



# Performance and Challenges of the UN Human Rights Council

An NGOs' View

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- The current dynamic within the UN Human Rights Council (HRC) has driven the Council in certain cases to function more closely in accordance with normative standards, as well as with the reality on the ground. Civil society stakeholders have a number of opportunities to consolidate that dynamic.
- The increasing number of cross-regional initiatives even on country situations indicates that »joint« does not necessarily mean »lowest common denominator«. However, instead of relying too much on a case- and victim-centred rationality underlying States' actions, NGOs should focus on new mechanisms, ultimately in terms of a trigger system.
- Successful outcomes in protecting human rights are produced by efforts made within the framework of Special Procedures. In maintaining such a dynamic, civil society stakeholders are a major resource for continuously challenging governments, for instance, in terms of follow-up processes at national as well as at Council level.
- Addressing thematic challenges from a southern perspective will be a crucial element in the better functioning of the HRC. NGOs and National Human Rights Institutions are among the main actors involved in keeping the spotlight on uncomfortable issues in order to improve international cooperation and ultimately a better functioning of the HRC.
- If it was possible to establish global governance in world trade relations through standards and an effective regulatory and sanctioning system there is no good reason to abstain from such regulation in the field of human rights protection.





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## List of Abbreviations

ASEAN	Association of Southeast Asian Nations
AU	African Union
DRC	Democratic Republic of Congo
ECOSOC	UN Economic and Social Council
ESC-Rights	Economic, Social and Cultural Rights
EU	European Union
GRULAC	Group of Latin America and Caribbean States
HRC	Human Rights Council
ICGLR	International Conference on the Great Lakes Region
ILO	International Labour Organisation
JUSCANZ	Japan, United States, Canada, Australia, New Zealand
LGBT	Lesbian, Gay, Bi- and Transsexual people
LLRC	Lessons Learnt and Reconciliation Commission
MONUC	Mission de l'Organisation des Nations Unies en République Démocratique du Congo
MONUSCO	United Nations Organization Stabilization Mission in the DR Congo
NAM	Non-Aligned Movement
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
OHCHR	Office of the UN High Commissioner for Human Rights
OIC	Organisation of Islamic Cooperation
UNGA	UN General Assembly
UNSC	UN Security Council
UPR	Universal Periodic Review
WEOG	Western European and Other States Group

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## 1. Introduction

The UN Human Rights Council (HRC) is the main UN body dealing with human rights questions. Its 47 members are elected by and from the General Assembly for up to two three-year terms. It holds three regular sessions per year of a total of at least ten weeks and can call special sessions to react quickly to urgent country and thematic situations. According to its mandate, the HRC is responsible for the promotion and protection of all human rights around the globe. The allocation of seats is organized along regional groups – Africa, Asia, Latin America and the Caribbean (GRULAC), East Europe and the Western Europe and Others Group (WEOG) – who still coordinate their actions on issues of common concern. Regarding common policy positions, the importance of those groups has been superseded in part by political or religiously defined groups such as the Non-Aligned Movement (NAM), the Organization of Islamic Cooperation (OIC), the European Union (EU) or the non-EU members of WEOG, known as JUSCANZ.<sup>1</sup>

When the HRC was established in 2006 by UN General Assembly (UNGA) resolution 60/251, it was designed to build a stronger and more effective human rights institution compared to its predecessor, the UN Commission on Human Rights. Despite its undeniable contributions to standard-setting with regard to human rights, the Commission had come more and more under fire because of the also undeniable political – detrimental to its normative – nature of some of its decisions, such as politicisation, double-standards and selectivity, which increasingly provoked calls for its reform.

A new feature of the HRC addresses this issue of selectivity and double standards: the Universal Periodic Review (UPR) was set up as a mechanism to regularly review and evaluate the human rights situation in each UN member state. It is based on a report by the state under review, accompanied by a compilation of information produced by UN entities and a summary of information provided by Non-Governmental Organisations (NGOs) and National Human Rights Institutions, both prepared by the Office of the High Commissioner for Human Rights (OHCHR).

By October 2012, having been in existence for about six years, the HRC had held 21 regular sessions and 19

special sessions, had completed the first round of the UPR and initiated its second round, and had adopted nearly 700 resolutions and decisions addressing human rights themes and situations around the globe. Among the special sessions were not only urgent country-specific human rights situations but also thematically emerging situations with a major impact on the economic, social and cultural rights of millions of people, such as the financial and economic crisis (2009)<sup>2</sup> or the food crisis (2008).<sup>3</sup> Compared to the former Commission, the HRC has managed to shed light on human rights issues that formerly largely went unnoticed.

Nevertheless, the Council is continuously criticised for not living up to its normative nature and protecting the victims of human rights violations, even in the most dramatic situations. A major opportunity for institutionally improving its performance was the review process requested by the above mentioned UNGA resolution 60/251 after five years of existence. Unfortunately, the outcome of the HRC review was rather meagre.<sup>4</sup> Nevertheless, the HRC has informally developed a number of specifications in its work, such as urgent debates, ad hoc fact finding missions, inquiry commissions and also new country mandates. The current dynamic within the Council has driven the HRC in certain cases to an assessment of human rights situations in countries as well as on thematic issues. This has been closer to the reality on the ground, but on other issues the HRC member states sometimes have very different perceptions of reality. Thus, this paper will focus on a non-state actors' perspective and indicate promising developments and good practices able to make the HRC a more victim and rights-holder orientated institution.

This paper discusses a number of instruments and actors and explore their capacities for improvement. It builds on analysis and assessments made in previous years in a series of conferences dealing with the HRC's performance.<sup>5</sup>

2. See outcome at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/10/index.htm>.

3. See outcome at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/7/index.htm>.

4. See Theodor Rathgeber (2011): *The Human Rights Council after the Review: Tangible Changes or Business as Usual?* Available at: [http://www.fes-globalization.org/geneva/documents/06-07Oct2011\\_Report\\_HRC%20Review\\_FES\\_FMR\\_DIIMR.pdf](http://www.fes-globalization.org/geneva/documents/06-07Oct2011_Report_HRC%20Review_FES_FMR_DIIMR.pdf).

5. The latest of these conferences was conducted on 16 and 17 October 2012 in Berlin, organised by Friedrich-Ebert- Stiftung, the German Forum Human Rights and the German Institute for Human Rights on »*The UN Human Rights Council's Performance: Prospects and Challenges*«. A brief

1. Japan, United States, Canada, Australia, New Zealand.

In the first section, the dynamics of regional groups are discussed, highlighting cross-regional cooperation and potential joint initiatives based on thematic issues such as the environment or climate change. The second section deals with UN Special Procedures and the confidential HRC Complaint Mechanism focussing on the question of how NGOs may better use these instruments in their lobbying of the HRC. The third section examines the prospects of the second cycle of the UPR. The fourth section looks at some major aspects to be considered when addressing country situations in the HRC, exemplified by the cases of the Democratic Republic of Congo (DRC), Sri Lanka and Myanmar. Along the same lines, section five examines experiences with the thematic issue of the right to freedom of religion or belief. Section six roughly assesses the current as well as the potential relationship between the HRC and the UN Security Council (UNSC). The seventh section details a number of aspects of what can be considered a southern perspective in terms of challenges concerning trust building among states and regional groups. Finally, section eight summarises the outcome of the previous analysis and in particular the role of civil society stakeholders in promoting a better and more effective functioning of the HRC.

## 2. Transforming Bloc Politics

The effects and dynamics of bloc politics have dominated the HRC's functioning in its first four years. In particular, African and Asian countries have used their numerical weight to push for a more state-orientated approach. Nominally, the two regional groups have 26 members out of 47 in total. Nevertheless, this merely numerical majority cannot be translated simplistically into a majority in votes. The few cases where such majorities were formed served to prevent or discontinue country mandates or to establish Special Procedures mandates by which a normative regulation of international cooperation was sought.<sup>6</sup> Meanwhile, regional groups in the HRC no longer act as cohesive entities. What happened?

report on this conference is available (in German) at: [http://www.fes.de/GPol/pdf/20121016\\_UNHRC\\_conference-report.pdf](http://www.fes.de/GPol/pdf/20121016_UNHRC_conference-report.pdf).

6. Such as the Independent Expert on the promotion of a democratic and equitable international order; the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights; or the Independent Expert on human rights and international solidarity.

There are significant rifts in particular within the African States Group as well as, remarkably, within the Organisation of Islamic Cooperation (OIC)<sup>7</sup> or the Non-Aligned Movement (NAM). A certain bloc mentality prevails among the States of the European Union (EU) which, in their efforts towards a Common Foreign and Security Policy, have created an exclusive caucus and coordinate their actions regularly in order to speak with one voice. Doubtless, this attempt may have its merits but according to many observers, meanwhile it rather hinders alliance- and trust-building and undermines joint efforts for larger majorities on sensitive country mandates or thematic issues. Thus, the EU's understanding of building alliances based on the EU's common – and lowest – denominator offers only limited access for others and effectively has turned into a real hindrance to cross-regional initiatives, hampering the political assessment of human rights situations as closely as possible to the normative reality. In addition, the EU bloc approach does not genuinely follow the ideal of a true human rights-based coalition in order to advance human rights. Bloc dynamics always include instrumental views on human rights for other ends.

