should be done to protect and strengthen these procedures. The experts need public support and their conclusions and recommendations should find more follow-up in the Council's decisions. The system of Special Procedures also needs more staff and financial resources.

8. Another weakness of the Council is the decreasing impact of NGOs on its work. Threats and reprisals have become common, both in the Council and at a domestic level, for those who cooperate with the Council and its mechanisms. Action should be taken against these repressive acts, summarised in the annual report on reprisals. Moreover, the COVID-19 pandemic badly affects the rights of NGOs and their ability to perform their advocacy. Attending the UN sessions online, even with the possibility to submit written and oral statements, constitutes only one aspect of the full participation of NGOs in the deliberations of UN human rights bodies. As they are no longer able to physically enter buildings, NGOs and human rights defenders can no longer meet with diplomats, experts and civil servants, as they did before. Currently, NGOs and region defenders are absent. The voice of the voiceless is having more trouble being heard in the Council, and it is troublesome that major donors seem to be decreasing their funding to NGOs. Hardliner States no doubt are delighted with such developments. One should not forget that the quality of the work of the Council highly depends on the full participation of victims, witnesses and human rights defenders.

VII. RECOMMENDATIONS

In view of the current threats to, and the main weaknesses of, the UN human rights system, the following recommendations can be made:

1. Regarding the UN human rights system

- 1.1. It all started more than sixty years ago with the battle over how the international community would react to grave violations. Some countries from the South and NGOs were the first to demand special mechanisms and procedures. The protection of the UN human rights system, which started with country resolutions, still depends on our ability to deal with these violations. This should be a priority, even when economic and geopolitical interests are at stake.
- 1.2. The Office of the High Commissioner for Human Rights (OHCHR) has become a key player, both for the Council, and system wide. OHCHR needs more resources and support. States promoting the (real) strengthening of the UN human rights system should increase their involvement in the debates of the Fifth Committee of the General Assembly.
- 1.3. More funding is indispensable to protect and strengthen the Special Procedures and treaty bodies. More attention should be paid to the proliferation of initiatives adversely affecting their work. All stakeholders should proactively resist any attacks against the experts and any setbacks to their working methods.
- 1.4. Elaborating cross-regional initiatives is a must. In each region, partners can be found to help strengthen the system and obtain resolutions on countries and on themes. The role of Fiji, the Marshall Islands and the current leadership of the Southern Cone of Latin America (Argentina, Chile, Uruguay) illustrate this. European countries are probably too often on the defensive. They could be more proactive on their own sensitive issues, as they did through the Council of Europe during the preparatory process to the 2001 Durban Conference on racism. They could have taken the initiative on the negative impact of colonialism. This would have been an opportunity to include contemporary forms of colonialism.

2. Regarding non-governmental organisations

Over recent years, the impact of NGOs on the work of the Council has decreased – all the more so during the pandemic. At a time when the UN human rights system is increasingly challenged, donors irreversibly decrease their funding to major international NGOs.

- 2.1. A more active engagement is required to preserve the rights of NGOs so that they can efficiently participate in human rights sessions, including for 'non-status' NGOs. More engagement is required in the deliberations of the Committee on NGOs in ECOSOC.
- 2.2. European countries should seriously increase their budgets to support the work of NGOs and human rights defenders in the UN human rights bodies. Their grants should no longer focus only on the participation of civil society in the UPR process, whose limits have become obvious, but also include the work of those international NGOs whose capacity to make proposals has always made a difference in the lobby, and those servicing NGOs and human rights defenders from within regions.
- 2.3. Special funding programmes should be established to increase financial support for NGO coalitions and networks, both on countries and on themes (e.g., executions, torture, enforced disappearance, indigenous peoples, minorities).
- 2.4. Special financial and institutional support should be provided to coalitions of NGOs from the regions to increase their permanent presence at the UN in Geneva.
- 2.5. At a time when no-one pays attention to the situations prevailing in many countries (in particular because of the pandemic), more needs to be done to support victims of reprisals for having contributed to the UN human rights system.

