



New Prospects for Human Rights?

The Human Rights Council between the Review Process and the Arab Spring

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- The UN Human Rights Council's review process has resulted in very limited progress. Unfortunately, more forceful tools for a better operational functioning have not been taken up. Judged in normative terms and on the basis of the corresponding expectations of rights holders and victims, the outcome of the review does not contain any fundamental novelties.
- Contrary to the shortcomings of the review, the actual evolution of the HRC's functioning within the context of the Arab Spring reveals a bundle of new or modified procedures that are potent enough to bring the HRC's functioning more into line with its mandate.
- The UN Security Council has shown it is able to incorporate human rights assessments in its considerations of conflict situations, with some diverging views and difficult discussions among its members, given the generalised national interest perspective. Its work should be further developed in terms of systematically taking on more human rights monitoring and it should refer relevant complaints on serious violations of human rights and humanitarian law to the International Criminal Court.
- Comparing the activities of the HRC and UNSC, better interaction is required to improve substantially the protection of human rights. The comparison between the HRC and UNSC demonstrates that their tools should be more appropriately used in terms of complementary action, rather than as a mere scale of escalating mechanisms.
- The independence and dissent shown by certain African states towards their regional and like-minded groups engenders hope for a continuously improving commitment, at least with regard to the HRC protecting human rights more effectively. It would be a tremendous contribution too if »human rights champions« in other parts of the world would follow such a self-critical approach.



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List of Abbreviations

HRC	United Nations Human Rights Council
IBP	Institution Building Package
NAM	Non-Aligned Movement
NHRI	National Human Rights Institutions
OHCHR	United Nations Office of the High Commissioner for Human Rights
OIC	Organisation of Islamic Cooperation
OP	Operative Paragraph
R2P	Responsibility to Protect
UNGA	United Nations General Assembly
UPR	Universal Periodic Review
UNSC	United Nations Security Council

1. Introduction

The UN Human Rights Council (HRC) emerged in response to the failures of the former Commission on Human Rights in effectively implementing its own rich normative standards. The HRC was created to raise in particular its ability to respond to urgent and chronic human rights situations in specific country situations in a timely manner. Irrespective of its detailed normative and institutional provisions, the Council should have looked into and monitored the victims' situations and should have advocated for their protection when their rights had been violated by their governments. In addition, the HRC should have supported human rights defenders in their work by providing appropriate cross-national attention. Thus, the Council was brought into being in 2006 by resolution 60/251 with the mandate: »promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner« (Operative Paragraph 2).

With the same resolution 60/251, the UN General Assembly (UNGA) decided to review the Council's work and functioning after five years. The resolution has three objectives. Operative Paragraph (OP) 1 of the resolution declares: »the General Assembly shall review the status of the Council within five years«. This part of the review process considered the institutional level of the HRC and to what extent it should be established as an independent organ of the United Nations. This part of the review process – including the number of members and membership criteria – was to be discussed and assessed in New York. Furthermore, OP 16 instructs that the HRC shall review its work and – functioning together with the assessment of the newly created country review procedure, the Universal Periodic Review (UPR) five years after its founding – pass on the results to the UNGA. These two latter segments of the review were to be discussed and assessed in Geneva and carried out by the Council itself, that is, by a Working Group formed for that purpose.

Although the review process was concluded only recently, there exist already a number of assessments on the Council's first years, its shortcomings, achievements, and future challenges, which will not be repeated in detail in this paper.¹ Instead, the second part

of the paper concentrates on some of the main shortcomings of the HRC, illustrating the review process and summarising the outcome. The text further elaborates ongoing challenges and issues. In the third part, the paper exemplifies the Council's work and functioning in relation to the recent situation in the Middle East and North Africa, as well as examines such activities within the larger institutional coordinates of the UN system for protecting human rights by emphasising the UN Security Council's (UNSC) involvement. The fourth section identifies the lessons learnt, and the concluding section argues that although the review process as such has ended with rather poor results – in terms of normative and institutional changes – the evolution of the HRC's functioning within the institutional constraints has revealed an extension of informal procedures that are potent enough to bring the HRC's functioning more into line with its mandate. The conclusion also comprises a preliminary outlook into what might be a comprehensive and effective response to severe and gross human rights violations involving simultaneously the Security Council and the Human Rights Council.

2. The HRC Review Process

When the Council started its first preparations for the review process in October 2009, preliminary assessments about the then first two years of the HRC's functioning painted a rather dark picture. The text of resolution 60/251 itself had set a high threshold. In its sub-sections a) to j), OP 5 details the main tasks of the Council as promoting the full implementation of human rights obligations undertaken by states, preventing human rights violations, and responding promptly to human rights emergencies. OP 11 and OP 12 oblige the Council to cooperate explicitly with national human rights institutions (NHRIs) and NGOs. Its methods of work shall be transparent, fair, impartial, and results-oriented, and shall allow substantive interaction with Special Procedures and mechanisms.

tion to these sources, the information and conclusions of this article are based on a further desk review as well as interviews with members of the UN Office of the High Commissioner for Human Rights, independent experts and NGO representatives, state delegates to the UN in Geneva, and other sources affiliated with the HRC. For a more detailed summary of major recommendations and the review process, see Rathgeber (2010, 2011a, 2011b).

1. See, for instance the evaluations, non-papers, and statements made in the process of the review, available on the HRC Extranet, section HRC Review at <https://extranet.ohchr.org/sites/hrc/Pages/default.aspx>. In addi-

2.1 HRC's Ability to Address Urgent Situations

A predominant concern articulated by NGOs and certain states referred to the Council's inadequate commitment and refusal to exhaust its institutional framework even to address severe, gross, and chronic human rights violations in certain countries. At its start, the Council had already revoked the country mandates on Belarus and Cuba; in the following HRC sessions, a group of member states headed by Cuba, China, Russian Federation, Egypt, and Pakistan – together with the majority of HRC member states of the Non-Aligned Movement (NAM) and the Organisation of Islamic Cooperation (OIC)² – worked continuously to prevent that the human rights situation in a country would be officially and publicly addressed or a country mandate be issued without the approval of the country concerned. Conversely, but in the same mode, Western states blocked critical evaluations, in particular in the course of the »war on terror« with regard to Iraq, Afghanistan, Guantánamo, rendition flights, and secret prisons. The majority of member states also prevented the Council from early involvement in Tunisia, Egypt, Libya, and Syria. Thus, the official register of human rights violations by the HRC differed substantially from the reality of the victims. This stalemate was perceived as a main obstacle to enable the Council to live up to its mandate. Meanwhile, this dynamic has changed, mainly due to the dissent of states in Africa, which, at their national levels, have successfully undergone a process of democratic reforms (Rathgeber 2011c).

Hence, civil society and a number of states pressed for a trigger mechanism to guarantee at least that the human rights situation in a country, or sensitive issues such as gender identity and sexual orientation, would be officially addressed, independent of particular political configurations and like-minded alliances. Among the proposals, the most favoured options were that the High Commissioner for Human Rights, the UN Secretary-General, the UN Special Envoy for the Prevention of Genocide, or a group of a minimum of five UN Special Procedure mandate holders could propose the inclusion of an urgent human rights situation on the HRC agenda. In addition, some proposals recommended dividing agenda item 4 – country situations – into regional segments in order to prevent selectivity and to guarantee a minimum of consideration of each of the regions. Other pro-

posals suggested adding an independent expert on each of the regions who would report to every regular session of the Council about the situations in the corresponding countries. It was also recommended to merge agenda item 4 with items 7 (occupied Palestinian territories) and 10 (technical assistance). In terms of procedures, some proposals recommended extending the Council's ability to respond to human rights violations beyond the scope of country resolutions and country mandates, as those instruments have been generally perceived as being of a punitive nature. Recommendations included enabling the HRC President to conduct an urgent debate, to publicly report on the communication with a concerned country, to organise pertinent panel discussions, round tables, and hearings, together with the participation of victims and rights holders.³

2.2 HRC Membership Criteria

A major point of dissatisfaction with the HRC's institutional functioning was the election process of its member states. The view prevailed that the requirement of resolution 60/251 to meet the highest human rights standards was not fulfilled by a number of member states. In this context, proposals were made, for instance by a number of NGOs, to make the review of the voluntary pledges a more serious task via an institutionalised, public contest procedure when putting forward a candidacy. Members of the Council should also have ratified at least half of the core human rights treaties without any reservations, issued a standing invitation to Special Procedure mandate holders, and should have cooperated with them effectively. Countries with which the UNSC is dealing – or which are being accused of serious human rights violations – should be excluded from being put forward as candidates.