In light of such problematic side effects of the EU's approach, the question remains why no serious attempts are being made to change this situation. A strategic openness to break free from bloc mentalities would ultimately require a self-critical attitude and policy that takes into public consideration human rights problems within the EU or WEOG states. Such issues are frequently addressed: for example, the situations of minorities such as Roma, stereotypes with regard to Muslim communities or the situation in Guantánamo. Unfortunately, nearly all such problems are addressed exclusively by countries from NAM or OIC with low human rights reputations. Rarely do Switzerland or Norway dare to raise these issues, and Switzerland also avoids talking about, for example, Minarets. Among representatives of States of the global South and non-state stakeholders, there is the widely shared expectation that such a self-critical approach would definitively increase the credibility of WEOG in general and the EU in particular. It might conflict with their self-perception as champions of human rights but would further encourage other States to accept invitations to formal or informal meetings on the elaboration of joint statements or resolutions. Ultimately, it would increase the normative functionality of the Council.

7. Previously, the Organisation of the Islamic Conference.



## 2.1 Cross-regional Initiatives

It is encouraging that the number of cross-regional initiatives in the Council is increasing. Most of them are thematic in nature and generally adopted by consensus. The most recent include people trafficking, especially in women and children (main sponsors the Philippines and Germany), the human rights of persons with disabilities (Mexico, New Zealand), the Rights of the Child (EU, GRULAC), the human rights of internally displaced persons (Austria, Uganda), enforced or involuntary disappearances (France, Argentina, Morocco), business and human rights (Norway, Argentina), human rights, sexual orientation and gender identity (South Africa, Brazil), human rights education and training (Morocco, Switzerland, Costa Rica, Italy), freedom of opinion and expression (Egypt, USA), human rights and the environment (Maldives, Costa Rica, Switzerland), peaceful assembly and protest (Costa Rica, Switzerland, Turkey), birth registration and the right of everyone to recognition everywhere as a person before the law (Mexico, Turkey), human rights, democracy and the rule of law (Morocco, Norway, Peru, Qatar, Rumania, Tunisia) and the role of good governance in the promotion and protection of human rights (Australia, Chile, Poland, South Korea, South Africa).

There are also cross-regional initiatives concerning country situations, such as the resolution on the »*Situation of human rights in the Islamic Republic of Iran*« (A/HRC/RES/16/9; April 2011). The resolution was submitted by Sweden, USA, Zambia, Republic of Moldova, Panama, and the former Yugoslav Republic of Macedonia. The resolution addresses the human rights situation in this country in strong terms, despite the resistance of HRC member States from OIC and NAM. The country resolution on Sri Lanka (A/HRC/RES/19/2, March 2012), submitted by the USA, was supported by countries from the global South (in addition to GRULAC) such as India, Benin, Cameroon, Libya, Mauritius and Nigeria, which in former times were hardly ever found in such voting constellations. These cross-regional initiatives indicate that »joint« does not necessarily mean »lowest common denominator«.

## 2.2 A Human Rights First Platform

In recent years, a proposal has emerged to generate *human rights first* platforms that should be built on open and flexible membership in order to enable States to build flexible formations. The proposal would generate helpful conditions for joint discussions and activities in order to discuss priorities concerning the normative human rights functionality of the HRC. Based on previous experience in the Commission on Human Rights,<sup>8</sup> there is considerable reluctance towards this proposal of a new platform. In addition, considering the current situation in the HRC, there are further questions concerning whether the concept of platforms or blocs is still relevant at all, or at least overestimated for assessing the HRC's performance.

Since 2010, a shift on human rights policymaking can be observed in the HRC, in particular among African States such as Ghana, Cameroon or Senegal, which have experienced changes in home politics and society based on democratic principles and the rule of law. Thus, standards for good governance such as human rights have become a legitimate reference point not only for internal but also for international policymaking. In particular, for instance, Uganda made a public statement during the HRC's 11th session in March 2009 defying Egypt as the then speaker of the African group, saying that the draft resolution on Sudan was not agreed upon by the group as a whole.<sup>9</sup> South Africa launched a resolution on the rights of Lesbian, Gay, Bi- and Transsexual (LGBT) people in June 2011 (A/HRC/RES/17/19) inherently defying Nigeria as the then speaker and against the informal agreement not to press an issue against the explicit opposition of the group's majority.<sup>10</sup> It is no longer surprising that the African Group has launched a country mandate on the human rights situation in Mali (A/HRC/RES/21/25, September 2012),

8. In the Commission, a Group of the Community of Democracies discussed the creation of a like-minded Democracy Group at the United Nations. Among the convenors in 2003–2005 were Chile, Czech Republic, India, Republic of Korea, Mali, Mexico, Poland, Portugal, South Africa and the USA, with the participation of Italy, Romania and Peru. The initiative was supported by NGOs such as the Campaign for UN Reform, the Council for a Community of Democracies, the Democracy Coalition Project, Freedom House, Human Rights Watch, the International League for Human Rights, the Open Society Institute and the Transnational Radical Party.

9. The final resolution on the human rights situation in Sudan (A/HRC/RES/11/10) established the mandate of an Independent Expert in order to support the government in implementing former resolutions and recommendations.

10. The resolution requests the Office of the High Commissioner to prepare a study for March 2012 and asks the HRC to organise a panel discussion during its March session 2012.

or that Ethiopia has strongly supported the country mandate on Eritrea (A/HRC/RES/21/1, September 2012).

Even Arab States in 2011 started to support or to launch resolutions by themselves which addressed or condemned the human rights situation in neighbouring countries such as Syria (country mandate) or Yemen (technical assistance in implementing human rights standards), although the human rights situation in Saudi Arabia or Qatar is far from acceptable. In earlier steps, countries from Latin America had started to reflect self-critically on dictatorships and atrocities committed by former governments against their citizens, emphasising the value of an international survey based on human rights standards. Thus, a common argument among human rights defenders emphasises that instead of continuing with building new platforms or like-minded blocs it is more effective for NGOs to support reform-orientated countries in seeking cooperation on a more normative orientation and to contribute to the erosion of existing blocs such as the regional States groups, OIC or NAM.

In addition, there are doubts in general whether regional and like-minded groups would ever voluntarily relinquish political considerations or power strategies acting in the HRC, which may prove detrimental to its normative standards. Although the Council has improved its performance and a number of States have enhanced their communication with others, as the previous paragraphs verify, it is not clear how far this change may have lasting effects. The membership of the upcoming Councils may differ substantially and bring in more bloc-orientated hardliners, which will affect the narrow majorities on country situations. Instead of relying too much on a case- and victim-centred rationality by States, NGOs should focus on new modalities among the HRC mechanisms, ultimately in terms of a trigger system. This aspect was already discussed during the review process but was disregarded. The trigger system was proposed in order to relate the assessment of a human rights situation and corresponding recommendations exclusively to normative human rights standards and require an objective report by independent experts, such as the UN High Commissioner for Human Rights, the mandate holders of the UN Special Procedures or the UN Secretary-General.

Furthermore, an increasing number of institutional procedures have come to the fore at the HRC, such as Commissions of Inquiry, fact-finding missions and reports of

the High Commissioner for Human Rights, which might be seen as a step towards the trigger system mentioned above. Some of the reports of these commissions, missions and assessments have produced solid facts on human rights violations and provided sound recommendations identifying the duties of the States concerned. Examples include the Goldstone report on the military operations by Israel in the Gaza Strip (December 2008 to January 2009)<sup>11</sup> and the reports on Libya, Côte d'Ivoire, Syria or Belarus, which were transferred into a political statement by the HRC addressing the accountability of the corresponding governments. These statements and resolutions informed those governments that the Council considers a change in governance as a need, the most the HRC can officially say. The resolutions on Syria might have also included a reference to the International Criminal Court but considering the blockade in the UN Security Council, the effect would not have been very different. Therefore, the path towards an institutionalised trigger system should be followed based on existing extensions of HRC mechanisms and instruments. NGOs should continue to encourage and support further cross-regional initiatives.

### 3. Special Procedures and the HRC Complaint Mechanism

Since the creation of the first mandate of independent experts in 1967,<sup>12</sup> the Special Procedures have contributed decisively to a human rights protection system. Despite several attempts to reduce, in particular, the number of country mandates, six new mandates on country situations<sup>13</sup> were created in addition to country-related resolutions, such as on Sri Lanka (2012) and Mali (2012). Furthermore, nine mandates were created on thematic issues.<sup>14</sup> While country mandates were introduced pre-

11. Richard Goldstone retracted from part of the report's findings (A/HRC/12/48) in 2011, saying that according to his reviewed conclusion, civilians were not intentionally targeted as a matter of policy by the government of Israel. The Co-authors of the report – Hina Jilani, Christine Chinkin and Desmond Travers – released then a joint statement emphasising that the full report was valid and that both, Israel and Hamas, had failed to investigate alleged war crimes satisfactorily.

