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From Commission to Council: hopes and concerns

I. Established principles must be safeguarded

After the adoption of the resolution creating the Human Rights Council on 15 March 2006, it is obvious that an important stage in the fight for the promotion and protection of human rights has come to an end.

The entire debate surrounding the various projects with a view to instating a Human Rights Council focused around the Commission's loss of credibility and effectiveness. The resolution to set up the Council nonetheless shows that some of the reforms envisaged may well fail to reach their goals, or might even call into question some of the considerable advances achieved by the Commission. It is therefore worth providing a more balanced appraisal of the nature and accomplishments of the Commission, as well as considering means of avoiding the errors that led to its paralysis.

A political authority

While the first members of the Commission were eminent personalities, it was quite obvious that, right from the outset, the Commission was given a political mandate that had to be ratified and implemented by politicians. The role of the Commission consisted of providing the international community with a set of instruments in the field of human rights in order to clarify and codify an area that tended to be considered as falling under customary law. The International Bill of Human Rights – consisting of the 1948 Universal Declaration of Human Rights and the two covenants – represented an unprecedented effort to clarify States' obligations in terms of human rights, whether relating to economic, social and cultural rights, or to civil and political rights. One may of course argue about the fact that these two categories of rights have not been dealt with in the same way and that States' obligations have not been symmetrically perceived in these two fields. The fact remains, however, that between 1946 and 1966, despite the Cold War, and despite the major changes resulting from decolonisation, a consistent and universal corpus was established, regulating the duties of States in the area of human rights. This regulation was not self-evident, in that – and therein lies one of the paradoxes of human rights – it imposes obligations upon one party, the State, while proclaiming and protecting rights for another party, namely individuals and peoples. Moreover, human rights challenge the absolute sovereignty of the State, both by establishing *jus cogens* norms, and by verifying the application of the international conventions. Moreover, even though these instruments apply directly only to States having accepted them by a ratification, the fundamental rules they contain obviously tend to be interpreted as the codification of international customary law.

If one compares with the situation prevailing prior to World War II, it is an undisputed fact that international human rights progressed extremely rapidly in all fields up until the late 1960s, leading to in-depth modifications in States' positive law, and gradually leading to a globalisation of law, meaning of rules shared by humanity as a whole and which all are theoretically willing to respect.

The demand for improved compliance with the norms

With the adoption of the major instruments, the Commission found itself facing a contradiction that was increasingly less acceptable. The application of the principles that it codified could not be entirely dependent on States' authority. International opinion, echoing victims' demands, advocated – particularly via NGOs – that the Commission become more involved in examining the situation

prevailing in the world as a whole. It soon became apparent that it could not confine itself to dealing exclusively with the normative aspect and with the establishment of a coherent system of international rules through declarations, principles, treaties and conventions, but that the international community must also take measures to ensure respect for these rules among all States around the world.

The monitoring system of committees instated by the international treaties was undeniably flawed, in that the legal competence of these bodies was restricted to situations prevailing in States Parties to these instruments. This meant that the States less inclined to respect human rights were the very ones on which it was hardest to apply pressure. The Commission, confronted by particularly grave crimes (apartheid in South Africa, the occupation of certain territories by Member States, and the massive violations of human rights systematically organised by dictatorships) had to decide also to take action as a supervisory and monitoring authority. Mechanisms were thus set up on a geographical level, and then on a theme-related level. The Commission thus progressively took on two roles that are in certain respects contradictory. On the one hand, completing the normative task that implies the adherence of as many States as possible and thus negotiations with the most reticent; and on the other, a "supervisory" role which, on the contrary, would call for an objective vision free of any political agenda.