2.3 Universal Periodic Review

Though the Universal Periodic Review has been widely acknowledged as a substantial improvement in addressing human rights situations within the UN institutional context,⁴ many proposals for the review process were aimed primarily at improving the national situation. The

2. Former Organisation on Islamic Conference.

3. See the summaries in Rathgeber (2010, 2011a); UNHRC (2010, 2011a).

4. See McMahon (2010), Smith (2011), and Sen (2011).

proposal to allow NGOs to participate in the three-hour hearing («interactive dialogue») in the Council's Working Group, however, met with little support. Non-state actors such as NGOs and NHRIs also feared that countries with questionable human rights records would refuse to submit to inspections if the process was no longer confined to their state peers. Instead, proposals recommended that the focus should be on giving a role to NGOs and NHRIs in the informal domain. Thus, the troika – the group of mediators consisting of three Council members – should, for example, arrange an informal meeting with national NGOs and NHRIs on the eve of the hearing to become informed about the latest developments in the country and to hear critical evaluations of the country report. This is an established practice in the case of UN treaty bodies. Complementing this, the NHRIs should play a role, for example in monitoring the implementation of the recommendations. In addition, the integration of national parliaments in the UPR procedure was also recommended. Finally, governments should be called upon to present an interim report after two years. In order to cope better with the occasional rush to get on the list of speakers at a hearing, it was proposed to extend the hearing from three to four hours and to examine only 12 or 13 states instead of 16 in one examination round.⁵

2.4 Subsidiary Bodies and Special Procedures

The subsidiary bodies of the Council – Advisory Committee, Social Forum, Minorities Forum, and Expert Mechanism on the Rights of Indigenous Peoples – remained somewhat neglected in the discussions on the review process. One criticism was that subsidiary organs were unduly restricted by the HRC and therefore it was proposed that in particular the Advisory Committee should be provided with a right of initiative. Similarly, members of the Committee should be able to present reports to the plenary of the Council and enter into an interactive dialogue, similar to the Special Procedure mandate holders.⁶

Regarding the UN Special Procedures, their independence was emphatically defended by actors that were open to the idea of using the review as an opportunity to launch a substantial reform, in particular countries of

Latin America and the Western group like France and Switzerland as well as Mexico. This was important because there were proposals emerging, for example, from the meeting in Algiers 2009⁷ and in a position paper by the Russian Federation, which sought to tighten the existing Code of Conduct for Special Procedures.⁸ According to the recommendations of Algiers, mandate holders should be obliged to cooperate more closely with governments, and the mandate holders' authorised access to the media should be restricted further. Others took up such proposals and wanted to establish a Working Group on the Special Procedures in order to mediate disputes in the case of complaints by governments.⁹ It was primarily non-state actors that took the opposite view – in a change of perspective, they demanded that if the Code of Conduct was to be tightened at all, it should focus on governments, obliging them to better cooperate with Special Procedures. According to this line, it was recommended that missing or unsatisfactory answers by governments – in particular to urgent appeals by Special Procedures – be reported and debated in the HRC plenary under agenda item 5. Also, refusals to allow mandate holders to visit a country should be the subject of a public debate.

2.5 Procedure and Deliberations

From the very beginning of the review process, a majority of states did not show any interest in using the review as an opportunity to fundamentally question the negotiated structure of the Council in 2006 and 2007 (HRC resolutions 5/1 and 5/2, the so-called Institution Building Package (IBP)). They showed their preference to review the HRC under a state-orientated perspective rather than a normative orientation. To the extent that institutional structures needed changing, the consensus principle would apply. Interestingly, at the time of creating the IBP, the consensus principle supported those state- and non-state actors that tried to prevent the worst in terms of not curtailing the achievements of the former Commis-

5. See the summaries in Rathgeber (2010, 2011a); UNHRC (2010, 2011a).

6. For one of the few contributions that dealt with the sub-organs, see Zoeller (2010).

7. »Retreat of Algiers« held on 20 and 21 February 2010, co-sponsored by the Permanent Missions of Norway and of New Zealand to the United Nations Office in Geneva. The main outcomes reflected the positions of NAM.

8. For an assessment of the Code of Conduct, see Domínguez Redondo (2011).

9. See the Summary Report on a meeting in Montreux, 20 April 2010, which considers an Advisory Committee of Magistrates for mediation, Permanent Mission of Switzerland to the United Nations Office in Geneva (2010). See also HRC Extranet, Footnote 1.

sion on Human Rights. In the context of the HRC review process, the consensus principle strengthened reform adversaries. Immediately, it became clear that real changes were not envisaged. Non-state actors could participate in nearly all formal and informal sessions as observers, while their official participation was reduced to a minimum.

In spite of the prejudiced positions of a number of states, the participants invested a lot of time, energy, and efforts towards recourse into the review process. Dozens of informal meetings and international conferences within and outside of the United Nations' framework were organised with the participation of states, academic institutions, NGOs, and NHRIs in, for example, Mexico City, Paris, Rabat, Seoul, Algiers, Montreux, Buenos Aires, Wilton Park, and Berlin. Many of the outcomes of these meetings were made public on the HRC Extranet¹⁰ and incorporated into the conference papers for further discussion in the officially established HRC Working Groups.¹¹

HRC resolution 12/1 established a special Working Group for the review process to meet in two sessions of five days each. The Working Group sessions were chaired by the HRC President and additionally preceded by informal meetings. The first formal session took place in October 2010 in Geneva and had on the table approximately 50 position papers from states, 14 from NGOs, 4 of NHRIs, and 4 submitted by the Special Procedures and the Office of the High Commissioner for Human Rights (OHCHR). At the end of this session, the HRC President presented a compilation of states' proposals and NGO recommendations for further discussion (UNHRC 2010). As a formal outcome, the Working Group decided to establish five facilitators moderating each of these discussions on UPR, Special Procedures, sub-organs, agenda, and methods of work. A sixth facilitator served as coordinator with the review process in New York.

Preceding the second Working Group session in February 2011 in Geneva, the HRC President had invited – in his capacity as Ambassador of Thailand – all his colleagues at the ambassador level for an informal consultation to Bangkok; without much success. Based on the reports by the facilitators (UNHRC 2011a), the Working Group conducted its second session. At the very beginning, the

representative of Egypt underlined that NAM was not prepared to accept any substantial change in the IBP, at best some fine-tuning. His statement did not contain any wording like human rights, protection, prevention, or accountability. Not surprisingly, the second session of the HRC Working Group ended with the adoption of a final report lacking substance (UNHRC 2011b).

In parallel to Geneva, the UNGA had been busy with the status review since March 2010. Here, too, there were broad consultations lasting months. Despite opposition from NAM, OIC, and the Russian Federation, demands for the highest standards in respect to Council membership and the election procedure were discussed, although talks did not produce much substance.

The review process in Geneva was formally concluded in March 2011 by a first resolution, 16/21, which reflected the outcome of the February 2011 session relating to the sub-organs, agenda, methods of work, Special Procedures, and, in part, the UPR. A second resolution, decision 17/119 of June 2011, adopted last agreements in relation to the UPR procedure. While both documents were adopted without request for a vote, the representative of the United States did not join the consensus due to dissatisfaction with the poor outcome. Australia, France, Canada, Mexico, and the European Union also raised their voices, deploring the non-inclusion of a trigger system and the disregard for turning the appeal for states' cooperation with Special Procedures into a more forceful obligation.

In contrast to Geneva, concluding resolution 65/281 of July 2011 by the UNGA on the review process was put to a vote. Israel, Canada, the United States, and Palau voted no; 154 states voted in favour, including the European Union. One reason for the no-vote was that no mandatory measures were introduced into the IBP seeking to guarantee the highest standards with regard to membership. A second reason was that the majority of NAM and OIC members refused to merge the agenda items on country situations and insisted to keep item 7 (occupied Palestinian territories) as a permanent item on the HRC agenda.

2.6 Main Outcomes

Finally, what are the results compared to the Institution Building Package of 2006 and 2007? Has anything changed fundamentally? In short: judged in normative

10. <https://extranet.ohchr.org/sites/hrc/Pages/default.aspx>; see also Footnote 1.