12. Resolution 1235 (XLII) by the UN Economic and Social Council (ECOSOC).

13. Belarus (2012), Côte d'Ivoire (2011), Eritrea (2012), Iran (2011), Sudan (2009), Syria (2011).

14. Contemporary forms of slavery, including its causes and its consequences (2007), human right to safe drinking water and sanitation (2008), human rights in the field of cultural rights (2009), rights to freedom of peaceful assembly and of association (2010), Working Group on





dominantly by Western countries, developing countries supported in particular the creation of thematic mandates on economic social and cultural rights, as well as on a human rights assessment of the current international order.

### 3.1 Systematic Aspects of the Special Procedures

Mandates dealing with Economic, Social, and Cultural Rights (ESC rights) can be attributed to special interests reflecting the priorities of countries from the global South. As already mentioned, there are a number of such mandates: the Special Rapporteur on the right to education (established 1998); the Special Rapporteur on extreme poverty and human rights (1998); the 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); the Special Rapporteur on the right to food (2000); the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights (2000); the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (2002); the Special Rapporteur on the human right to safe drinking water and sanitation (2008); and the Independent Expert in the field of cultural rights (2009).

There are further mandates that also involve ESC rights to a certain extent, such as the Special Rapporteur on human rights defenders (2000); the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (2001); the Independent Expert on human rights and international solidarity (2005); the Working Group on the issues of human rights and transnational corporations and other business enterprises (2011); and the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2012). All these mandates evolved with strong support

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the issue of discrimination against women in law and in practice (2010), promotion of a democratic and equitable international order (2011), 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), human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2012).

by countries of the global South, sometimes together with NGOs specialising in topics such as the right to food, water or housing, such as FIAN<sup>15</sup> and COHRE.<sup>16</sup> We can assume that developing countries will increasingly stress international equity and link such assessments to human rights standards.

At the end of 2012, there were 12 country mandates and 36 thematic mandates, involving 72 mandate holders, 42 male and 30 female.<sup>17</sup> What may sound like a proliferation of mandates can also be read as necessary differentiation and genuine attention to specific life conditions. In view of the limited resources in terms of finances and staff, the number is definitely too large. The annual support to Special Procedures from the regular UN budget is barely 8 million US dollars, less than 0.01 per cent of the UN budget. Despite such shortcomings, the Special Procedures have become a pillar of the UN Human Rights system and one of the most important instruments for promoting human rights at the national and international levels. In particular, countries from GRULAC are increasingly recognising the constructive and important role of Special Procedures in supporting the national process towards good governance and the rule of law.

### 3.2 Current Issues and NGO Interaction

The positive impact of the Special Procedures' work and methodology depend to a significant extent on the involvement of civil society stakeholders. A number of mandate holders conduct country visits, communicate with victims and their representatives, and write urgent appeals and allegation letters, sometimes jointly with other mandate holders, based on the information provided by civil society stakeholders.<sup>18</sup> In 2011, a total of 605 communications were issued to 124 countries. By 31 December 2011, the States had replied to 44.9 per cent of the communications. According to the latest communication report of the Special Procedures (A/HRC/21/49)

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15. Food First Information and Action Network; see <http://www.fian.org>.

16. Center On Housing Rights and Evictions; see [www.cohre.org](http://www.cohre.org).

17. See <http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx> and <http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx>, respectively.

18. For instance, a joint urgent appeal sent to the Government of Afghanistan on 14 January 2011 by the Chair-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Independent Expert on Minority Issues, the Special Rapporteur on Freedom of Religion or Belief and the Special Rapporteur on Torture expressing concern about the detention of two Christian converts.



covering the period 1 June 2006 until 31 May 2012, the following mandates have issued the largest numbers of communications: human rights defenders (1,914), freedom of expression (1,646), torture (1,370), arbitrary detention (869), independence of judges and lawyers (722) and summary execution (714). The top five countries with the highest number of communications have been Iran (203), China (167), Mexico (163), Colombia (121) and India (117). The governments of India (81 per cent) and China (80 per cent) feature with the highest numbers of responses.

Frequently, it is some time before an appropriate or substantive response is received from the concerned government. Often, the substantive elements concerning the violation of rights are not addressed, or responses seek to justify the State action. NGOs and other civil society stakeholders are indispensable for highlighting the victims' view and drawing attention to the case, although the communication between mandate holder and government remains confidential for a while. NGOs provide, regularly share and update information about human rights violations and, occasionally, address the incongruence of the domestic legal codes and practices.

Some of the Special Procedures' mandate holders issue press statements publicly expressing concerns, or provide legislative analysis,<sup>19</sup> or develop guidelines on best practices, or submit annual reports and recommendations to be discussed in the Council – in some cases at the UN General Assembly, too – and urge governments to implement remedial measures. Governments are not obliged to respond to the recommendations. In fact, States often ignore recommendations or attempt to discredit the mandate holders. Other – only a few – governments have allowed mandate holders to verify the implementation of their recommendations.<sup>20</sup> Some mandate holders undertake follow-up visits, others present follow-up reports and others write follow-up letters to States. Among all these options, NGOs are one of the main sources and al-

lies in echoing, requesting and supporting the follow-up process. Vice versa, NGOs are continuously invited to participate in seminars, conferences and lectures undertaken by the mandate holders.

Indeed, there are a number of successful outcomes of the efforts of the Special Procedures, sometimes supported by civil society stakeholders. During the visit of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and after further encouragement, the government of Mauritius decided on 6 May 2011 to ratify the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. On 15 February 2011, the Special Rapporteur on the Rights of Indigenous Peoples issued an urgent letter and a press release expressing concern about growing tensions reflected in protests by indigenous peoples in Panama. The protests addressed the amendment of the Law on Mineral Resources through Bill No. 277 to be approved by the National Assembly of Panama. In the course of the protests, several people were injured and arrested. In this situation, the Special Rapporteur stressed the importance of initiating a good-faith dialogue with indigenous peoples in order to find a peaceful solution and to address the underlying problems stemming from the proposed amendment. Subsequently, the government of Panama decided not to move forward with the amendments. Obviously, such immediate impacts are rare but the numbers can be increased with more decisive support from civil society stakeholders.

### 3.3 HRC Complaint Mechanism

The confidential Complaint Mechanism<sup>21</sup> remains mainly behind closed doors. The Working Group on Communications, a group of five experts from the Advisory Committee,<sup>22</sup> receives a large number of complaints addressing human rights violations each month and selects those that can be identified as severe and systematic. This working group is entitled to communicate with the concerned government in order to verify the facts. Once the working group concludes that the complaint meets the requested characteristics, it forwards the case to the

19. Some mandate holders engage in legal processes through the submission of *amicus curiae* in which they present their expert opinions on systemic matters of concern.

20. Such as the Representative of the UN Secretary-General on internally displaced persons in a number of countries, the Special Rapporteur on summary executions (Brazil), the Working Group on arbitrary detention (China), the Special Rapporteur on the independence of judges and lawyers (Colombia, Guatemala), the Special Rapporteur on human rights defenders (Colombia), the Special Rapporteur on poverty (Ecuador), the Special Rapporteur on toxic waste (Netherlands), or the Special Rapporteur on Torture (Kyrgyzstan, Uruguay).

21. For details on the procedure see <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Complaint.aspx>.

22. For details on the Advisory Committee see <http://www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/HRCACIndex.aspx>.

Working Group on Situations, a group of five diplomats representing member States of the HRC of each of the regional groups. If the Working Group on Situations also come to the conclusion that the complaint is admissible, the Council will deliberate on the case together with the government concerned behind closed doors. The entire procedure up to this stage normally takes three years.

In a next step the HRC discusses with the relevant government ways of ending the violation. Some governments engage constructively and seek a normative solution. Some do not, or even deny the violation. The HRC then decides whether to proceed with the complaint in public or to conclude the case. Decisions are taken by vote and sometimes follow a bloc orientation. The President of the HRC makes publicly available information on the proceedings and the decisions taken.

In June 2012, the Council decided, for the first time, to transfer the confidential complaint against the government of Eritrea to a public procedure and to establish the mandate of a Special Rapporteur to follow up, although the government of Eritrea denied any such need (A/HRC/RES/20/20). The High Commissioner was instead alarmed by the intimidation of human rights defenders and journalists, as well as by the restrictive way of registering civil society groups. It was interesting to note that the country mandate was introduced by three main sponsors from Africa: Djibouti, Nigeria and Somalia. This was the first time in the history of the HRC that the African Group had called for a country mandate even though the concerned government did not agree. Interestingly, Cuba, China and the Russian Federation did not insist in a vote, whereas they normally, on principle, asked for a vote in such cases. The country mandate was therefore adopted without a vote, although China, Cuba and the Russian Federation delivered statements to the protocol saying they would dissociate themselves from the consensus.