II. A half-reform

Contradictions between the essential requirements of human rights and political interests

Initially, questions such as apartheid did not divide the international community to the point of obstructing the mechanisms gradually being put in place. Not only did it prove possible to adopt a convention against the crime of apartheid, but South Africa also quickly lost the support it still enjoyed in certain non-African countries. This made it possible for the Commission to denounce this criminal practice and to suggest to the General Assembly measures liable to put an end to it. Nonetheless, this consistent approach did not hold up when faced with other situations. Geo-strategic and regional solidarity reasons, as well as economic exchanges, soon turned out to be important factors determining the manner in which members of the commission dealt with the various cases that might be submitted to it. Mechanisms were devised to remedy this problem, and in particular the role assigned to the Sub-Commission which, despite its title, soon became an authority dealing with the entire range of violations, wherever they occur in the world.

The Sub-Commission, which one may recall, is composed of independent experts, has played a major role by choosing to take up questions of grave violations in particularly sensitive countries. Moreover, it was also the culminating point of Procedure 1503, a procedure that enabled members of civil society to draw the attention of the international community to practises involving massive and systematic violations in a given country. According to this procedure, the Sub-Commission, after making an evaluation, was to submit the case to the Commission for a more thorough examination and with a view to interventions to be decided by the General Assembly. Even though the Sub-Commission had not initially been conceived as the "independent" conscience of the Commission, it soon became a fundamental arena for debating the most serious violations, whichever the country involved. The Ambassadors attending the Commission, despite instructions from their capital, could not ignore the conclusions of the Sub-Commission, which naturally led to certain tensions, which reached a peak at the time of the events on Tiananmen Square. On this occasion, the Sub-Commission took up a case concerning one of the permanent members of the Security Council and went so far as to adopt a resolution implicating the Chinese authorities. This initiative was unfortunately short-lived, since the Commission decided not to pursue it. The opposition force represented by the Sub-Commission's independent experts was called into question during the subsequent reform. From then on, these experts no longer had the right to adopt resolutions concerning States; thereby preventing them from placing on the Commission agenda any particular situations politicians did not wish to deal with

In parallel, an evolution was taking shape within the Commission itself, where the increase in the number of seats was leading to a situation whereby governments at odds with human rights were demanding to be part of this body. Due to the voting system, they succeeded by the interplay of regional groups in being elected as members of the Commission, and even of chairing it. Paradoxically, the end of the Cold War was to accelerate this process. Whereas there were formerly three groups of countries facing off – socialist countries, liberal democracies and non-aligned nations – and none of them were able to achieve hegemony over the Commission, groups were re-formed on a geographical basis and an alliance was established between the countries of the South and certain

other countries. Thanks to the automatic majority it enjoys on most cases regarding States belonging to this coalition, this self-titled “like-minded group” imposed a selective approach to the cases examined, thus depriving the Commission’s resolutions on the countries analysed of any genuine credibility.

After the reform of the Sub-Commission, the only means of submitting a case for scrutiny based on independent sources depended entirely on the so-called special procedures and mechanisms established by the Commission. Working groups (particularly on enforced disappearances and arbitrary detention), Special Rapporteurs (including those on torture and summary executions, to mention just two) continued to provide the Commission with reliable information by reporting on situations that this authority could not simply ignore. Unfortunately however, the treatment applied to the reports stemming from these mechanisms steadily deteriorated. Facing restrictions in terms of their written presentation, they were summoned to submit their reports within very short time-frames unworthy of the work conducted, whereas the debate aroused by their conclusion was often evaded or curtailed Moreover, certain governmental delegates went so far as to make personal attacks against the authors of the reports that challenged the actions and attitudes of the States they represented.