11. See UNHRC (2010, 2011a).

terms and on the basis of the corresponding expectations of rights holders and victims, the documents do not contain any fundamental novelties. In particular, there is no robust approach such as an independent trigger to better respond to situations of concern. Instead of fundamental reform, the status quo was protected by focussing on fine-tuning individual aspects, such as the Council's yearly meeting cycle in future beginning with the calendar year and no longer on 19 June (when the first Council session was called to order in 2006), while the Council's annual report to the UNGA continues to cover the period of October 1 to September 30. The documents also stipulate that the next review process should take place in the next 10 to 15 years.

However, there are some more modifications indeed. The UPR procedure underwent the broadest change. According to resolution 16/21 and decision 17/119, the next cycle was extended to 4.5 years (previously 4 years) with 14 rounds of meetings (previously 12). Only 14 (no longer 16) states are examined in each UPR round. Hearings have been extended from 3 to up to 3.5 hours. The recommendations to states under examination are to be summarised thematically. States are to submit an interim report on a voluntary basis. The time available at a hearing is to be subdivided in such a way that all states that wish to speak may do so. Further changes are related to time periods and report formats in the context of the hearings.

Within the UPR procedure, the participation of NHRIs with »A« status – according to the Paris Principles – was expanded. First, NHRIs will have their own separate section within the summary reports of NGOs and NHRIs to UPR. Second, they will be granted the right to speak at the Council session on adoption of the UPR report immediately after the state to be examined. Otherwise, the demands for a comprehensive inclusion of NGOs and their documents were not taken into account. Furthermore, NHRIs were granted the right to nominate their own candidates for Special Procedures mandates and – analogous to the UPR procedure – to be able to issue a statement in the interactive dialogue on a country situation directly after the government concerned.

In order to upgrade the Advisory Committee, the Committee's first session is to be held directly before the traditional March session of the Council. Other changes concern an annual podium discussion with

all relevant UN bodies for the purpose of implementing human rights standards within the UN system, the temporal and textual streamlining of resolutions, greater use of information technology such as videoconferencing, improved access for disabled people to Council sessions, and the establishment of a bureau for the HRC Presidency, but funded within the existing budget. The latter task had been performed previously by a department of the OHCHR. In relation to Special Procedures, the review outcome emphasises the need to follow up their recommendations as well as adequate funding for their appropriate functioning. In a nutshell, once again governments have protected themselves rather than human rights and the victims of human rights violations.

2.7 Moving within the Given Structure

Has the Council thus written out the prescription for its own demise, as NGOs put it in a statement? Apart from the formal review process, recent developments in the Council sound more promising. Bloc formations – in accordance with regional groups of states or like-minded groups such as NAM or OIC – are confronted with internal dissidence. OIC member states vote against their own agreements even on religious issues.¹² Cooperation between states from different regional groups, on the other hand, has increased markedly, for example the resolution to establish a new mandate of a Special Rapporteur on the rights to the freedom of peaceful assembly and of association, whose main sponsors were the United States, Mexico, Maldives, Nigeria, and Indonesia.¹³ Another example is the country mandate on the situation of human rights in the Islamic Republic of Iran, which was supported as main sponsors by Sweden, Republic of

12. For instance, since 1999 the OIC has annually sponsored and pushed a resolution calling for the criminalisation of »defamation of religion« in order to impose a conception of freedom of religion and belief as well as of freedom of speech and expression that would severely limit anything deemed critical of or offensive to Islam or Muslims. Already in March 2010, the corresponding resolution 13/16 by the HRC achieved only a narrow majority of 20:17, while Cameroon abstained and Gabon did not participate in the voting process; both are OIC members. In March 2009, this issue was still adopted by 23:11 and 13 abstentions (A/HRC/RES/10/22). In March 2011, the majority in the HRC had changed notably, and the corresponding resolution, A/HRC/RES/16/18, was adopted even by consensus but is now called »Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence, and Violence against Persons Based on Religion or Belief«. Just the title reflects a very different approach that is opposite to the OIC's previous and ongoing intentions. The Maldives, another member of the OIC, tends to vote more in accordance with normative standards than like-minded guidelines.

13. Resolution A/HRC/RES/15/21, October 2010.

Moldova, Panamá, Zambia, the former Yugoslav Republic of Macedonia, and the United States.¹⁴ A third example is the resolution on a new Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, which was supported as main sponsors by Argentina, Morocco, and Switzerland.¹⁵

With the new administration in the United States seeking to define itself from the previous presidency, the US delegation in Geneva showed more openness for a normative approach, and performed with a decisive dynamic within new alliances. Obviously, in the years since 2009, it has been possible to overcome previous blockades, for example against country mandates, by means of new majorities. This was confirmed by the country resolutions on Iran (resolution 16/9) and Belarus (resolution 17/24) in March and June 2011. The 18th session of the HRC in September 2011 adopted 37 resolutions, seven of them pertaining to country situations – yet, appropriate attention on Bahrain, Afghanistan, Iraq, or the detention centre in Guantánamo Bay was lacking.

A particularly important development is that the Human Rights Council diversified its instruments to analyse and evaluate country situations by introducing »urgent debates« alongside special sessions. Further, the OHCHR is instructed from time to time to prepare a report or to organise an inquiry mission and to present its findings to the following Council session to be debated; as happened in relation to Libya and Syria in 2011. Serving as an »escalation level« below that of the country mandate, there are now decisions taken to deploy ad-hoc fact-finding missions appointed by the Council's President, as happened with regard to the situations in Ivory Coast, Libya, and Syria in 2011. In relation to thematic issues, there are meanwhile podium discussions on all topics. Even the longstanding and highly disputed issue of human rights and sexual orientation was concluded for the time being by adopting resolution 17/19 on human rights, sexual orientation, and gender identity in June 2011 with the approval, for example, of Thailand, South Africa, Mauritius, Cuba, and Ecuador, and the abstention, for example, of Burkina Faso. Without a doubt, progress was made, especially in the establishment of additional tools, although below the level of a normative automatism, for example in terms of triggers.

Dynamic actors such as the United States, Norway, Uruguay, and courageous Council presidents have recognised and seized these opportunities. In order to make such political moves more stable, it will be nevertheless necessary to undertake more and strategically planned démarches by states open for reforms at the eve of HRC regular sessions, as well as the lobbying of the capitals of countries relevant to the subject. NAM and OIC have already been doing so for a number of years. Within the given structure of the HRC, the Special Procedures and the OHCHR continue to provide the facts and the normative assessment but will need some additional political support to maintain their professional independence and personal integrity. NHRIs and NGOs keep insisting on the victim's view. The dissidence in particular of African states with regard to regional and like-minded groups, as well as the radical changes in North Africa, are also promising signs for lasting fissures in the previous bloc orientation. Altogether, this engenders hopes that at least the informal changes will have lasting effects and overcome the current HRC mode of clinging to the imperfect.

2.8 Evolution within Institutional Constraints

Is such an optimistic approach justified or does it rather harbour unnecessary illusions, starting from incalculable political constellations? Does the current institutional framework of the Council with the noted modifications have any practical meaning on the local level? Should the outcome of the review on the Council's work and functioning and the mentioned informal changes be measured rather in terms of symbolically harvesting »small potatoes«, as some participants identified during an expert seminar in The Hague in 2011?¹⁶ Will the HRC ever be able to yield »big potatoes« given the very nature of this body? Or should we broaden the perspective and look for developments that are improving the HRC's efficiency and effectiveness in informal sectors? What might be indicators for such an exploration, considering the aspect of immediate, mid-term, and long-term impacts? For sure, it will always be a challenge to attribute a certain result to the functioning

14. Resolution A/HRC/RES/16/9, March 2011.

15. Resolution A/HRC/RES/18/7, September 2011.

16. The Hague, September 14, »The Review of the Human Rights Council: Is There Still Hope?« organised by the Dutch Section of the International Commission of Jurists, Amnesty International, Society for International Development (SID) Netherlands, and the Netherlands Institute of Human Rights (SIM) Utrecht.

of the Council, as governments tend to deny that the changing of its policy was due to anything else than its own wisdom.