Despite this particular success story the large number of complaints sent to the Working Group of Communication compared to the small number of cases finally dealt with, casts doubt on the efficacy of the mechanism, in particular from the viewpoint of the people affected. As the procedure is mainly confidential, it is also hard to estimate how far the mechanism may contribute to establishing indicators with regard to the question of when a human rights violation is identified as systematic and severe. Another open question is the final end of the

unattended complaints and how far NGOs might be in a position to be involved and to organise political pressure.

## 4. Recent Debates on the Universal Periodic Review

The debates inside and outside the HRC on the Universal Periodic Review (UPR) largely emphasise the promising outcome of the first UPR cycle. Positively noted is the participation of all UN member States, accompanied by a high-level participation of State delegations and a number of norm-related comments, questions and recommendations posed to the State under review. Even though some States only participated in a minimalist fashion, the conclusion can be made that the UPR is accepted worldwide.

### 4.1 Main Findings of the First Cycle

From approximately two dozen at the beginning, the number of recommendations to the State under review later increased in some cases to over 150. The total was over 20,000 recommendations at the end of the first cycle. More than two-thirds of all recommendations were accepted. However, the more specific and the more action-oriented the recommendations, the lower the acceptance rate. Recommendations related to ESC rights were more likely to be accepted. Studies show that there was a general effort on the part of most of the States under review to avoid explicitly rejecting recommendations by providing very general responses or giving no response, for example, simply 'taking note of' the recommendations.<sup>23</sup> An increasing number of States, meanwhile, report on how far they have implemented recommendations, some even voluntarily provide mid-term reports and thus demonstrate that the mechanism can work.

A larger portion of the recommendations, in particular the specific and action-oriented ones, were presented by WEOG. According to statistical assessments, African and Asian States are more likely to make recommenda-

23. For an assessment of the first cycle see Edward McMahon (2012): The Universal Periodic Review: A Work in Progress. An Evaluation of the First Cycle of the New UPR Mechanism of the United Nations Human Rights Council. accessible via <http://library.fes.de/pdf-files/bueros/genf/09297.pdf>.



tions in terms of what the State under review is already doing or to recommend a general, fairly nonspecific action.<sup>24</sup> Asian and African States also present most of their recommendations to countries of their own regional groups. In contrast, WEOG and the EU members of the East Europe Group mostly address States of Asia and Africa. Democratically ruled States made stronger recommendations than less democratic States. A large number of recommendations addressed issues such as international instruments, women's and children's rights, torture, the administration of justice, detention conditions or minorities. Altogether, these and further results can be interpreted as modest but positive. The entire review process, including the second cycle, should be understood as evolutionary. Overall, the UPR emerged with excellent and concise documentation on country situations and the corresponding political environment in the countries.

With a particular regard to NGOs and civil society organisations, the national segment of the UPR procedure improved the dialogue between governments and civil society, in particular in Asian States, although starting from quite a low level. NGO engagement has been crucial in pressuring for mid-term compliance reports and requesting participation in the follow-up. A very instructive example of civil society's role during the first UPR cycle was observed in Lebanon. Before the review started, civil society stakeholders underwent capacity-building in cooperation with the Office of the UN High Commissioner for Human Rights (OHCHR) and the Friedrich-Ebert-Stiftung. A coalition of NGOs emerged that launched its stakeholder report during a conference at the press club in Beirut in order to attract media and public attention. The coalition also invited diplomatic representatives of the UPR Troika<sup>25</sup> and involved the Lebanese parliament. In preparation for the UPR interactive dialogue in Geneva, the NGO coalition lobbied embassies in Beirut, especially HRC members, and diplomatic missions in Geneva. During the review, the coalition organised a side event in which the government delegation also participated. During the days between the review and the adoption of the UPR outcome of the interactive dialogue, the NGO

coalition lobbied the Lebanese government back home in order to get the government to accept 14 recommendations under study. At the end of the UPR, in the adoption process by the plenary of the HRC, the coalition delivered an oral statement.

Afterwards, back in Lebanon, the coalition organised a roundtable on the follow-up, printed posters referring to the recommendations and sent a letter to parliament members and other NGOs. The next planned steps are lobbying the Lebanese government in order to get the UPR recommendations included in the national human rights action plan, as well as to identify a time frame and who will be in charge. At the end of 2012, the coalition was due to publish its mid-term report. All activities were also reflected by social media such as YouTube, blogs and Facebook. This experience showed in an exemplary manner the high-profile opportunities offered by the UPR to NGOs for advocacy and monitoring human rights.

## 4.2 How to Make NGO Engagement Sustainable

In order to keep the UPR a useful instrument in the future, some experiences should be taken note of in general terms. NGOs should provide a clear statement about facts and concerns in relation to the human rights situation in the State under review. NGOs should further propose concrete and specific recommendations aiming to improve the situation; in other words, recommendations that are action-orientated and measurable. It was observed that States participating in the interactive dialogue were likely to raise concerns previously expressed by NGOs. The most likely accepted concerns dealt with the international framework for human rights, rights to social security and an adequate standard of living, equality and non-discrimination, education and participation in the cultural life of the community.<sup>26</sup>

States are fairly unlikely to raise concerns about civil and political rights, such as rights to life, liberty and security of the person, freedom of religion or belief, expression, association, peaceful assembly, and participation in public and political life, regarding the administration of justice and the rule of law or addressing State power in general. States were also reluctant with regard to the

24. See Edward McMahon 2012, *op.cit.*, and further assessments; see also the database of UPR-Info at <http://www.upr-info.org>.

25. The Troika consists of three HRC member States from different regional groups who serve as rapporteurs in the interactive dialogue of the State under review (*outcome report*); for details see <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>.

26. See footnote 23.

right to privacy, marriage and family life, lesbian, gay, bisexual, transgender, minorities, and indigenous peoples. The latter are among the most contentious issues as they touch on a different understanding based on cultural norms (privacy, marriage, family life) and cultural diversity (minorities, indigenous peoples).<sup>27</sup> Despite the hesitancy, the UPR provides a legitimate platform to request the responses to these issues by the State under review.

Some of the most significant opportunities for NGO lobbying on human rights within the UPR proceedings concern the State obligation to include civil society stakeholders in the national process, as laid down in UNGA resolution 60/251 and the HRC institution-building package (A/HRC/RES/5/1).<sup>28</sup> Thus, NGOs can legitimately engage in the UPR and advocate national consultation, visits of Special Procedures or ratification of human rights treaties. The UPR definitively supported the self-organising process of civil society stakeholder in many countries, particularly in Asia. It can be further concluded that the UPR contributed to improve the participation of civil society stakeholder on human rights matters, even in countries, such as the United Kingdom, Switzerland, USA, Ireland or Brazil.<sup>29</sup>

On the other hand, the UPR imposes an additional burden not only on countries but on many civil society stakeholders interested in providing their assessment of the country's human rights situation. This is particularly true for developing countries that do not have the financial or technical capacities needed to participate fully or to comprehensively fulfil the recommendations and expectations concerning the reporting system and the follow-up process. The use of social media and the webcasting of HRC sessions now allows contributions even at the grassroots level, avoiding costly and complicated transportation. Nevertheless, the full participation in particular of people from the global South is still an unresolved issue, although it has been under consideration for a long time.

27. Op. cit.

28. Added by HRC resolution 16/21 and decision 17/119 as outcome from the review process providing the necessary modifications of modalities for the review in the second and subsequent cycles.

29. See footnote 23.

## 5. Exemplary Country Situations

In the wake of the so-called »Arab Spring«, the HRC adopted a number of resolutions criticising the regimes in Libya and Syria. The Council even decided, for the first time, to call the UN General Assembly to suspend the membership of Libya in view of the human rights violations of the Gaddafi regime. On Syria, the HRC has adopted eight resolutions addressing and condemning human rights violations and held four special sessions in 2011 and 2012. On both countries, independent fact-finding missions and commissions of inquiry were set up to investigate and report on human rights violations. The investigations uncovered flagrant human rights violations committed by the regimes. In response to these crises, the HRC managed to respond effectively. Against this background, the question emerges what makes the difference between these two countries compared to many others that would deserve similar attention, such as the Democratic Republic of Congo (DR Congo), Sri Lanka and Myanmar, and what lessons could be learned with relevance for NGOs.

