The United Nations and Human Rights: Achievements and Challenges

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Here below follows the text of the lunch lecture which Prof. Dr. Marc Bossuyt gave on 12 December 2016. The lecture was organized by the United Nations Association Flanders Belgium (VVN) and the Leuven Centre for Global Governance Studies at the occasion of Human Rights Day 2016. It took place at the Permanent Mission of Belgium to the EU. We are grateful to Prof. Dr. Neri Sybesma-Knol, Honorary President of VVN, for chairing the meeting, and to the Permanent Mission for its generous hospitality.

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He was appointed to the Constitutional Court by Royal Order on 28 January 1997. From 9 October 2007 until his retirement Professor Bossuyt was the President of the Dutch linguistic group of the Constitutional Court of Belgium. Upon reaching the mandatory retirement age of 70 years, Professor Bossuyt retired from the Court and became President-Emeritus. He has been a member (1981-1985; 1992-1999; 2004-2006) and President (2006) of the UN Sub-Committee on Human Rights, and was and currently is a member of the UN Committee on the Elimination of Racial Discrimination (2000-2003, 2014-present).

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I was asked to speak about the United Nations and Human Rights. I will base the lecture on my book, "International Human Rights Protection", which was published in September 2016.

Before the United Nations

The first question we need to ask is where do we come from regarding human rights? Where were we before the United Nations was founded? Well we were not very far. Human rights were generally considered to belong to the domestic jurisdiction which means that it was not a matter of international law. The only subject dealt with by international law was slavery: combating slavery and combating slave trade. Sometime after, mention could be made of the minimum standards for foreigners, a notion that would dealt with by private international law nowadays. As a matter of principle international law did not care about how States treated their own citizens but rather how they treated foreigners by virtue of the 'foreign element' in it. To a certain extent, foreigners were treated better than national citizens by international law.

A second point regards the concept of humanitarian intervention. Normally there is a prohibition of military intervention in another State. One exception however was accepted: in some particular very grave situations and particularly when Christians were abused in other countries, the Western countries could intervene to stop this abuse. Since the prohibition of the use of force in the UN Charter, it is highly debatable whether the notion can still be invoked.

A third point concerns the protection of minorities. It is different from human rights protection because it did not deal with individual persons as such but rather with groups of persons. It also did not deal with all minorities in all countries but, since the Treaty of Versailles, minorities in the Balkan States were protected by the League of Nations.

This was the landscape of human rights before the United Nations.

The evolution of human rights after the foundation of the United Nations

Everything changed with the foundation of the United Nations because there is a provision in the UN Charter that require States to cooperate jointly and individually to pursue certain goals, one of which is the universal respect for human rights, even though there was no enumeration of these rights, nor a specific definition.

A distinction has to be made in the United Nations human rights system between Charter-based organs that derive their existence from the UN Charter, and treaty-based organs, that derive their existence from a specific human rights treaty.

Charter-based organs

I. Commission on Human Rights / Human Rights Council

The main Charter-based organ is the Commission on Human Rights. As early as in 1946 the Commission was established as one of the functional Commissions of ECOSOC. The Commission on Human Rights was a governmental body consisting of governmental representatives. The Commission has been very useful as it developed a number of human rights instruments as well as a substantial quantity of special human rights procedures.

After its establishment, the Commission was reformed from time to time. A lot of time was devoted to debating whether one should reform or should not reform. In total there have been three reforms.

The first reform dates back to 1992 and it was not very substantial. It led to an enlargement of the Commission from 43 member States to 53. Ten new member States came from Asia, Africa and Latin America. Another development in this first reform (not fully accomplished at the same time because one could only agree on this point at the big World Conference on Human Rights in 1993 in Vienna) was the creation of a High Commissioner for Human Rights. This created more visibility and more prestige of the post of the Director of Human Rights, a function later replaced by the High Commissioner. Zeid Ra'ad Al Hussein is currently the High Commissioner for Human Rights.

The second reform took place in 1999-2000. A major victim of this reform was the Sub-commission. In the beginning it was called the Sub-commission on the Prevention of Discrimination and Protection of Minorities, but in fact, it dealt with all matters of human rights. As an expert body, not composed of governmental representatives but of 26 independent experts, the levels of independence of such experts as well as their levels of expertise varied, but it is still of terrible importance given that when they speak, they do not speak on behalf of their respective governments which do not engage. Instead, they voice their own opinion which allows them to do more than an intergovernmental body could do. More specifically, the Sub-commission was weakened in 2000 by deciding that the Working Group dealing confidentially with individual communications would no longer report to the Sub-commission but directly to the Commission.