At the outset, it should be noted that the HRC supports the principle of dispute mediation taken by the United Nations as the basic approach to conflict resolution. Thus, the HRC is not a tribunal but intentionally composed as a body of states, with the limitations inherent in any intergovernmental body. In addition, the Council – like the entire United Nations – will always be confronted with the situation that powerful states will have great capacity and incentive to act without regard to legal restraints. Notwithstanding this condition, the Council, its subsidiary organs, and in particular the UPR demonstrate that states have accepted in principle the legitimacy of discussing, reporting, and monitoring their behaviour in relation to human rights.

It is also noteworthy that a bundle of instruments, mechanisms, and tools has meanwhile been developed by the UN treaty bodies, the mandate holders of the Special Procedures, the OHCHR, and within the UPR in order to assess the human rights situation, and in accordance with the pertinent normative standards.¹⁷ The evolution of such guidelines and tools can be interpreted as progress in methodology, which is incorporated into the HRC functioning. It has definitively contributed towards substantial improvement in the examination of violations of human rights on the ground, the interpretation and assessment regarding relevant norms, as well as the conformity of the state's behaviour to the norms by independent experts. The studies and recommendations by Special Procedures, OHCHR, or the UN Secretary-General are abundant, publicly accessible, and publicly debated. This part of the HRC's work and functioning is close to an optimum.

The principal open question relates to the consistency and coherence by which the HRC implements its institutional framework and tools. This, in turn, means that the HRC continues to discuss and monitor human rights situations without having to always obtain the consent of the government concerned and despite the reluctance of a number of states to accept this mechanism. In addition, as mentioned before, meanwhile such scrutiny

has even been extended, and not only in the capacity of country resolutions. Furthermore, starting in 2012, the Special Procedures are entitled to present their communications with governments at every regular session, not only once a year. Thus, the communication with the state concerned has been extended within the framework of the HRC and thereby improved.

A related important aspect is the application in terms of resolutions, decisions, and Presidential Statements based on the assessment of the situation, the identification of the pertinent norms, and subsequently its recommendations referring to the studies of and interactive dialogues with the OHCHR and Special Procedures. This will always depend on the political interests of the Council's majority and makes any progress precarious, as the Council's functioning depends on political constellations, which, by their nature, are subject to change. Nevertheless, the new political conditions in 2010 and 2011 in the Council's membership, which led to a number of resolutions and official statements expressing a critical view on state's situations, were at least used, in part by initiatives stemming from cross-regional alliances of states.

The observation can be extended to the examples given in part three below. They also indicate that the political constellations in 2011 have been favouring a better partnership in the Council between the normative and the operational levels. Again, this does not automatically result in lasting effects, as there are many variables at work (international, regional, national, and local). Thus, the fundamental challenge remains to keep insisting on triggers in order to orientate the operational level towards an expert and normative viewpoint. As an ongoing challenge, the HRC's work and functioning should be further extended towards preventive measures and effective early warning systems. Tools such as the commissions of inquiry or fact-finding missions should be converted into a permanent stand-by procedure.

3. UN Action on Human Rights in North Africa and the Middle East

Both the Human Rights Council and the Security Council have played prominent roles in 2011 in discussing and taking action on the so-called Arab spring and the complex developments that have followed to this day. Although the UNSC is not a human rights organ in a

17. See UN Human Rights Treaty Bodies (2005, 2008); UN Special Procedures (2005); UN Coordination Committee of Special Procedures (2008a, 2008b); UNOHCHR (2009); UNGA (2006); and UNHRC (2007); see also UNGA resolution 60/251, in particular paras. 3 and 5.

strict and normative sense, it has constantly extended its scope of operation towards this perspective and is meanwhile involved in evaluating and judging country situations with a high level of human rights violations. This section offers an overview of major trends in both UN organs' handling of those country situations. The cases of Libya and Syria will provide the most visible distinction between the HRC and UNSC, while the cases of other countries reveal the HRC's institutional setting and discursive competence to be an asset.

3.1 Human Rights Council

In relation to the Middle East, the HRC has been dealing since its very beginning with the issue of the occupied Palestinian territories and Israel, which will always be a kind of Litmus test whether the HRC is able and willing to handle a situation in an appropriate human rights language. The complexity of this problem would require the HRC to follow a normative approach and to carve out human rights aspects from the complex situation. Indeed, the handling of the human rights on this particular situation by the HRC can definitively be improved, irrespective of the complexity. Nevertheless, for the purpose of this text, the HRC's involvement in this conflict will not be considered here.

Beyond Palestine and Israel, the HRC has dealt with the recent unrest and crises in the Middle East and North Africa and developed a number of mechanisms. In general, the HRC addressed the crisis in the sub-region utilising oral and written reports by the High Commissioner for Human Rights, Navi Pillay, presented to the regular sessions in March, June, and September 2011. The HRC's agenda provided room for corresponding debates or »urgent debates« in the plenary, and concluded some of these debates in the form of resolutions. In 2011, the HRC conducted four special sessions (three on Syria, one on Libya), and asked the UNGA to suspend Libya's HRC membership.

3.1.1 Tunisia

The High Commissioner made an important reference in the HRC session in March 2011 to the situation in Tunisia. In January 2011 the OHCHR had sent a delegation to the country in order to assess human rights priorities, to

define an OHCHR strategy of engagement for the protection and promotion of human rights, and to assist the transitional government. The Minister of Foreign Affairs of Tunisia requested the opening of an OHCHR country office, which was finally opened in July 2011, the first in any North African country. In her opening speech to the June session, the High Commissioner stressed the positive steps taken by the transitional government of Tunisia that ranged from allowing freedom of expression to improving the rule of law and promoting social and economic rights. She also acknowledged the ratification of four major human rights treaties, including the Optional Protocol to the Convention against Torture and the ratification of the Rome Statute for the International Criminal Court. The transitional government had meanwhile established three domestic institutions to oversee transitional justice processes and to ensure accountability for past human rights violations, and created its first independent National Electoral Commission to oversee the election of a constituent assembly in October. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism reported in March 2011 on his mission to Tunisia in 2010, but could therefore not include the most recent protests.¹⁸

3.1.2 Egypt

In her speech to the HRC June session, the High Commissioner commended Egypt for the reforms undertaken, including the dismantling of the State Security Intelligence, as well as the introduction of constitutional amendments that would enable free elections, a new law governing political parties, and measures to reinforce freedom of association. The OHCHR had sent a team of senior staff members to Egypt in late March and April in order to meet with the government, UN representatives, the National Council for Human Rights, and civil society organisations. The High Commissioner reported afterwards on the activities of her office, which followed the human rights situation closely, repeatedly urging authorities – in particular the Military Council – to refrain from the use of violence to quell demonstrations and to respect people's right to peaceful assembly. She also welcomed a number of achievements, including the registration of political parties and new independent

18. See document A/HRC/16/51/Add.2.

trade unions, as well as the investigations of human rights violations. Although a number of reports by Special Procedure mandate holders were presented in 2011 on their missions to Egypt, none of them were able to include the issue of the protest or previous signs of unrest because their country visits were conducted before the unrest emerged.¹⁹

3.1.3 Libya

Until 2011, no official statement was made and hardly any written documents were issued on the human rights situation in Libya, despite the poor record. Even the disputed nomination of Libya for chairing the Commission on Human Rights in 2003 did not provoke an official communication within the framework of the Commission at that time. Against this background, it was rather novel, though appropriate, that on 25 February 2011 the HRC convened a special session on Libya. As an outcome of this session, the Council adopted a resolution by which the HRC condemned the gross and systematic violations of human rights, established an International Commission of Inquiry and, moreover, unanimously called upon the UN General Assembly in an unprecedented action to consider suspending Libya's membership in the Council.²⁰ The UNGA did so subsequently on 1 March 2011 by consensus. Such a move would hardly have been possible during the time of the Commission on Human Rights. In September 2011, the HRC adopted a resolution on the resumption of Libya's membership in the Human Rights Council,²¹ which was followed by the UNGA readmitting Libya as a member in November.²²