### 5.1 Democratic Republic of Congo

The human rights situation in the Democratic Republic of Congo (DRC) can be roughly characterised as a general decay of economic and administrative infrastructure due to the Mobutu dictatorship (1967–1995), the wars between 1996 and 2002, followed by years of unrest, corruption, lack of governmental outreach and impunity. Today, major concerns relate to the instability in the eastern provinces, the activities of militias and the existence of Mafia-like structures, combined with reckless economic exploitation. Human rights violations are committed by non-state militias as well as by State security forces, including sexual violence as weapon of war. There is a high infant mortality rate in combination with a lack of basic education and medical treatment. Overall, there is an extreme rate of impunity. It has been estimated that there have been up to six million victims and the Presidency of Joseph Kabila (since 2006) has not made any difference for the better, rather for the worse.<sup>30</sup>

30. For a more comprehensive specification of the human rights situation see the data of the Ökumenisches Netzwerk Zentralafrika (ÖNZ) at <http://www.oenz.de>, and the country analysis in the annual reports 2012 of Human Rights Watch at <http://www.hrw.org/world-report-2012>, and Amnesty International at <http://www.amnesty.org/en/annual-report/2012>.

Although civil society in the DRC is lively, it lacks cooperation, resources and training. Civil society actors suffer from government repression, criminalisation, threats, arrests and impunity, even in cases of murder. Civil society also encounters problems in finding common interests and strategies. Meetings beyond the capital Kinshasa are rare. There is also an increasing lack of appropriate international attention, together with a general »donor fatigue« towards the DRC, reflecting despair.

The disastrous situation is a matter of concern for the United Nations, which deals with the DRC at various levels. The UNSC sent an international peace keeping mission in 1999, known as MONUC<sup>31</sup> (since July 2010 MONUSCO),<sup>32</sup> which is now the biggest UN peacekeeping mission, with over 20,000 troops. According to its mandate, MONUC/MONUSCO should mainly protect the population from military harassment. A special UNSC Expert Group is engaged to document and regularly report to the UNSC on human rights violations.

A second level of attention within the UN context is marked by the HRC mechanisms since 2006 and by its predecessor, the former Commission on Human Rights. The latter dealt with Zaire and the subsequent DRC since 1993 by a country mandate of the Special Procedures. In 2008, a majority led by the regional group of African States decided to end the country mandate, at that time already degraded in status from a full-fledged country mandate monitoring and critically assessing the human rights situation to a mandate of technical assistance conducted by an Independent Expert. Nevertheless, the same majority felt that some international monitoring should be continued and decided to invite six thematic mandate holders of the Special Procedures to present joint annual reports together with the Special Representative of the UN Secretary-General for children and armed conflict.<sup>33</sup>

31. Mission de l'Organisation des Nations Unies en République Démocratique du Congo.

32. United Nations Organization Stabilization Mission in the DR Congo; for details see <http://monusco.unmissions.org>.

33. HRC resolution A/HRC/RES/7/78; the six thematic mandates of the Special Procedures were the Special Rapporteur on violence against women, its causes and consequences; the Special Rapporteur on the human rights of internally displaced persons; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders; the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (transformed 2011 into a mandate of a Working Group). The seven experts delivered three joint reports in the years 2009 to 2011.

In 2012, the HRC decided by consensus to review the issue of technical assistance but this time conducted by the OHCHR and not by an Independent Expert.<sup>34</sup> In December 2009, the DRC underwent the UPR, within the framework of which the participation of local and international NGOs in the review was qualified as 'weak'.

Beyond the institutional mechanisms of the UNSC and HRC, the human rights situation in the DRC receives relatively little international attention. This is certainly not owing to a lack of accurate information. African bodies such as the African Union (AU) and the International Conference on the Great Lakes Region (ICGLR)<sup>35</sup> are even active in the conflict resolution. There must therefore be other reasons why such a human rights crisis is maintained and barely known beyond the level of experts and a few human rights defenders.

Contrary to the tendency of decreasing bloc relevance in general, in the case of the DRC the bloc approach of African States still prevails with regard to the DRC government. This has a number of different reasons, including a still strong anti-colonial motive to refuse international – that is, Western-led – involvement and intervention. In addition, neighbouring countries are substantially involved in the security crisis, in particular in the Kivu provinces and in collaboration with international companies. Thus, the war economy is maintained, resources are looted and sold at a tremendous profit on world markets. The political arena is narrow and democratic procedures are underdeveloped, obstructing human rights defenders and civil society actors in properly articulating their concerns. There is State oppression of members of the opposition and the media. DRC society is largely fragmented and traumatised.

Within the means of the HRC, a resolution with a robust language would be required. As long as the neighbouring countries – also with ambiguous human rights records – tolerate the situation, the prospects at State level are fairly limited. The current engagement of NGOs might be enlarged, making use of the HRC and its instruments as a platform for seeking coordination among organised civil society stakeholders covering the area of the Great Lakes.

34. See HRC resolution A/HRC/RES/19/27.

35. A regional initiative aimed at rationalising the management of public resources.



## 5.2 Sri Lanka

Sri Lanka has barely been subject to an institutional mechanism, either by the former Commission or by the later HRC, although the human rights situation would have required a referral a long time ago.<sup>36</sup> During the Commission's time, Western countries addressed the human rights situation by oral statements but no formal procedure was established. The current situation is far from guaranteeing equality in terms of political representation and participation of citizens in governmental planning and decision-making. The former institutional checks and balances have been altered. Political decision-making lacks transparency. Independent institutions such as the judiciary are under attack from the Executive. Although the government of Sri Lanka exercises its power in accordance with legal rules, the rule of law and democratic governance are in jeopardy.

Despite the formal end of the military conflict in May 2009, the current human rights record is characterised by disappearances, extra-judicial killings, assaults, abductions, killings and censorship of journalists, fierce attacks on human rights defenders, impunity with regard to sexual violence and torture in police stations. Minorities are oppressed, land rights and language rights and freedom of religion or belief are denied. The North of the country is militarised and the Sinhalese language and cultural symbols are systematically imposed on it. There is no reconciliation policy towards Tamil people and Muslims. The government shows its unwillingness to meet minimum standards of accountability and to deal with allegations of war crimes and crimes against humanity during the final stage of the war in early 2009. The minimum standards required by international criteria on good governance are not met at all.<sup>37</sup>

The first formal referral on the country's human rights situation by HRC mechanisms was the 11th HRC special session held on 26 and 27 May, 2009, requested by the EU. On the eve of this session, the government of Sri Lanka issued a joint communiqué together with the UN Secretary-General in which Sri Lanka reiterated its commitment to the promotion and protection of human rights

and maintaining international human rights standards and international obligations. The UN Secretary-General underlined the importance of an accountability process for addressing violations of international humanitarian and human rights law. He expressed his expectation that the government would take measures to address those grievances.<sup>38</sup>

Against this background and considering the well embedded position of Sri Lanka within NAM and the Asian States group, the EU initiative failed to enforce accountability. Even worse, the government of Sri Lanka managed to introduce its version of the incidents into Resolution A/HRC/RES/S-11/1. The text not only backed the government's position but, unlike other resolutions of this nature, did not mention any follow up and even denied the HRC the right to comment on human rights issues as allegedly interference with the internal affairs of a sovereign country. This was a fundamental setback with regard to the agreements made at the Vienna Conference on Human Rights in 1993 on international monitoring on human rights. The original intention of the EU to enhance human rights and international procedural standards ended up in a complete disaster. This experience negatively predetermined for a while any further attempts to address the human rights situation in any country through a resolution.

In the case of Sri Lanka, it was the UN Secretary-General who took the initiative to bring this human rights situation back to the UN institutions. He established an international expert group in order to pave the way for an accountability process in accordance with international standards. The Panel of Experts<sup>39</sup> was asked to collect the available information and to submit the report in April 2011. The Panel concluded that there was credible information that could meet the criteria of war crimes and crimes against humanity. Therefore, the UN Secretary-General should seek investigation modalities taking into account the scope of the alleged violations in Sri Lanka. The Panel stated that the national Lessons Learnt and Reconciliation Commission (LLRC) would not satisfy standards of independence and impartiality and other

36. For details on the human rights situation see the reports by Amnesty International and Human Rights Watch op.cit., footnote 30.

37. See the term and concept of good governance translated into Asian circumstances at <http://www.unescap.org/pdd/prs/ProjectActivities/On-going/gg/governance.asp>.

38. See the joint statement at <http://www.un.org/News/Press/docs/2009/sg2151.doc.htm>.

39. Composed of Mr Marzuki Darusman (Indonesia, Chair), Mrs Yasmin Sooka (South Africa), and Mr Steven Ratner (United States); for details on the mandate and the outcome see <http://www.un.org/en/rights/srilanka.shtml>.

domestic mechanisms did not exist to meet such an end. The Panel recommended reconsidering the resolution of the special session from May 2009 in light of the Panel's report.<sup>40</sup>

At the 17th regular session in June 2011, the HRC President informed the plenary that the Panel's report would be available at the HRC's extranet website but engaged in no further activity. The Canadian government then presented a draft resolution at the 18th regular HRC session in September 2011. The draft requested the Government of Sri Lanka to submit the report of the LLRC to be discussed during the 19th session of the HRC in March 2012 in the Council's plenary. The HRC should have been enabled to make an assessment of both documents and conclude how far international standards on accountability were met. Although the Canadian delegation was quite confident in obtaining a majority to support this resolution, Canada dropped the draft without any further explanation. Despite this setback, the discussions made it possible to conclude that the balance of forces in the HRC on Sri Lanka had changed.