The second and most important blow to the Sub-commission was the prohibition to adopt any country-specific resolutions. Before that, the Sub-commission adopted resolutions on violations of human rights by specific countries. There was a tremendous amount of lobbying; for example, when the Sub-commission met there were at least 100 governmental observers and around 200-300 NGO observers engaged in watching and lobbying. The result could be a resolution and States were very afraid of those.

A third blow to the Sub-commission was that its meeting time was reduced from four weeks to three weeks.

Finally, the final reform was the transformation of the Commission into a Council in 2006. The Commission on Human Rights became a Human Rights Council. Some elements of this reform are however quite positive. One of the positive elements is that the Council is no longer a subsidiary organ of the Economic and Social Council. As a matter of fact (but not in law) it is more or less on the same level as the ECOSOC. It gives more visibility and prestige to the Council given that henceforth it reports directly to the General Assembly.

However, there were also some deficiencies of such transformation. One of the major complaints about the Commission, particularly by the Americans, was its so-called "politicization". It was argued that even countries that violate human rights were members of the Commission. This argument however overlooks that the United Nations represents the world as it is, not as we would like it to be. Several such countries are still members of the Human Rights Council. It is precisely because it is a political organ that it has the authority to adopt texts forming the basis of the international human rights protection. It is this political organ that has for example drafted the Universal Declaration of Human Rights, the Covenants of Human Rights and several other human rights treates.

The criticisms were best addressed by High Commissioner Sergió Vieira De Mello. He said that "*when I see members of the Commission reproaching other members of the Commission of being politicized, it is like fish reproaching other fish of being wet*."

When we look at the present composition of the Council, we can see that it is as bad as it has ever been. The efforts to achieve a better composition were unsuccessful. Too many concessions were made in order to reach a goal that was actually unattainable. The reform was adopted by 170 votes in favor, three abstentions and four votes against. By voting against that resolution, the USA had the courage to recognize that the final result was not good enough. They were the driver behind the reform but because they did not like the outcome, they voted against it. They were supported by Israel, the Marshall Islands and Palau. There were three abstentions from Belarus, Iran and Venezuela however for totally opposite reasons. Another change was that the Human Rights Council is at present composed of 47 member States and not 53 as was the case before.

Remarkably, quite often it is the West that pushes for reform that ultimately leads to weakening its position. Currently the Human Rights Council is composed of 13 African countries, 13 Asian countries, eight Latin American countries, six Eastern European countries and seven countries of

the Western Group. In 1991, the Human Rights Commission/Council (when there were only 43 member States) was composed of ten Western countries and 20 Afro-Asian countries.

When asked if there is anything positive in the reform, I must say I believe that it is positive that we now have three sessions of ten weeks in total annually instead of one single session of six weeks. When there was only one session per year and something happened in the weeks following the session, the Commission could not discuss it for another year. At least now the machinery can be said to be active on a nearly permanent basis.

Another positive point is that it became much easier to convene the Special Sessions. Prior, half of the membership was required to convene a Special Session. Because of this requirement only five Special Sessions have been convened between 1992 and 2000. Now, it is no longer necessary that half of the membership requests a Special Session. As a result, 24 Special Sessions have taken place between 2006 and 2015. A Special Session is an opportunity for the international community to exercise pressure on countries that misbehave in terms of their international obligations.

My feelings are mixed about the procedure of UPR, the Universal Periodic Review. A positive remark is that every State, with no exception, comes under review every four years. This is not similar to any other procedure. I am however somewhat skeptical about it, because it entails a lot of paperwork and time, it costs a lot and on many occasions it is an opportunity for befriended States to exaggerate the successes of the human rights landscape in some States that grossly violate human rights. The Review is not very critical, nor objective, so I am not very convinced. But at least everybody appears before the Human Rights Council nevertheless

II. Procedures in the Human Rights Commission / Human Rights Council

One of the many procedures that existed in the Human Rights Commission are the Communications, a somewhat nicer word for complaints, that can be submitted. It facilitates a means of imposing pressure on member States when required.

Next to the Communications Procedure there are also Special Procedures, both country oriented and thematic. A country oriented procedure began with South Africa (1967) and the Israeli Occupied Territories (1968). For quite some time the human rights interest in the United Nations was limited to the fight against apartheid and against Israeli occupation. These were easy targets. On that basis procedures were developed that were later used with regard to other States. A major procedure on Chile was started in 1975 and later on Bolivia, Guatemala, El Salvador and Afghanistan, Romania, occupied Kuwait, Iraq and Cuba. Its development was highly progressive. In the final period of the Commission there were also procedures regarding D.R. Congo and Rwanda in 1994 and Burundi in 1995.