A following contribution within the HRC institutional framework was the report of the OHCHR from June 2011 to the HRC, which provided the follow-up information on the situation of human rights in Libya, as requested by OP 13 of resolution S-15/1 (UNOHCHR 2011a). The OHCHR supported the International Commission

of Inquiry on Libya to investigate alleged violations by all sides before presenting its final report to the HRC in March 2012.²³ The OHCHR was also involved in initial discussions on transitional justice. According to Human Rights Watch, the work of the Commission of Inquiry in Libya played a key role in setting the stage for the investigations of the International Criminal Court, which in turn issued arrest warrants for Libyan leader Muammar Gaddafi and other involved individuals.²⁴ The attention devoted to Libya by the HRC was complemented by a statement of the Special Procedures' Coordination Committee to the Special Session in February 2011.²⁵

3.1.4 Syria

Until 2011, the HRC dealt with Syria exclusively on issues related to the occupied Golan Heights. However, in 2011 the HRC conducted three special sessions in April, August, and December 2011. The 16th special session in April 2011 established an urgent fact-finding mission by the OHCHR in order to look into the escalating human rights violations and to report to the following sessions of the Council.²⁶ This fact-finding mission found evidence indicating that crimes under international law, including crimes against humanity, and other grave violations of human rights had been committed by the government of Syria in the context of the largely peaceful pro-democracy protests. The report was published on August 18 and led to the next (17th) special session on Syria on August 22.²⁷

Considering that the Syrian government, its military, and its security forces have continued to commit serious violations of human rights, the HRC established an International Commission of Inquiry on Syria with resolution S-17/1 to investigate alleged violations of human rights since March 2011. In its report from November 23 (UNHRC 2011f), the Commission of Inquiry found evidence of gross violations of human rights committed by Syrian military and security forces since protests had started in March

19. See, for example, reports by the Special Rapporteur on trafficking in persons, document A/HRC/17/35/Add.2, and the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, document A/HRC/15/31/Add.3.

20. Resolution A/HRC/RES/S-15/1.

21. Resolution 18/9 from September 29.

22. On 18 November 2011 UNGA member states voted overwhelmingly to readmit Libya as a member of the Human Rights Council after Colonel Gaddafi's regime had been toppled and Libya had committed itself to promote and protect human rights, democracy, and the rule of law.

23. See the report of June 2011 in UNHRC (2011e).

24. <http://www.hrw.org/reports/2011/09/22/keeping-momentum>, p. 11; (accessed on 9.11.2011).

25. See <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10763&LangID=E>; (accessed on 9.11.2011).

26. Resolution S-16/1.

27. The report was later formally presented to the HRC regular session in September 2011; see UNOHCHR (2011b).

2011. The Commission also reported that crimes against humanity had been committed in different locations in Syria during the period under review. The Commission concluded to call upon the government of Syria to put an immediate end to the ongoing gross human rights violations, to initiate independent and impartial investigations of these violations, and to bring perpetrators to justice.

Since the violent crackdown against peaceful protesters and civilians in Syria continued unabated, a third special session (18th) on Syria was called for on 2 December 2011. The OHCHR had reported on more than 4,000 people killed, tens of thousands arrested, 12,400 who were seeking refuge in neighbouring countries, and tens of thousands who were internally displaced. Through resolution S-18/1, the HRC decided to establish the mandate of a Special Rapporteur on the situation of human rights in Syria once the mandate of the Commission of Inquiry ends. The Special Rapporteur shall monitor the situation of human rights as well as the implementation of the recommendations made by the Commission and of pertinent resolutions of the Council.

Though the HRC decided to transmit the report of the Commission to the UN Secretary-General for appropriate action and transmission to all relevant UN bodies, the resolution did not explicitly mention the UN Security Council, nor did it urge referring the situation in Syria to the Prosecutor of the International Criminal Court. The resolution welcomed the commitments of the League of Arab States. Resolution S-18/1 was adopted by a vote of 37 to 4 (China, Cuba, Ecuador, Russian Federation), with 6 abstentions. Among the latter was India, emphasising that means of addressing human rights violations through robust mechanisms should be conducted by the state itself and that international scrutiny should be resorted to only when such mechanisms are non-existent or have consistently failed. In spite of the Commission's evidence, India did not see the momentum for such activity. The work of the HRC on Syria in 2011 was complemented by three statements of the Special Procedures Coordination Committee on behalf of all mandate holders to the 16th,²⁸ 17th,²⁹ and 18th³⁰ special sessions.

28. See <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10967&LangID=E>; (accessed on 9.11.2011).

29. See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11320&LangID=E>; (accessed on 9.11.2011).

30. See http://www2.ohchr.org/english/bodies/hrcouncil/docs/specialesession/SpecialProcedures_MsFaridaShaheed.pdf; (accessed on 14.12.2011).

3.1.5 Yemen

With regard to Yemen, the OHCHR carried out an assessment mission in June and July 2011, which reported to the HRC that government security forces had deployed excessive and lethal force against civilians using live ammunition and even snipers. The report further stated that the situation was exacerbated by armed opponents bringing weapons to otherwise peaceful demonstrations (UNHRC 2011g). The OHCHR mission found that the government had not initiated credible independent investigations, which were referred to in UN Security Council resolution 2014 (see below). The report concluded that there is a need for an international investigation and human rights presence on the ground to lay the groundwork for accountability. Due to this report and based on the international pressure, the Yemeni government agreed upon a resolution on technical assistance and capacity-building in the field of human rights.³¹ The resolution calls upon the government of Yemen and the OHCHR to develop a framework for continued dialogue and cooperation, and requests the OHCHR to report back to the HRC session in March 2012.

3.1.6 Other Countries

In relation to the human rights situations in countries like Algeria, Morocco, Jordan, Bahrain, and Oman, the contributions in terms of oral statements to the HRC by official institutions were far fewer in number. In June, the High Commissioner commended Algeria for lifting the state of emergency that had prevailed for 19 years and for initiating consultations on constitutional reforms. In relation to Morocco, the High Commissioner mentioned the announcement of constitutional reforms by King Mohammed VI, including the consolidation of the rule of law, the strengthening of the human rights system, and the broadening of individual and collective liberties. Similarly positive was the report on Jordan, as King Abdullah II had established a commission to review the constitution – a key demand of the protests. In relation to Bahrain, the High Commissioner criticised the repression against the protesters, including the use of lethal force, while she commended the government of Bahrain for showing its readiness to allow a mission of the OHCHR to visit that country. The lower number and bre-

31. HRC resolution 18/19, September 2011.

vity of statements were due to developments in which the protests had achieved a certain openness of some governments to consider a new democratic political order based on human rights and rule of law. In September, the High Commissioner made reference to a report by the International Labour Organisation that established a direct link between the popular uprisings in North Africa and the Middle East and situations of increasing poverty, unemployment, inequality, and exclusion, that is, the results of a long-term deficit of democratic governance, essential freedom, and social dialogue (ILO 2011).

In sum, with regard to the unrest in the Arab countries, the HRC has become an active UN institution together with the Special Procedures, and the reports of the OHCHR on some of the most urgent issues have led to global calls for accountability for gross violations of human rights. The HRC performance contributed towards ensuring practical arrangements, establishing the facts, and securing accountability. In addition, both the resolution on human rights and transitional justice 9/10³² as well as the resolution 18/7³³ are expected to play a pertinent role for North Africa and the Middle East in the near future. Resolution 18/7 establishes the mandate of a Special Rapporteur for a period of three years on the promotion of truth, justice, reparations, and guarantees of non-recurrence of serious crimes and gross violations of human rights.

3.2 UN Security Council

The recourse to UN mechanisms and forums to ascertain circumstances and responsibilities for human rights violations includes the UN Security Council, which, as mentioned, is not a human rights body, but responsible for international peace and security (which should, of course, include human rights concerns). Again, like the HRC, the UNSC has been dealing with the Middle East since its very beginning, that is, the conflict of Palestine and Israel. Although this problem contains a lot of issues pertinent to human rights, peace, and active UN engagement, it will not be considered within this text in relation to the HRC, as mentioned before.³⁴

32. Resolution 9/10 of September 2008, plus resolution 12/11 of September/October 2009.

33. September 2011.

34. For further information on the UNSC context, see <http://www.un.org/News/dh/latest/mideast.htm> or <http://www.globalissues.org/article/119/the-middle-east-conflict-a-brief-background>.

3.2.1 Human Rights, Peace, and Security

Beyond this special issue, the UNSC has shown a gradually increasing awareness of human rights violations being a threat to peace and security. After years of considering human rights nearly a taboo, the UNSC started including human rights in the scope of its work with the issue of peacemaking and peacekeeping.³⁵ Currently, there are 14 peacekeeping missions being carried out with a human rights component. Rule of law and international justice issues also have become a focus of the Security Council on issues such as the protection of civilians; women, peace, and security; and children and women in armed conflict. The UNSC refers to these aspects when evaluating the use of sanctions under Chapter VII of the UN Charter.