Thus, the USA took the lead in March 2012 and introduced a resolution which called on the government of Sri Lanka to implement the recommendations of the LLRC, to initiate credible and independent actions to ensure justice, equity, accountability and reconciliation for all Sri Lankans, to elaborate a comprehensive action plan for the LLRC recommendations and to address the alleged violations of international law. The text encouraged the OHCHR and relevant mandate holders of the Special Procedures to provide advice and technical assistance in implementing the above mentioned steps, in consultation with and with the concurrence of the government of Sri Lanka. The resolution requested the OHCHR to present a report to the HRC at its 22nd regular session (March 2013). It was argued that the international community had waited almost three years for action by the Sri Lankan government but nothing perceivable had happened. The resolution *»Promoting reconciliation and accountability in Sri Lanka«* was put to a vote and achieved a majority (A/HRC/RES/19/2).<sup>41</sup>

40. Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, at [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf).

41. The resolution was voted on with 24 in favour, 15 against and eight abstentions; see details of the text and voting at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/126/71/PDF/G1212671.pdf?OpenElement>.

National and international NGOs as well as human rights defenders supported the initiative through campaigns, advocacy, oral and written statements and side events in Geneva. The complaint mechanism with pertinent mandate holders of the Special Procedures was used, together with briefings for the diplomatic missions and alternative media coverage at the HRC level. The civil society stakeholders from Sri Lanka and the international forum also provided information to the UN Treaty Bodies such as CAT, CESCR or CEDAW.<sup>42</sup> Thus, they contributed to making countries such as Benin, Cameroon, India, Libya, Mauritius, Nigeria, and Uruguay vote in favour and countries such as Angola, Botswana, Burkina Faso, Djibouti, Jordan, Kyrgyzstan, Malaysia, and Senegal at least to abstain. In 2009, Angola, Burkina Faso, Cameroon, Djibouti, India, Jordan, Malaysia, Nigeria, Senegal, and Uruguay still supported the view of the government of Sri Lanka. Some of these governments had lost confidence in the government of Sri Lanka, however, which obviously had no intention of cooperating with international human rights mechanisms and instead started reprisals against human rights defenders.

Taking this experience into consideration, civil society stakeholders need to continue advocacy, provide assessments and reports on local situations and check the implementation of LLRC recommendations. The membership composition of the HRC during the upcoming 7th cycle (January to December 2013)<sup>43</sup> seems still to favour a normative approach, insisting in minimum standards of accountability. Although it will be a big challenge to maintain the high level of activities and expertise, it seems to be worth it.

### 5.3 Myanmar

Since March 2011, Myanmar has witnessed a liberalisation of certain sectors of society such as the media, the release of a number of political prisoner and political dialogue with opposition and ethnic groups. On 1 April 2012, elections were held which turned into a victory for the opposition, the National League for Democracy. While the reforms are state-driven and stem predomi-

42. Committee against Torture (CAT), Committee on Economic, Social and Cultural Rights (CESR), Committee on the Elimination of Discrimination against Women (CEDAW).

43. See details at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx>.



nantly from the president and progressive members of the military-dominated party, the Union Solidarity and Development Party, it has set free a social dynamic within the country that may go beyond the safety barriers set by the military and traditional political elite. Some components facilitating liberalisation have been external factors, such as the growing economic presence of China and ASEAN's<sup>44</sup> peer approach towards Myanmar. Both aspects may have worried and encouraged the military to allow reforms. However, this does not mean a genuine process of liberalisation of Myanmar society and it is difficult to attribute even part of the changes to any of the international sanction regimes imposed by the United Nations.<sup>45</sup> Thus, the progress is slow, uneven and fragile, and the entire reform process is continuously threatened by military hardliners. The influence of the military within the political system and the economy still prevails.

Against the background of this ambiguous picture, it is questionable how the further opening of the formerly foreclosed country can be best supported. The EU has already suspended almost all its sanctions, with the exception of the arms embargo, launched incentives to effect further liberalisation and is offering development aid. At the level of the HRC, the regular session in March 2012 showed the willingness of the HRC member States to adapt the country mandate on Myanmar<sup>46</sup> in accordance with the reform process and reliable prospects of continuing with the change. During the interactive dialogue on the annual report of the Special Rapporteur, a number of States from all regions underlined their preparedness to further support the liberalisation process. In case of continued progress, the country resolution in March 2013 may be renewed but shifted from a mandate with monitoring competence to a mandate of technical assistance.

NGOs, particularly human rights organisations, continuously monitored the human rights situation in Myanmar throughout the decades of dictatorship. Assessing the current situation, there is an unanimous analysis welcoming the reform process but still hesitating to grant

credit to the reform-orientated regime.<sup>47</sup> The human rights organisations argue that though Myanmar shows signs of change, the government is still dominated by the military and former generals and is therefore still far from seriously addressing the human rights situation in the country. A number of political prisoners have been released, laws to form trade unions enacted, freedom of assembly extended, media censorship eased, and the opposition allowed to register and contest by elections. However, a large number of political prisoners remain in detention. Journalists report that topics such as corruption, civil war, peace talks between government and ethnic groups, or government mismanagement still cannot be reported on. The government remains reluctant to amend old censorship laws and journalists are forced to work undercover. Furthermore, ethnic-based civil war and inter-ethnic armed conflict have escalated. The security forces continue to use forced labour. Extrajudicial killings, sexual violence, intimidation and attacks on civilians are everyday experiences, in particular in remote areas.<sup>48</sup>

This overview reveals that at the level of NGOs and civil society organisations, there is little effective involvement in the HRC mechanisms. Compared to the examples of Libya and Syria, communication infrastructure, access to expertise, lobbying and advocacy are limited to the inner circle of experts. There is still room for improving, for instance, the cooperation between initiatives that have been addressing different platforms, such as the European Commission, the European Council or the International Labour Organisation (ILO). In order to make the civil society stakeholders' involvement more relevant and effective, a basic infrastructure should be built, combined with exposure visits including local Burmese. The current public and international attention provides an extraordinary opportunity for this. Thus, the reform process could be supported towards further democratisation and to prevent it ending up as a smarter form of authoritarian rule. This requires additional efforts in order to emerge with a critical mass of human rights defenders.

Altogether, a first lesson learnt by NGOs consists in the acknowledgement that efficient lobbying at HRC level

44. Association of Southeast Asian Nations.

45. For an overview of the measures taken by the UN human rights system see <http://www.ohchr.org/EN/countries/AsiaRegion/Pages/MMIndex.aspx>.

46. Established in 1992 by resolution 1992/58 by the then Commission on Human Rights.

47. See the reports of Amnesty International and Human Rights Watch quoted in footnote 29.

48. Reports of Human Rights Watch and Amnesty International, op.cit. footnote 29; see further assessments made by the International Crisis Group, at <http://www.crisisgroup.org/en/regions/asia/south-east-asia/burma-myanmar.aspx>.

requires a medium-term or rather long-term strategy, a consistent presence and comprehensive contribution to the respective HRC mechanisms, a corresponding budget together with an open mind for cooperation, in particular when the NGO's budget does not allow a continuous presence at regular HRC sessions. Although the case of Sri Lanka remains ambiguous, it shows the changes that can be achieved by such efforts to swing the majority in the HRC. A majority of States had accepted in principle the legitimacy of discussing, reporting and monitoring the governance of a country in accordance with the pertinent normative standards, sometimes even despite the reluctance of the country concerned. Does it have any practical meaning on the ground, however? In Sri Lanka, human rights defenders are strongly backed and encouraged to insist on the rule of law and the accountability of their government.

A second lesson learnt relates to this observation: effective involvement in the functioning of the HRC needs a critical number of engaged people at national level: in other words, human rights defenders and other civil society stakeholders who will support the initiatives taken in the UN at domestic level through campaigns and advocacy. Furthermore, the UN human rights mechanisms are an effective tool to counter or prevent reprisals against human rights defenders, as in the case of Sri Lanka. The case of Lebanon shows what can be achieved when civil society stakeholders are systematically supported, trained and qualified in using the HRC and its instruments.

A third lesson is related to the opportunity to use the HRC and its instruments as a platform for seeking coordination among civil society stakeholders organised at the domestic level, as well as at regional or international level. The HRC and its instruments constitute a legitimate body for efforts to better coordinate the human rights approach in particular among stakeholders of neighbouring countries, as in the case of the DRC. A fourth lesson immediately follows from this observation: international monitoring can be continued, for example, by NGOs, even though the government concerned might be reluctant.