The “non-action motions” (designed to avoid dealing with a topic), the pitifully restricted scope for intervention allotted to the independent mechanisms, and the bargaining on resolutions pursued by the delegations, were doubtless responsible for discrediting the Commission and the ensuing loss of its reputation. Nonetheless, it is worth emphasising that the political debate generated, and the fact that the States are represented on the Commission by Ambassadors and even Ministers, are not problems in themselves if the role of the Commission mainly consists of drafting treaties or conventions and submitting them to the General Assembly. For a treaty or a convention to reach its goals, it is important that this instrument should be ratified by a sufficiently large number of States. That is why one of the provisions stipulates a minimum number of States for the entry into force of any convention. Ensuring that the most “difficult” states take part in the debate and voice any objections during the negotiation phase provides a certain guarantee that the text adopted does not merely reflect the views of a minority showing a concern for human rights, but is instead accepted – or at least tolerated – by countries including those wishing to raise objections regarding these new regulations.

Nor can it be viewed as absurd to undertake the broadest possible preliminary consultation before considering measures designed to sanction a recalcitrant State where necessary. However, it is far more debatable to submit the practice of such or such a State to the scrutiny of government representatives whose interests may lie in turning a blind eye to certain grave violations, so as not to adversely affect their diplomatic relations and their economic interests. Moreover, human rights are sometimes also used to isolate a political enemy. The rigorous attitude displayed by certain States unfortunately often stems less from the reproaches addressed to a country, than from a will to attack an enemy by isolating it diplomatically. Not only do certain States responsible for grave human rights violations enjoy inexcusable clemency, but others whose crimes, even though actually proven, are not necessarily very serious, are treated as if they were in disgrace for purely political reasons.

The Sub-Commission and the special mechanisms provided a necessary counterbalance to the political interests of the Commission. While not perfect, the special mechanisms and the treaty-monitoring bodies turned out to be far less biased in their analysis of situations than resolutions adopted by members of the Commission. Moreover, both the Commission and the Sub-Commission had granted broad access to human rights defence organisations, whose contributions often forced them to deal with questions they would have preferred to keep within a confidential setting or even to hush up.

The dangers of naïve optimism

The new Council could not possibly be composed exclusively of States above suspicion. This proposal was short-lived. It proved both practically and politically impossible to establish the “worthiness” enabling a State to be voted in or another to be considered unworthy to sit on the Council. Quite rightly, severe criticism was directed against States such as the United States which were asking for a considerable reduction in the number of members of the Commission through seeking to reserve access to those deemed “worthy”, while laying claim to automatic inclusion for themselves. This self-satisfied attitude was particularly shocking in that it came after the revelations on Guantanamo and Abou Ghraib. Nonetheless, two particular reforms liable to ensure a better mode of operation than that of the Commission, have been adopted.

The first consists of replacing the current six-week session by several meetings enabling improved monitoring of the evolution within countries where there are threats of violations. The second relates to a systematic scrutiny of all countries in the world, by means of a "peer review". As far as the first point is concerned, it is undeniably true that three to four meetings per year, convened in accordance with the evolution of the situation, will enable better follow-up on specific cases. One may thus legitimately hope that, contrary to what occurs in the commission, the resolutions adopted annually will not go unheeded and that one will not have to wait another twelve months only to observe that they have not been implemented. Moreover, for States that agree to cooperate in improving the situation, the frequency of these meetings will facilitate fruitful exchanges to consolidate the progress achieved and to better identify the obstacles that might hamper the fulfilment of the established goals. One should not however harbour too many illusions. The frequency of the sessions will not in itself solve the problems raised if there is not a political will on the part of the authorities concerned to acknowledge the problems raised, to accept criticism and to actually implement the requested improvements.

As far as the "peer review" system is concerned, it is important to gain more insight into the way in which it is expected to operate. Undoubtedly, the fact that each State in turn will be subjected to a thorough analysis is a measure that might avoid the selectiveness of which many complain. This measure does not however guarantee an objective examination of the situations analysed. It is vital to render this scrutiny as transparent as possible, meaning that not only should the State concerned be able to present the situation prevailing in the country, but also that authentically independent NGOS should be heard and that the conclusions of the independent experts should take precedence over political considerations.