The UNSC held its first thematic debate on the rule of law in 2003, followed by debates in 2004 and 2006. In June 2010 and January 2012, there were debates on »The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security«. The UNSC Presidential Statement following this debate³⁶ expressed the commitment to ensure that promoting the rule of law is part of UN efforts to restore peace and security. The statement further recognised that a sustainable peacebuilding requires an integrated approach and coherence between security, development, human rights, and rule of law. The statement reaffirmed the UNSC's stance opposing impunity with regard to serious violations of international humanitarian law and human rights law. The UNSC requested in 2004 the UN Secretary-General to report within 12 months on the implementation of the recommendations that were contained in his report of 23 August 2004 dealing with the rule of law and transitional justice in conflict and post-conflict societies.³⁷

A recent development evolved the concept of the Responsibility to Protect (R2P) and it has been revealed that a number of states are willing to intervene in other states based on that objective. However, there is no firm

35. See Weschler (2004); for an international law perspective see Krieger (2006).

36. See document S/PRST/2010/11. Under Article 39 of the UN Charter, the Council may determine that severe human rights violations constitute a threat to the peace, which may lead to taking enforcement measures in order to restore the peace.

37. See the summary of a discussion on that subject in 2011 in Geneva in Rathgeber (2011b).

legal ground for a legal obligation binding third countries to react when human rights are not adequately protected or are clearly abused. Irrespective of the disputes on R2P, the UNSC has developed an explicit human rights language – in particular in the context of Libya and Côte d'Ivoire – in the Goldstone Report³⁸ as well as in its references 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.³⁹

It is not surprising that also at the level of the UNSC, the issue of human rights is trumped from time to time by national political considerations alien to the subject. Such behaviour has been exhibited by the United States and other Western countries. In recent times, those considerations have become also more prominent among emerging regional powers such as South Africa, India, and Brazil. In the debates on Syria, Brazil was seen as being closer to the West, and India closer to the Russian Federation.⁴⁰ As with the HRC, double standards will probably persist for a long time, whereas international civil society and human rights-friendly governments should work against such tendencies.

3.2.2 Actions on Libya

In relation to Libya, the UNSC adopted in total six resolutions in 2011, including resolution 1970 of February 26 on Peace and Security in Africa.⁴¹ The UNSC unanimously adopted resolution 1970, demanding an end to violence, and referred the situation in Libya to the International Criminal Court, asking the Court to investigate the regime of Col. Muammar al-Gaddafi. The resolution further imposed an arms embargo and targeted sanctions against the regime and members of the Gaddafi family, for example a travel ban. A sanctions committee was established to monitor the implementation of these measures. The Council finally cited the »responsibility to

protect« civilians from atrocities, which is rather unusual in a UNSC resolution (Gowan 2011).⁴²

Resolution 1973 authorised all necessary measures to protect civilians in Libya, enforced the arms embargo, imposed a no-fly zone, strengthened the sanctions regime, and established a panel of experts. Annex II provides a detailed list of entities subject to the asset freeze. With resolution 1973, the UNSC admitted for the first time an intervention recalling the obligation to protect civilians – while the intervention by NATO rather turned de facto into the air force of the rebellions. This led to criticisms about how the resolution was implemented by the Western powers involved in military action. For example, Brazil asked for safeguards.⁴³ South Africa voted in favour of this resolution.

Security Council resolution 2009 authorised the deployment of a United Nations Support Mission in Libya (UNSMIL) for an initial period of three months with a broad mandate to assist and support Libyan national efforts on, for example, restoring public security and order; promoting the rule of law; promoting national reconciliation; strengthening emerging accountable institutions; promoting and protecting human rights, particularly for those belonging to vulnerable groups; and supporting transitional justice (OP 12). The resolution also partially lifted sanctions related, for example, to the arms embargo and the asset freeze. The resolution further requested the UN Secretary-General »to report on implementation of this resolution in 14 days from adoption, and every month thereafter, or more frequently as he sees fit« (OP 22). Resolution 2016 transferred more power to the transitional government. Resolution 2017 raised concerns on information about the proliferation of arms and the threat of strengthening terrorist groups. Resolution 2022 finally extended the mandate of UNSMIL until 16 March 2012.

3.2.3 Inaction in Other Cases

While the UNSC was outspoken on the situation in Libya, it abstained from a similar involvement in other domestic crises in Arab states, particularly in Bahrain,

38. See document A/HRC/12/48 on »Human Rights in Palestine and Other Occupied Arab Territories. Report of the United Nations Fact Finding Mission on the Gaza Conflict«, Geneva.

39. The first High Commissioner for Human Rights to be invited for briefing the UNSC was Mary Robinson in 1999.

40. See Gowan (2011).

41. Documents S/RES/1973 (2011) in March, S/RES/2009 (2011) in September, S/RES/2016 (2011) and S/RES/2017 (2011) in October, S/RES/2022 (2011) in December, and resolution S/RES/1970 (2011) in February.

42. The sanctions on Libya in fact constrained Gaddafi's ability to buy much-needed support in the battle against his opponents; see Carisch and Rickard-Martin (2011). The latter also provide an overview on the variety of main instruments by the UNSC.

43. See document A/66/551-S/2011/701.

Syria, and Yemen, despite the repression employed by all three governments. In the case of Yemen, the UNSC adopted one resolution in October 2011⁴⁴ expressing regret at the hundreds of deaths, condemning the continued human rights violations by the Yemeni authorities, expressing its concern over the presence of Al-Qaida, and requesting that the UN Secretary-General report on implementation of the resolution within 30 days of its adoption and every 60 days thereafter. No further action was taken. Observers assumed that in relation to Bahrain and Yemen, the United States would predominantly aim to maintain regime stability, as its Fifth Fleet was anchored on Bahrain, and the Yemeni government was an ally in the fight against franchises of Al-Qaida.

The UNSC was likewise quiet about Syria, with the exception of a Presidential Statement of August 4 calling »on all sides to act with utmost restraint«. In June 2011, when the Syrian government's forces started to brutally crack down on civilians, the European members of the UNSC put forward draft a resolution on September 28 that demanded an immediate end to all violence in Syria. In order to ensure its adoption, the draft was watered down, omitting any reference to sanctions. Despite such modifications and nine UNSC members in favour, the draft resolution was vetoed and blocked by China and the Russian Federation in October 2011. Their joint veto was a certain exception. In the history of the UNSC, and since the end of the Cold War, China and the Russian Federation issued a double veto only three times in relation to a country situation: in January 2007 on Myanmar, July 2008 on Zimbabwe, and October 2011 on Syria. In the latter case, it was assumed that the Russian Federation was seeking to prevent a repeat of the Libya scenario against its historical ally Syria, where the Russian Federation maintains a military base and to whom it provides arms.⁴⁵ South Africa, Brazil, and India abstained, with reference to preventing the Libya scenario, while Brazil had brokered the abovementioned Presidential Statement. The attention shifted then to the Arab League and its efforts to deal with the crisis, leaving the UN on the periphery (Gowan 2011).⁴⁶

44. Document S/RES/2014 (2011).

45. For more details on Russian interests in the sub-region under consideration see Klein (2012).

46. Barbara Plett, BBC 8 November 2011, »UN Security Council Middle Powers' Arab Spring Dilemma«; available at <http://www.bbc.co.uk/news/world-middle-east-15628006> (accessed on 15.11.2011).

Despite such shortcomings, the UNSC was in 2011 a key arbiter of international action regarding the situations in the Arab world and Libya in particular, while the decisive stand on that country may have triggered action in other Arab countries as well. It is noteworthy that the handling of Syria and Libya by the UNSC allows for the conclusion that Libya was more likely properly addressed by the UNSC, whereas with Syria, political considerations prevailed on the subject of human rights.