A fifth, and final, lesson learnt draws attention to the issue of extending and diversifying the platform of activities. This includes consideration of the region and its institutions; taking into account the UNSC and its mechanisms for a human rights monitoring; drawing

attention to business involvement; and considering additional stakeholders with »institutional weight«, such as religious communities, for example, churches, with capacities as global players. With regard to the DRC, for instance, a summit of church leaders predominantly from the region was discussed, together with a working secretariat of the churches at the HRC. But again, what may sound simple, is highly challenging in terms of organisation, training, capacity building and funds.

## 6. Freedom of Religion or Belief

A further example of NGO involvement in the HRC, the right to freedom of religion or belief (also: religious freedom), has always been a highly controversial issue within the UN human rights system. While the UN treaty system has the Convention on the Elimination of All Forms of Racial Discrimination (1966), the parallel project on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief never achieved adoption as a treaty but was adopted by the UN General Assembly in 1981 (resolution 36/55) with the status of a legally non-binding declaration. In the context of the Commission on Human Rights and later the HRC, a number of resolutions were adopted that addressed religious freedom with a rather hostile perspective towards other religions and their adherents.

Such controversy even turned into a voting pattern in terms of a North–South division. The most notorious crystallisation point was the resolution on »*Combating Defamation of Religions*«, since 1999 regularly presented to the UNGA, the Commission on Human Rights and later the HRC. The main sponsor was the OIC with Pakistan as speaker, generally supported by NAM and like-minded groups. For more than a decade, the resolutions almost always received a majority of votes. The Western governments voted against this resolution.

But the term »*defamation*« was problematic, fostering the misunderstanding that religion as such and its reputation should be subject to international legal protection, while the human rights concept institutionalises respect for the dignity and freedom of the individual human being. The discord was not limited to the intellectual debate. The resolution had a real impact and served some governments to legitimise domestic legislation, such as blasphemy laws. Those laws at least intimidate members

of religious communities different to the State-supported ones, minorities, converters, dissenters or heretics and run against the normative understanding of the right to freedom of religion or belief. In orthodox Muslim-orientated countries, such as Pakistan, Iran or Saudi Arabia, blasphemy offences can even lead to capital punishment. The controversies polarised in 2006 when the so-called Danish cartoons provoked an outcry in the Muslim world. Beyond the comprehensible ill feeling of Muslims, the polarisation and the term »defamation« turned out to be instrumental in promoting censorship, exclusion, criminalisation and further restrictive measures characteristic of authoritarian policymaking.

The discord on defamation has also always been a symbol of the debate within the UN human rights system on the universalism of human rights norms, principles and legitimate limitations. The resolution on defamation reflected at best the traditional understanding of tolerance defined by ruler and State, while the human rights approach speaks of rights holders. For good reasons, the State is deprived of sole authority and the UN human rights systems introduced a second authoritative opinion based on the UN human rights system.<sup>49</sup> This system pays particular attention to making its bodies and experts as independent as possible from States and power-related considerations in order to enable them to follow a fairly strict normative orientation of their mandates. Thus, the dispute about the term and concept of defamation dealt not only with the right to freedom of religion or belief, free choice, communication and practice as such, but also with the right to freedom of expression and assembly, in other words, fundamental conditions enabling human beings to make their own choices in life planning in particular, and for an open society and the diversity of cultures in general.<sup>50</sup>

Due to the re-arrangement of majorities in the HRC mentioned above, the OIC submitted in March 2011 the resolution on »*Combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence and violence against persons based on religion or belief*« (A/HRC/RES/16/18), adopted

49. The UN Charter, the Universal Human Rights Declaration, the UN treaties, UN Treaty Bodies, independent experts of the Special Procedures, the OHCHR as well as pertinent mechanisms and instruments.

50. For a more detailed overview and scope of the dispute see Michael Wiener (2007): *The Mandate of the Special Rapporteur on Freedom of Religion or Belief – Institutional, Procedural and Substantive Legal Issues*. In: *Religion and Human Rights 2* (2007), pp. 3–17.

without a vote. Yet the title indicated that something had changed fundamentally. The purpose of the resolution is now orientated towards the protection of the individual human being, and the wording is in line with international human rights standards. The developments in the Council and the pendulum towards new majorities promoting more normative standards, opened the window. Among other things, newly elected Council member the USA (2009) had chosen to handle the issues of country resolutions, freedom of speech, freedom of religion or belief and freedom of assembly as the main topics of its involvement in the HRC.

A critical contribution was further made, at the peak of the controversies, by the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène. They released a joint report in 2006 that dealt with the term »defamation« from a critical perspective and its negative impacts both on freedom of religion or belief and on freedom of expression. With this report, they managed to re-establish a normative language and freedom of speech as a constitutive element for religious freedom.<sup>51</sup> Immediately afterwards, countries such as Algeria started to address substantial threats to religious freedom in terms of intolerance, stereotypes, prejudices or manifestations of extreme hatred.

The debates and conflicts with regard to UN human rights mechanisms around the issue of freedom of religion or belief have been closely followed by civil society stakeholders since their beginning. In- and outside the United Nations, NGOs had expressed their deep concern at the adverse impact not only on the freedom of religion or belief but also freedom of expression and peaceful assembly. A number of NGOs had developed a series of written and oral statements already delivered to the Commission and later to the Council,<sup>52</sup> accompanied by side events, workshops, seminars, advocacy in Geneva

51. See Asma Jahangir /Doudou Diène (2006): Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance. Document A/HRC/2/3, Geneva.

52. Such as the European Centre for Law and Justice (2008): *Combating Defamation of Religions*. Submission to the UN Office of the High Commissioner of Human Rights, available at: [http://eclj.org/PDF/080626\\_ECLJ\\_submission\\_to\\_OHCHR\\_on\\_Combating\\_Defamation\\_of\\_Religions\\_June2008.pdf](http://eclj.org/PDF/080626_ECLJ_submission_to_OHCHR_on_Combating_Defamation_of_Religions_June2008.pdf).

and a number of capitals. NGOs and other civil society stakeholders provided the Special Rapporteur on freedom of religion or belief with pertinent expertise and conducted continuous communication. Given the hostile environment towards any normative approach at the latest stage in the Commission and the first three years of the HRC, the mandate on freedom of religion or belief was understood as a keystone in defending the normative architecture of the HRC. NGOs have underpinned these endeavours. Again, as stated in the previous section on exemplary country situations, the constituting of civil society stakeholders was a complementary need to make the HRC mechanisms effective. This conclusion can be extended to further thematic issues, such as water and sanitation, food, housing, internal displacement, migration, poverty, development or business and human rights. The lesson learnt from the activities on freedom of religion or belief is that even such unspectacular advocacy can yield a positive result and concrete outcome in swinging the majority of the HRC. The work has been based on a long-term strategy requiring corresponding inputs in terms of qualified personnel and funds.

## 7. Relationship between the UN Security Council and the UN Human Rights Council

The UNSC has gradually increased its awareness of human rights violations as a threat to peace and security, particularly in relation to peacemaking and peacekeeping. Currently, there are 14 peacekeeping missions with a human rights component. The rule of law and international justice have also become a focus of the UNSC dealing with the protection of civilians related to issues such as women, peace and security, and children and women in armed conflict. The UNSC now systematically considers human rights standards when evaluating the use of sanctions under Chapter VII of the UN Charter, such as arms embargoes, travel bans, listing of persons, asset freezes, commodity and trade sanctions, financial restrictions, and limited access to Internet or satellite communications.

The UNSC has further developed a human rights language in the context of Libya, Côte d'Ivoire, the Goldstone Report and the referrals to the International Criminal Court. In 2011, the High Commissioner for Human Rights, Navi Pillay, was invited nearly every six months to brief the

UNSC on the situations in Syria, Libya, Yemen, and Côte d'Ivoire. The so-called Arab Spring was obviously a key point in extending the UNSC human rights approach. On Libya and Yemen, the UNSC expressly condemned human rights violations. At least in 2011, the UNSC turned into the key arbiter of international action regarding the situation in the Arab world.<sup>53</sup>

Thus, the UN Security Council has increasingly demonstrated its ability to incorporate human rights assessments in its debates on conflict situations, while the UNSC is still far from developing systematic human rights monitoring, even in peacekeeping operations, or paying special attention to war crimes, crimes against humanity and gross violations of human rights. A step forward would be taken if the UN Secretary-General included a human rights analysis in all his reports on country situations. The UNSC can also be encouraged to undertake missions to countries in which early signs of crisis indicate a need for its involvement. For such purposes, the UNSC could make use of the expertise of the HRC Special Procedures.