APPENDIX

I. Main Human Rights Conventions

- Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG, 9 December 1948)
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitutions of Others (2 December 1949)
- Convention relating to the Status of Refugees (CSR, 28 July 1951)
- Convention on the Political Rights of Women (CPRW, 20 December 1952)
- Protocol amending the Slavery Convention of 25 September 1926 (23 October 1953)
- Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (7 September 1956)
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 21 December 1965)
- International Covenant on Economic, Social and Cultural Rights (ICESCR, 16 December 1966)
- International Covenant on Civil and Political Rights with its First Optional Protocol creating a communication procedure (ICCPR, ICCPR-OP1, 16 December 1966)
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (26 November 1968)
- International Convention on the Suppression and Repression of the Crime of Apartheid (ICSPCA, 30 November 1973)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 18 December 1979)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 10 December 1984)
- Convention on the Rights of the Child (CRC, 20 November 1989)
- International Convention against the Recruitment, Use, Financing and Training of Mercenaries (4 December 1989)

- Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP2, regarding the abolition of death penalty, 15 December 1989)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW, 18 December 1990)
- Rome Statute of the International Criminal Court (17 July 1998)⁸⁰
- Convention on the Rights of Persons with Disabilities (CRPD, 13 December 2006)
- Convention for the Protection of All Persons from Enforced Disappearance (CPED, 20 December 2006)

⁸⁰ Adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court.

II. Country Resolutions by the UN Commission on Human Rights and the HR-Council

Since 1980, resolutions, decisions and Chairperson's Statements adopted in the public procedure by the Commission and (since 2006) by the HR-Council concerned:

Latin America: Bolivia^{81*}, Chile*, Colombia, Cuba*, Ecuador, El Salvador*, Guatemala*, Haiti*, Honduras, Nicaragua, Panama (after the US invasion), Paraguay, Peru (hostages), Uruguay; Venezuela*

Africa: South Africa and Namibia*, Angola, Burundi*, Central African Republic*, Chad*, Eritrea*, Equatorial Guinea*, Ethiopia (& Tigray Region)*, Guinea, Ivory Coast*, Liberia*, Mali*, Nigeria*, Rwanda*, Somalia*, Sierra Leone, Sudan*, Togo, Uganda, West Sahara, (Congo-DRC)*

Middle East: Arab Occupied Territories*, Irak*, Occupied Kuwait*, Libya*, Syrian Golan, (South-)Lebanon, Palestine*, Syria*, Tunisia, Yemen*

Asia - Pacific: Afghanistan*, Burma*, East Timor, Iran*, North Korea*, Bougainville, Nepal, Philippines, Sri Lanka

Europe: Albania, Baltic States, Belarus*, Georgia, Poland, Romania*, former Yugoslavia*, Kosovo, Kyrgyzstan, Russian Federation (Chechnya), Turkmenistan, Ukraine

⁸¹ * implies the creation of a Special Procedure

III. List of Thematic Procedures created by the HR-Council, 2006 – 2021

In its first 15 years, the Council created many additional thematic mandates, on the following issues:

- slavery (2007)
- access to safe drinking water and sanitation (2008)
- cultural rights (2009)
- rights to freedom of peaceful assembly and of association (2010)
- discrimination against women in law and in practice (Working Group, WG, 2010)
- truth, justice, reparation and guarantees of non-recurrence ('transitional justice', 2011)
- human rights and transnational corporations and other business enterprises (WG, 2011)
- promotion of a democratic and equitable international order (2011)
- human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2012)
- rights of persons with disabilities (2014)
- negative impact of unilateral coercive measures on the enjoyment of human rights (2014)
- enjoyment of human rights by persons with albinism (2015): right to privacy (2015)
- protection against violence and discrimination based on sexual orientation and gender identity (2016)
- the right to development (2016)
- elimination of discrimination against persons affected by leprosy (2017)

And, following the assassination of Georg Floyd in the USA, the HR-Council also established during its 47th session (June-July 2021), a new mechanism of three experts 'to further the agenda towards transformative change for racial justice and equality in the context of law enforcement globally, especially where relating to the legacies of colonialism and the Transatlantic slave trade in enslaved Africans, and to contribute to accountability and redress for victims'.

IV. List of Thematic Special Procedures of the HR-Council, 1980 – 2021

- Working Group on enforced or involuntary disappearances (1980)
- Special Rapporteur on extrajudicial, summary or arbitrary executions (1982)
- Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (1985)
- Special Rapporteur on freedom of religion or belief (1986)
- Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material (1990)
- Working Group on arbitrary detention (1991)
- Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (1993)
- Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (1993)
- Special Rapporteur on the independence of judges and lawyers (1994)
- Special Rapporteur on violence against women, its causes and consequences (1994)
- Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes (1995)
- Special Rapporteur on extreme poverty and human rights (1998)
- Special Rapporteur on the human rights of migrants (1999)
- Special Rapporteur on the situation of human rights defenders (2000)
- Special Rapporteur on the right to food (2000)
- Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (2000)
- Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (2000)
- Special Rapporteur on the rights of indigenous peoples (2001)
- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (2002)
- Working Group of experts on people of African descent (2002)