III. Challenges for the new Council

A tough balance to strike

To achieve this, one important move would involve rethinking and reinforcing the mechanisms which may be said to ensure a certain degree of "checks and balances" between the contradictory interests mentioned above, and which were in our view largely responsible for the negative evolution of the Commission. As we have seen, the failure of the Commission probably lies mainly in its inability to strike a balance between two contradictory demands: on the one hand, the need for a consensus among all partners in order to elaborate a globally acceptable legal system; and, on the other, the necessity of complete independence and impartiality in the treatment of situations that must be judged according to their gravity and not according to parties' interests or the diplomatic relations existing between the examiners and the examinees.

The lessons to be learned from the Commission do not apply merely to structural issues. Over the years since it was established, it has contributing to relativising the concept of State sovereignty by asserting that individuals have rights that they could invoke directly on an international level. Even though the mechanisms established are still relatively modest, the possibility for certain people of referring their case to certain committees in order to reveal how the State has failed to live up to its responsibilities and to obtain formal condemnation, represents a full-fledged revolution compared with the legal system prevailing prior to the creation of the United States. Moreover, human rights have moved on from an ethical and philosophical approach to a genuine system of rights, including with regard to economic, social and cultural rights. This despite the fact that the Commission encountered more difficulty with regard to this second category in defining the legal framework of accountability for these rights. The pre-eminence of international human rights law over the positive law of the States concerned is now generally recognised and the relative definitions of the gravest violations, such as breaches of physical or mental integrity or of individual freedom and other collective rights, are now clearly defined and perceived as a globally established principle.

Gender equality, children's rights and minority rights are recognised, even though not always respected, on a virtually universal scale.

A universal system being undermined

Nonetheless, these principles established by the Commission, and which one would like to believe are a permanent part of our global heritage, are now under greater threat than twenty years ago. After the

9/11 attacks, it took OMCT three years to persuade the Commission to incorporate a reference to the prohibition of torture as a *jus cogens* norm. Nonetheless, the coalition that formed to achieve this result did not manage to convince the authors drafting the resolution to incorporate a reaffirmation that cruel, inhuman and degrading treatment or punishment are also prohibited, and that no exceptions may be made to this prohibition. Yet in the1960s, members of the Commission had chosen to adopt Article 4 of the International Covenant on Civil and Political Rights, which clearly stipulates that no exemptions may apply to the prohibition of torture and of cruel, inhuman and degrading treatment or punishment, whatever the threats to State security. Moreover the jurisprudence of international courts, and most recently the one dealing with former Yugoslavia, has systematically recalled that the prohibition of torture is a *jus cogens* norm. The fact that, twenty years on, the delegations sitting on the Commission on Human Rights should prove reticent or hesitant to issue a reaffirmation of something that has been universally recognised for several decades is an eloquent sign of the risks of seeing a relativisation of the most important and most binding norms within international human rights.

The Council thereby faces two main challenges. First of all, that of inventing the mechanisms which are indispensable to the objective and impartial scrutiny of any national situation by independent experts, focusing exclusively on compliance with the norms stemming from treaties and from international customary rights. This implies not only maintaining the special procedures established by the Commission (Rapporteurs, Working Groups and Representatives), but also actively reinforcing their position and their authority in order to withstand any form of political pressure. The risk of seeing the new Council fall into the same rut is far from eliminated by the current reform. Moreover, it will also be important for the Council to fight against the erosion of fundamental rights by means of a political or cultural relativism, as well as by interpretations that contradict both international doctrine and jurisprudence. The manner in which some State are attempting to redefine torture in a more restrictive way and to exclude the total prohibition of cruel, inhuman and degrading treatment or punishment, is unfortunately not an isolated problem. After being held in contempt and presented as a right mainly based on moral and political issues and with no binding value, human rights are now undeniably recognised, although their scope is being challenged by the very nations that had been their most ardent advocates. The Council must thus be careful to protect this established principle, and the best way of not slipping back is undoubtedly to move forward.

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