Based on this brief assessment, a constructive and complementary relationship between the HRC and the UNSC would require a strategy that takes into account the genuine instruments and assets of each institution as regards particularities of membership, structure and voting procedures, as well as changes in the political situation. In addition, it should be noted that non-state actors have only very limited official access to the UNSC. Considering the instruments and mechanisms of the HRC, this institution seems to be appropriate for doing the groundwork on prevention, serving as an early warning instance and seeking conflict arbitration based on a normative structure and on political dialogue. The HRC is recognised by its expertise and gathering reliable evidence by its independent experts and is thus in a position to contribute to showing the options for an effective and rapid crisis response. The UNSC has shown its potential for engaging in situations in order to combat massive violations of human rights, including robust measures. A possible en-

53. For a more detailed analysis see Wolfgang S. Heinz /Peter Litschke (2012): *Der UN-Sicherheitsrat und der Schutz der Menschenrechte. Chancen, Blockaden und Zielkonflikte*. Deutsches Institut für Menschenrechte, Berlin, available at: [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/Essay\\_13\\_Der\\_UN\\_Sicherheitsrat\\_und\\_der\\_Schutz\\_der\\_Menschenrechte.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Essay_13_Der_UN_Sicherheitsrat_und_der_Schutz_der_Menschenrechte.pdf). See also Theodor Rathgeber (2012): *New Prospects for Human Rights? The Human Rights Council between the Review Process and the Arab Spring*. Friedrich-Ebert-Stiftung, Deutsches Institut für Menschenrechte, Berlin, available at: [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/new\\_prospects\\_for\\_human\\_rights.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/new_prospects_for_human_rights.pdf).

hancement of the relationship between UNSC and HRC could include hearings with mandate holders of the Special Procedures and briefings by the High Commissioner for Human Rights. In order to increase public attention to certain cases and make such a complementary relationship effective, NGOs and other civil society stakeholders play a role in preparing a conducive environment.

## 8. Challenges from a Southern Perspective

Civil society stakeholders in countries of the global South face a number of structural hindrances in fully participating in the mechanisms of the HRC, starting with legal and financial obstacles. In addition, although these phenomena are not limited to countries of the global South, recent studies on the criminalisation of civil society organisations reveal an unequivocal, global trend of limiting, if not arbitrarily preventing, civil society's engagement in societal matters, in particular in Africa, Asia and Latin America.<sup>54</sup> Thus, the building of civil society as such and creating a conducive environment remain fundamental tasks and require ongoing efforts. At the same time, the realities in a number of States may cast doubt on whether the UN human rights system in general and the HRC in particular are relevant considering the non-compliance of these governments with procedures and normative standards. Often, the reluctance of these governments reinforces the ascription of weakness or irrelevance to HRC mechanisms by civil society stakeholders. Thus, the experience of the complementary role of UN institutions on human rights in creating a more favourable domestic environment is limited to small groups of experts. A certain breakthrough has been experienced by indigenous peoples and, more recently, by LGBT people, however. Altogether, the presence of civil society stakeholders in general and NGOs in particular at HRC sessions remains a challenge.

In previous sections, some expectations were identified with regard to a comprehensive human rights policy by WEOG in general, and the EU in particular. Key aspects included credibility in acting, including extraterritorial State obligations, contributions to a fair international order and seeking cross-regional initiatives based on a

partnership approach. Those expectations are widely shared among civil society stakeholders of the global South. It was further analysed that a southern perspective genuinely prioritises the issue of development, historical barriers and the current asymmetric relationships in politics as well as in the economy. Breaking down such aspects into a human rights terminology and strategic concept, the challenges from a southern perspective will emphasise ESC rights; the issues of racism, xenophobia and related intolerance; the demand for active involvement in the Durban follow-up process; the treatment and rights of migrants and refugees; the right to development, including global justice; an equitable international order; the impact of the financial and the food crises on human rights; climate change and climate refugees; environmental degradation; business and human rights, including the role of private security companies and mercenaries.

All these issues are covered by mechanisms of the HRC and the Special Procedures and therefore part of the interactive dialogues, although it is obvious that there is a disparity in attributing importance to the issues, as well as to the dialogue. Obviously, such mandates and mechanisms have been established by countries such as Cuba that might have additional intentions beyond a genuine human rights approach. To be sure, the sponsors' low reputation in human rights provides a comfortable argument in qualifying these initiatives as low ranking or even irrelevant. Nevertheless, it is due to the very nature of the issues and simple logic not understandable why there is such a reluctance on the part of most of the members of the EU and WEOG to discuss the human rights-related aspects of global justice, an equitable international order or the impact of the financial and the food crises on human rights. In the academic world, the human rights impacts have long been analysed, assessed and recognised.

With regard to civil society stakeholders, there is a number of NGOs from the global South as well as from the global North that deal with these issues. Some have been involved in developing benchmarks and guidelines to improve international cooperation and make the global North more sensitive to such issues. Within the HRC context, civil society stakeholders have a lot of opportunities to extend and strengthen agenda setting and to better link these debates in Geneva with the discussion at the national level. Expectations should not be too high, however, taking into account that those issues are

54. See, for example, Act Alliance [ed.] (2011): *Shrinking political space of civil society action*, available at: <http://www.actalliance.org/resources/publications/Shrinking-political-space-of-civil-society-action.pdf>.

'minefields' for many EU and WEOG governments and both the global South and NGOs are perceived as »the opposition«. Getting a government to change its politics is not easy; even more difficult is to move governments who are convinced that there are no alternatives.

Taking all views together, the most encouraging practice at the HRC has been the increasing number of cross-regional initiatives, while it was noted that the member States of the European Union play a rather adverse role. A southern perspective would challenge this and require opening up existing thematic resolutions and mandates for joint cross-regional sponsorship, in particular those dealing with ESC rights. For instance, the mandate and resolution on the right to safe drinking water and sanitation is obviously an issue of major interest to many countries from the global South.

Although the challenges from a southern perspective will be a crucial element for the better functioning of the HRC, there should be no illusions that Northern (Western) governments will address those issues in the near future more properly. However, considering the history of the HRC and its predecessor (the Commission), NGOs and National Human Rights Institutions (NHRIs) were among the main actors in keeping the spotlight on »uncomfortable« issues. In cooperation with more reform-orientated States, for instance from GRULAC, there is potential for agenda-setting also at the level of the HRC in order to improve international cooperation and, thus, finally lobby towards better HRC functioning. In the meantime, NGOs organise about 100 side events per HRC session, spotlighting issues that deserve public attention. A joint effort by NGOs, other civil society stakeholders including academics and NHRIs has the potential to focus on southern perspectives.

As mentioned at the beginning of this section, with the simple and extended participation of rights holders on the ground the need emerges to reflect upon an international order that offers a fair chance for everybody to develop their talents and capacities based on a free choice. Obviously, some of the topics to be handled will be discussed in other institutions and environments, such as development assistance or negotiations on world trade. But the social aspects still lack such an institutional framework. In order to contribute to such a framework, including social infrastructure, the social aspect is inherently linked to human rights standards, most obviously

laid down in the Covenant on Economic, Social and Cultural Rights, or – addressing specific groups, for instance, migrants and refugees – addressed in other conventions. As it was possible to establish global governance in world trade relations through standards and an effective ruling system, including a monitoring institution and an efficient complaint mechanism, there is no good reason to abstain from such regulation in the field of human rights protection.

## 9. Conclusion

The most promising aspect for a better and more effective functioning of the HRC from the perspective of civil society stakeholders would be the creation of an automatic trigger system. A second major aspect is the institutionalisation of a follow-up system for decision-making, resolutions and recommendations. To transform those ideas into practice, a conducive political environment needs to be organised in- and outside the HRC. At State level, joint, cross-regional initiatives and trust building have been identified as key elements for generating such a milieu. This requires – among other things – a self-critical approach on the part of governments of the global North in their perception as leading forces in matters of human rights, but also on the part of governments from the global South acknowledging their duty, in particular to protect, respect and promote human rights defenders as a key element in advancing human rights at home. For both, it is true that civil society stakeholders are uncomfortable to governments when addressing human rights issues as they may often challenge power relations. In the same way it is true that this engagement contributes to good governance in both cases. Unfortunately, there is a trend of rising reprisals against human rights defenders and civil society stakeholders, which is not limited to the southern hemisphere.

In order to develop a conducive political environment, civil society stakeholders have quite a number of means and opportunities in- and outside the HRC. A recently emerging instrument, also in the Council, is the use of social media. Human rights activism and messages have taken new forms, as evidenced on numerous occasions at HRC sessions, in particular in the wake of the Arab Spring. The HRC itself has been increasingly reliant on webcast services since its first session, thus enhancing its visibility and allowing the live participation of peo-



ple from remote places. Pre-recorded video messages have become a regular feature at official meetings, allowing the participation of those who otherwise would have been unable to deliver an oral statement or attend the meeting. The Council has been projecting its voice through a variety of social media tools, which has worked well to heighten awareness among the public worldwide, better informing the meeting participants and the media about key developments and providing practical information. For the future involvement of civil society in the HRC, social media will be an additional avenue to extend the outreach of the HRC and to promote improvements in its functioning.



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