4. Lessons Learnt

4.1 Human Rights Council

The HRC was created in order to strengthen the ability to respond to urgent and chronic human rights problems in a timely manner. In line with the normative viewpoint, the UN should advocate for the victims when their rights are violated by governments. The HRC should provide appropriate public and international attention and use all of its institutional options. Since its founding in 2006, critical observers often viewed the HRC in its first years as a body that functioned with a rather state-orientated perspective, following particular political national considerations and reflecting like-minded alliances among its membership. The review process raised expectations that these shortcomings might lead to the reforms necessary to implement the specific mandate of the UN General Assembly resolution 60/251. All in all, the outcome of the review did not meet such expectations. However the evolution of instruments, mechanisms, and tools within the regular sessions and institutional constraints have come closer to meeting such ends.

The Human Rights Council diversified its instruments by introducing a number of new formats to analyse and evaluate country situations, such as urgent debates or panel discussions on all topics. The HRC also established procedures like ad hoc fact-finding missions or inquiry commissions, though they were below the level of a normative automatism, that is, an institutional trigger. Together with new mandates of the Special Procedures, and subsequently their reports and the public debates, as well as through extension of the public communication with states, the HRC improved its efficiency in terms of drawing public attention to human rights situations. In addition, particularly the UPR procedure contributed

towards making states accept, in principle, the legitimacy of discussing, reporting, and monitoring their behaviour in relation to human rights.

This improved performance started in late 2010 and continued throughout 2011. How far this may have directly contributed towards preventing, stopping, or redressing particular human rights violations is difficult to assess. The experiences drawn from the profound changes in Arab countries demonstrate that the abundance of oral and written reports, the public, sometimes urgent debates, special sessions, resolutions, and visits definitively contributed towards encouraging and supporting those governments that were prepared to refrain from further use of violence, to respect the right to peaceful assembly, and to enter into a dialogue with its populations as well as with international institutions like the OHCHR. Where the government showed reluctance, as in Libya, the reports and assessments made by HRC institutions contributed towards increased political pressure, for example by involving the International Criminal Court. The situation in Syria, however, has lacked such an impact for the time being, although the public attention given to this country by the HRC has been high.

There is no conclusive answer as to how lasting those changes that are beneath the level of institutional amendment will be, as they depend in part on the political constellation at the membership level and are subject to change in composition as new member states step in, as well as in relation to the constitutional arrangements of each of the members. However, it can be stated that irrespective of the improvements, there is still an imbalance in addressing human rights violations towards a number of countries and situations. Therefore, there is still the need for a trigger system.

Despite this lacuna, the HRC – built upon the former Commission on Human Rights – provides a unique framework within the United Nations system that enables and encourages dialogues not only among states but with non-state actors and offers opportunities to develop discourses aimed at standard-setting. This element is the result of a long process including conflicts, and means by its mere existence an improvement in drawing public attention to human rights situations. Since the founding of the HRC, the scope of the discourse has been extended by establishing, for instance, new mandates of the Special Procedures.

There is a wide range of themes on which the HRC has established discourses, alongside the mandates of the Special Procedures, whereas issues like human rights and a democratic and equitable international order, international solidarity, extreme poverty, migrants, right to peace, or effects of foreign debt and other related international financial obligations of states evolved in the context of conflicting interests between South and North. Subsequently, the current contributions from each side to these issues mainly keep the perspective of entrenched viewpoints and therefore tend to rather hamper a discourse building which may have impacts at all. In principle, they would also be feasible for human rights-related benchmarks on such discussions with the view of preventing future infringements.

In 2009 the issue of cultural connotations of human rights emerged in the form of a mandate of the Special Procedures and will be supplemented in a study entrusted by the HRC to the Advisory Committee, following an initiative by the Russian Federation. At the beginning, many caveats were articulated, fearing the cultural relativism of the universality of human rights. The question was raised as to what kind of practice and implementation the HRC could expect or demand from governments when culture served as a reference point. The mandate of an independent expert on the issue of »Promotion of the Enjoyment of the Cultural Rights of Everyone and Respect for Cultural Diversity« is therefore still perceived by a number of countries rather as an attempt to qualify human rights in relation to cultural backgrounds, and thus contributes towards the dispute of the issue of universality.⁴⁷

This is even truer in relation to the current »Preliminary Study on Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind« entrusted to the HRC Advisory Committee (UNHRC Advisory Committee 2011: paras. 73ff.). The study states in Chapter VI a certain conflict between the universality of human rights and traditional values, in particular in terms of practical implementation. Despite linguistic attempts to evade the conflicting objectives, conclusions like »There is thus, (...) an indissociable link between traditional values and human rights, which promotes their recognition as both obligatory and universal« (ibid.: para. 78) remain ambivalent and fuel apprehensions.

47. Resolutions 10/23 of March 2009, 14/9 of June 2010 and 17/15 of June 2011.

Beyond the HRC, there are also a number of controversies surrounding this issue. For our purpose, it is sufficient to conclude that human rights are universal, in the sense of a deeply rooted and politically sustained consensus in international basic law that emerged as a response to the most severe violations of human rights and humanitarian law, including genocide, during the Second World War. Thus, the human rights standard is an achievement of civilisation based on disasters and catastrophes. Human rights are therefore not an ontological attribute of history in any region of the world. Human rights need to be strengthened and implemented everywhere with regard to local and anthropological restraints.⁴⁸ In the context of such an approach, the combination of universal human rights and traditional values could improve the HRC's genuine work and core functioning by developing more specific and effective standards for implementation.

Furthermore, the assessment of the HRC's current functioning reveals that there is a precarious majority among the member states that are open towards acknowledging human rights violations and problems in their own regions, although it is still difficult to get them to address those problems with instruments such as resolutions, which are identified as being of a punitive nature and having negative effects on the government of the country concerned. Hence, the increased diversity of instruments is met with resistance in certain states. Unlike in former times, when a resolution was the main instrument used to address human rights violations, the HRC's recent performance in relation to Arab countries has revealed a set of mechanisms that have been consecutively used. They started from practical arrangements – for example, allowing the transitional governing group of Libya to make a statement to the plenary of the HRC via the diplomatic mission of Jordan – and assistance-leading to robust mechanisms and international scrutiny if the concerned government consistently failed to act.

Though shifting positions among the majorities in the HRC already started in 2010, it was apparently underpinned by the peoples' movements in North Africa and the Middle East. While it is not clear whether these experiences and demands will be taken up by concerned governments in the Arab world, expressions for demo-

cracy and human rights will continue to play a major role in politics in the near future and provide the reason and the impetus to assess country situations by the HRC in its own domain. The response of some of these governments to the reports of the Special Procedures mandate holders presented to the HRC in 2011, although touching upon investigations in the past, was definitively more receptive. They were invited to imagine what preventive measures and an effectively working early warning system could mean in the future.

A number of countries relevant as swing votes in the HRC are now prepared to work with critical information on human rights violations and to disregard for the time being stereotypical reactions to human rights allegations as being »Western-biased« – instead giving a fresh and impartial look at the country situation under review. Obviously, such a change lasts only if there is a corresponding process on all sides. While there are remarkable rifts within certain regional and like-minded groups, others still need more engagement. Despite its expertise in dialogue and mediation, the European Union finds itself among those with much room for improvement. Changed perceptions and positions would include the acknowledgement that armed conflicts, poverty, economic and financial crises hamper the implementation of human rights, and that a coherent human rights policy has to include trade and investment areas, too. For instance, the implementation of human rights usually requires appropriate access to financial recourse apart from political will. Vice-versa, the deterioration of human rights violations in the contexts mentioned and the increasing vulnerability of civil society – including refugee movement and internal displacement – have made the UN Security Council a prominent actor that is getting more involved in certain country situations, namely because human rights issues and consequences are conceptually seen as issues of international peace and security, which is clearly a sign of major progress compared to the past.

4.2 Security Council

In general, the UN Security Council has paid increasing attention to human rights violations in the last two decades, starting with the issue of peacemaking and peacekeeping, and has extended its focus to rule of law, international justice, the protection of civilians – in par-

48. On universality, see Donnelly (2003); on diversity in relation to human rights, see Forsythe and McMahon (2004).

tical women and children – and referring cases to the International Criminal Court. The UNSC has developed an explicit human rights language.⁴⁹ Human rights are meanwhile systematically considered when the UNSC evaluates 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 access to Internet or satellite communications. Whether the attention on human rights will become a general practice instead of taking up selected cases, is a likely development but not guaranteed. Different worldviews, especially between the West and among countries of the global South, and assessments on friends and foes influence positions and voting at the Council.