- Special Rapporteur on trafficking in persons, especially women and children (2004)
- Special Rapporteur on the human rights of internally displaced persons (2004)
- Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2005)
- Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (2005)
- Special Rapporteur on minority issues (2005)
- Independent Expert on human rights and international solidarity (2005)
- Special Rapporteur on contemporary forms of slavery, including its causes and consequences (2007)
- Special Rapporteur on the human rights to safe drinking water and sanitation (2008)
- Special Rapporteur in the field of cultural rights (2009)
- Special Rapporteur on the rights to freedom of peaceful assembly and of association (2010)
- Working Group on the issue of discrimination against women in law and in practice (2010)
- Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2011)
- Working Group on the issue of human rights and transnational corporations and other business enterprises (2011)
- Independent Expert on the promotion of a democratic and equitable international order (2011)
- Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2012)
- Independent Expert on the enjoyment of all human rights by older persons (2013)
- Special Rapporteur on the rights of persons with disabilities (2014)
- Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights (2014)
- Special Rapporteur on the right to privacy (2015)

- Independent Expert on the enjoyment of human rights by persons with albinism (2015)
- Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (2016)
- Special Rapporteur on the right to development (2016)
- Special Rapporteur on the elimination of discrimination against persons affected by leprosy and their family members (2017)
- Special Rapporteur on climate change and human rights (2021)

V. List of Special Sessions of the HR-Council, 2006 – 2021

- S-1** Occupied Territories (5-6 July 2006)
- S-2** Israel in Lebanon (11 August 2006)
- S-3** Gaza (15 November 2006)
- S-4** Darfur (12-13 December 2006)
- S-5** Myanmar (Burma) (2 October 2007)
- S-6** Palestine (23-24 January 2008)
- S-7** Food crisis (and right to food) (23–24 May 2008)
- S-8** (East of) Congo-DRC (28 November & 1 December 2008)
- S-9** Gaza Strip (9 & 12 January 2009)
- S-10** Impact of the global economic and financial crises (20 & 23 February 2009)
- S-11** Assistance to Sri Lanka (26-27 May 2009)
- S-12** Human rights situation in the Occupied Palestinian Territory and in East Jerusalem (15-16 October 2009)
- S-13** To support the recovery process in Haiti (27 January 2010)
- S-14** Situation of human rights in Ivory Coast since the elections on 28 November 2010 (23 December 2010)
- S-15** Situation of Human Rights in the Libya (25 February 2011)
- S-16** Situation of human rights in Syria (29 April 2011)
- S-17** Situation of human rights in Syria (22 August 2011)
- S-18** Situation of human rights in Syria (2 December 2011)
- S-19** Situation of human rights in Syria and recent killings in El Houleh (6 June 2012)
- S-20** Human rights situation in the Central African Republic (20 January 2014)
- S-21** Human rights situation in the Occupied Palestinian Territory, including East Jerusalem (23 July 2014)

- S-22** Human rights situation in Iraq in light of the abuses committed by the Islamic State and the Levant and associated groups (1 September 2014)
- S-23** Terrorist attacks and human rights abuses and violations committed by the terrorist group Boko Haram (1 April 2015).
- S-24** Preventing further deterioration of the human rights situation in Burundi (17 December 2015)
- S-25** The deteriorating situation of human rights in the Syrian Arab Republic, and the recent situation in Aleppo (21 October 2016)
- S-26** Human rights situation in South Sudan (14 December 2016)
- S-27** Human rights situation of the minority Rohingya Muslim population and other minorities in the Rakhine State of Myanmar (05 December 2017)
- S-28** The deteriorating situation of human rights in the occupied Palestinian territory, including East Jerusalem (18 May 2018)
- S-29** The human rights implications of the crisis in Myanmar (12 February 2021)
- S-30** The grave human rights situation in the Occupied Palestinian Territory, including East Jerusalem (27 May 2021)
- S-31** The human rights situation in Afghanistan (24 August 2021)
- S-32** The human rights situation in Sudan (5 November 2021)
- S-33** The grave human rights situation in Ethiopia (17 December 2021)
- S-33** The grave human rights situation in Ethiopia (17 December 2021)
- S-34** The deteriorating human rights situation in Ukraine stemming from the Russian aggression (12 May 2022)