With certainty, it was the purpose of many that favored reform of the Commission to get rid of the country oriented procedures. Fortunately they did not succeed because the reality was stronger than their wish, that is not to deal with specific countries. In 2011 another type of procedure was created: the Commissions of Inquiry. There are currently Commissions or investigations on Syria, Eritrea, the Gaza conflict, Sri Lanka, Libya and Burundi. These Commissions go a step further than a Special Rapporteur or a Working Group.

Out of the country oriented procedures, thematic procedures also developed. A clear example shows how a country oriented procedure of Chile was replaced by a Special Rapporteur on Chile and later by a Special Rapporteur on disappearances when it became clear that the problem of disappearances was not limited to Chile.

The purpose of special procedures is to impose pressure on governments. Their influence is not to be underestimated as States do not like to become subjects of such a special procedure. However, the United Nations is not able to investigate all countries that deserve it. To do so would be impossible because a political majority is required. However, just because the UN is unable to go after all countries, this does not mean that those countries that can be dealt with should be let go. when scrutinizing the UN's past approaches, it becomes apparent that there is less selectivity than one would imagine and countries are quite sensitive to the procedures.

Treaty bodies

Next to the Charter-based bodies exist treaty bodies based on specific conventions that deal with human rights norms. The starting point is the Universal Declaration of Human Rights of 1948 adopted by the Human Rights Commission, accepted universally to contain the fundamental human rights norms. A weakness of the Universal Declaration however, is that its text is not binding and there are no monitoring systems. This is a reason why there are human rights treaties. After the adoption of the Universal Declaration, the Commission worked on the Human Rights Covenants. A need arose to create two different Covenants (one on Civil & Political Rights and another one on Economic, Social & Cultural Rights). In 1954, the two drafts were submitted to the General Assembly and only slow progress followed since (one or two articles every year). Because of the delay, the Europeans created their own Convention – the European Convention on Human Rights supplemented by a supervisory body (the European Court of Human Rights). In the 1960s there were some developments as a consequence of the newly gained independence of African States that were highly interested in one specific human rights issue: racial discrimination. In 1963, a Declaration on the Elimination of Racial Discrimination was adopted and two years after, in 1965, International the Convention on the Elimination of All Forms of Racial Discrimination was adopted. The convention is the oldest human rights treaty. Its monitoring body is the Committee on the Elimination of Racial Discrimination. I am also one of its 18 members.

In 1966, there was an acceleration as the possibility of the adoption of a human rights treaty in the United Nations was proven. The two International Covenants were consequently adopted in 1966. The ICCPR has a Human Rights Committee composed of 18 independent experts elected by the meeting of the States parties to the Covenant. The same process took place with regard to the ICESCR. Similarly to other treaty bodies, the monitoring committees deal with reports submitted by State parties.

Other procedures include interstate communications and individual communications. The interstate communications give a possibility to States parties to complain about violations of the Covenant by another State. However, this never happens. On the contrary, the individual communications procedure is much more successful.

Next to the Human Rights Committee and the Committee on the Elimination of Racial Discrimination, there is a Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child, which are the two most popular committees. The Convention on the Rights of the Child has 196 States parties, more than the number of member States to the United Nations.

There is also the Convention Against Torture from 1984. A particular unpopular convention with the Western countries and one we should examine closer because it is not as overburdening as it may seem at first glance is the Convention on the Protection of the Rights of Migrant Workers. None of the European Union Member States are parties to this Convention. The newcomers include the Convention on the Rights of Persons with Disabilities and the Convention for the Protection of all Persons from Enforced Disappearances, both from 2006.

States began to complain of the obligation to write reports to all bodies, generally every four years what realistically amounts to a lot of work.

Would it be possible to merger the conventions? The likely result of mergers would be just another Convention that would require ratification. An alternative idea floating around is that there should be at least two permanent bodies because all the Special Rapporteurs and members of Committees all work part-time on a voluntary basis. Perhaps we could be better off with two permanent bodies, one to engage with examination of reports and one to examine individual communications. Former High Commissioner Louise Arbour intended to move into such direction but it was deemed as too ambitious at the time and was therefore unsuccessful. Navi Pillay, who was her successor, was more realistic and she attempted to streamline the work of the treaty bodies. Some miraculous achievements were made as a result, including getting rid of three of the six UN languages whereby now the Committees only work in English, French and Spanish, resulting in a 40% increase for meeting time.

This should provide you with an overview of how complex everything is, how successful some elements have become and also where failures occurred.