In the case of Libya, a combination of complex targeted measures with short-term measures was imposed and quickly lifted when the situation was deemed appropriate.⁵⁰ Whereas in the case of Libya the UNSC demonstrated its ability to adapt its instruments to existing realities, the UNSC resolution on Yemen limited its scope to condemn the continued human rights violations and thus revealed that such a learning process does not guarantee future outcomes. It further reminds us that coercive measures are not exclusively decided in response to facts on the ground, but that political considerations play an important role, too.

Similar to the assessment of the HRC in general, there are different approaches towards identifying the results of the UNSC's performance. There are assessments that claim 2011 was ultimately a disappointing year, as the UNSC lost momentum in its response to the crises in Libya (and Côte d'Ivoire), and did not play a significant role in shaping the Libyan conflict (Gowan 2011). It is true: the UNSC was unable to prevent the conflict from escalating and opted to mandate a military engagement, which turned into an ambivalent activity for some governments, to say the least. However, as mentioned earlier, it has to be recognised that the UNSC was a key

arbiter of international action regarding the situations in the Arab world, with particular reference to Libya. This decisive stand on that country may have helped reform movements in other Arab countries.

Looking back at 2011, it is noteworthy that the UNSC membership was composed of a number of countries of quite some influence in world affairs. It differed from other session cycles, in which most activities started with permanent members,⁵¹ usually in private negotiations. The membership of middle and emerging powers contributed to an approach in which the situation was assessed closer to the facts and favoured more in-depth discussions and deliberations on the Arab situations. It also allowed for seeing more clearly how the mix of diplomacy, sanctions, and further coercive measures might be effectively included in future deliberations by the UNSC. The Libyan case also revealed that effective sanctions should be more than a simple substitute for the use of force, but potentially an instrument of bargaining. However, such an approach requires a coherent strategy for conflict resolution. Finally, the UNSC activities in 2011 stressed the need for cooperation with regional organisations such as the League of Arab States.

In sum, the brief remarks to the variety of actions taken to deal with the Arab unrest underline that one can be disappointed with the UNSC's performance but it remains necessary to look beyond numeric results and to consider the scope of – and the political conjuncture for – the activities. The handling of Syria and Libya by the UNSC allows for the conclusion that Libya has more likely been properly addressed by the UNSC, whereas, with regards to Syria, political considerations prevailed and human rights considerations were somewhat distant and much less important. The experiences with the Arab spring further indicate that the UNSC's instruments constitute, by their nature, an escalation of steps, while it is increasingly understood that these instruments should be used as complementary measures. This entails the need to analyse each case within its own context, taking into account the membership composition, and considering the burden-sharing with the HRC, as far as human rights are concerned.

The lessons learnt further indicate that it is necessary to understand the relationship between the HRC and UNSC not exclusively in terms of an escalation mecha-

49. Given the increasing reference to human rights in conflict resolution matters, it may be worthwhile to further discuss the considerations on effectiveness and efficiency as related to the HRC and UNSC and its specific platforms, not only in expert but in public forums, too.

50. Faced with a new conflict, the UNSC normally starts with actions under Chapter VI (peaceful settlement of disputes) and continues with more robust actions under Chapter VII. Under Chapter VII, the UNSC may choose sanctions as an appropriate tool; for details, see Carisch and Rickard-Martin (2011).

51. China, France, Russian Federation, United Kingdom, the United States.

nism either, but rather something requiring a broader understanding in conceptual terms. In order to effectively address human rights violations, those efforts require a sophisticated strategy that takes into account the instruments and assets of both institutions, the memberships and prevailing political conjunctures, as well as non-state actors at the HRC, which are allowed a very limited role as watchdogs at the UNSC.

5. Conclusions

The United Nations are based on the principle of mediation as the basic approach to the settlement of conflicts. Throughout the history of each of the institutions, both the HRC and the UNSC have shown their abilities as developing and dynamic bodies that are open for discussions on how to improve efficiency and effectiveness, for instance through the use of more preventive measures and effectively working early warning systems. The coherence between policy, institutional mechanisms, and instruments as well as adequate implementation will always be a challenge. Both institutions can definitively improve their capabilities to respond to urgent and chronic human rights situations in a timely manner. In the face of expanding UN action, states have, in principle, increasingly accepted the legitimacy of publicly discussing, reporting, and monitoring their behaviour in relation to human rights.


Looking at the UN human rights architecture for the next 10 to 15 years, a tendency is clearly visible that civil society actors will have more space for engagement. According to our findings, this will be predominantly realised within the institutional framework of the HRC, although there is a need of more civil society lobbying towards the UNSC. This will be a major challenge, given the structural and institutional restrictions for civil society participation in that body. Such an endeavour may start with the training of non-state actors about the roles of the HRC and UNSC, their complementary roles, and comparative advantages.

The analysis of the Human Rights Council's review process showed rather poor results in terms of amending the institutional provisions towards creating more forceful tools for better operational functioning. However, the evolution of the HRC's functioning revealed a diversified bundle of procedures that are potent

enough to bring its functioning more into line with its mandate. To a certain extent, these developments sound promising, considering in particular the rift in bloc thinking, the increase of cross-regional initiatives, and the firm stand of a – currently precarious – majority of member states on the issue of accountability beyond like-minded group-think. Although there is a certain hierarchy in the utilisation of instruments and mechanisms – starting with dialogue and communication with a country concerned and moving on to public criticism and establishing international scrutiny – the variety of tools allows for much more than a strategy of escalation; rather, it facilitates a strategy of complementary action. This is even truer with the UN Security Council's ability to act, which includes high-level diplomacy and coercive measures.

The UN Security Council increasingly demonstrates its political will – emerging sometimes from controversial discussions – to incorporate human rights assessments in its debates on conflict situations. This should be further developed in terms of a systematic human rights monitoring in peacekeeping operations, paying special attention to war crimes, crimes against humanity, and gross violations of human rights. This may be supplemented by a system yet to be developed that facilitates building cases against individuals for having committed serious violations and sending them to the International Criminal Court for investigation. In addition, the UNSC may request that the UN Secretary-General include a human rights analysis in all his reports on country situations. The UNSC may in the future also undertake missions to countries showing early signs of crisis, and thus, make use of the expertise of the HRC Special Procedures.

Comparing the actions of the HRC and UNSC, in particular as related to countries of the Arab spring, a better interaction between the two UN organs is required for the sake of better protecting human rights. The tools available might be more appropriately used in terms of complementary actions rather than as a mere scale of escalating mechanisms. Subsequently, the HRC is far from losing its genuine feature within the UN system – being a political body concentrating on human rights – though it needs to be better equipped with pertinent instruments. It is worthwhile to note that taking into consideration the scope of the HRC's mandate, the analysis revealed a quite actively engaged Human Rights Council in the situations of countries touched by the Arab Spring.



Among the necessary reform steps, a first step could be to establish regular meetings between the Presidents of both institutions. Second, in both councils, the discussions could address the issue of shifting the focus from a reactive to a more preventive mode in order to protect human rights. Considering the variety of instruments and mechanisms of the HRC, this institution seems to be appropriate for doing the groundwork on prevention, while the UNSC has shown its potential for engaging in situations revealing massive violations. The HRC enjoys recognised expertise in gathering evidence from its experts (with more than 40 special rapporteurs on countries and themes) and thus is in an excellent position to contribute towards options for effective and rapid crisis responses. Moreover, the HRC does not have veto powers. Furthermore, consideration should be given to a series of open or closed hearings with mandate holders of the Special Procedures as well as making use of their reports, in particular as part of an early warning system. In addition to the briefings by the High Commissioner

for Human Rights, Special Procedure mandate holders should be used to brief the UNSC on situations on its agenda.

Whether those ideas will be put into practice – and how lasting the recent changes will be – depends on favourable political constellations, in particular at the membership level. Within the present political climate, increased efforts of diplomacy on this subject will be necessary, as well as overcoming stereotypical thinking and acting in closed regional mindsets. Alternatively, more cross-regional initiatives should be sought. To realise such an expectation requires transparency and credibility of all actors. The independence and dissent shown by an increased number of African states towards their regional and like-minded groups engenders hope for a further commitment on human rights, increasing the effectiveness of the UN institutions. It would be another tremendous contribution too if »human rights champions« in other parts of the world would follow a similar self-critical approach.



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