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978-1-107-04007-6 - The United Nations Security Council in the Age of Human Rights

Edited by Jared Genser and Bruno Stagno Ugarte

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PART I

The Security Council and Human Rights

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Evolution of the Security Council's Engagement on Human Rights

Bruno Stagno Ugarte and Jared Genser

Reflecting on the consequences of the fall of the Berlin Wall on November 10, 1989, Zbigniew Brzezinski declared that “human rights have become the genuine historical inevitability of our times.”¹ Looking forward, and in light of the remarkable yet still unfinished awakening of Arab societies after the spark lit in Tunisia on December 17, 2010, it would seem that recent events are once again giving credence to the inevitable role that human rights and fundamental freedoms will play into the future. A new age seems to have dawned, one that has been slow in coming and in making because the recognition of human rights as a universal entitlement within all states casts doubt on the very sovereignty inuring in states.²

Through ratification or accession, states have agreed to be bound by human-rights covenants and protocols, a process that has been surprisingly universal despite the perception of human rights as a predominantly Western concern.³ Although the end of the Cold War was only an intermediate point, with many significant human-rights developments preceding it,⁴ the increased global prominence gained by the human-rights agenda since is indisputable. After all, the Cold War was in part a confrontation between the dignity and the opacity of the individual in which the latter view

¹ Zbigniew Brzezinski, *THE NEW DIMENSIONS OF HUMAN RIGHTS: FOURTEENTH ANNUAL MORGENTHAU MEMORIAL LECTURE ON ETHICS AND FOREIGN POLICY* (Carnegie Council on Ethics and International Affairs, 1995), 7.

² Thomas M. Franck, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (Oxford University Press, 2002).

³ The 1989 Convention on the Rights of the Child was the most universal human rights instrument at time of writing, with 193 states parties. Other instruments nearing universality include the 1979 Convention on the Elimination of Discrimination against Women, with 187 states parties; followed by the 1966 International Convention on the Elimination of All Forms of Racial Discriminations, with 175 states parties; and the 1966 International Covenants on Political and Civil Rights and on Economic, Social and Cultural Rights, with 167 and 160 states parties, respectively. See the United Nations Treaty Collection, *Status of Treaties – Chapter IV: Human Rights*, available at <http://treaties.un.org/pages/Treaties.aspx?id=4%subid=A%lang=en>, for updated information.

⁴ Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen, *Human Rights and World Public Order: Human Rights in Comprehensive Context*, 72(2) NORTHWESTERN UNIVERSITY LAW REVIEW 227–307 (1977).

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lost either through exhaustion or implosion. Although defeated, such views were not eliminated altogether, with different quarters still resisting the universality and indivisibility of human rights.

Refutations based on the hypocrisy of former colonial powers lecturing newly independent countries on human rights have slowly but surely taken a backseat, as the latter have signed and ratified human-rights instruments acting on their own sovereign volition.⁵ Arguments for “African solutions to African problems,” “Asian values,” or other claims for cultural relativism notwithstanding, the dignity and integrity of the individual have progressively cut across cultural and geographical divides and pierced through the inviolability of national sovereignty. Indeed, as an illustration of this phenomenon, as of June 2013, there are 167 states parties to the International Covenant on Civil and Political Rights (ICCPR), and more than 98 percent of the world’s population is protected by this treaty.⁶

The sweeping transitions to self-determination that liberated many previous colonial dominions or possessions that peaked in the 1960s, as well as the transitions from authoritarian rule in Latin America in the 1980s and from totalitarian rule in Eastern Europe and Central Asia in the 1990s, ushered in the exercise of human rights previously denied to wide expanses of the planet. With the establishment in 1993 and 1994, respectively, of ad hoc international criminal tribunals to try those responsible for the mass crimes committed in the Former Yugoslavia and Rwanda, and the entry into force of the Rome Statute of the International Criminal Court (ICC) in 2002, accountability for the most egregious denials of the most fundamental human rights is unquestionably on the rise. Progress, however, has been uneven.

These unmistakable signs of an apparent dawning of an “age of human rights” have been and will continue to be darkened or threatened by regressions so abhorrent that they bring into question whether the claim of the universality and indivisibility of human rights is real at all. As stated by then UN Secretary-General Kofi Annan, “the tragic irony of this age of human rights – where greater numbers are enjoying human rights than perhaps ever in history – is that it has been repeatedly darkened by outbursts of indiscriminate violence and organized mass killings.”⁷

⁵ In 1994, for example, the then Deputy Prime Minister of Malaysia, Anwar Ibrahim, complained that “to allow ourselves to be lectured and hectorated on freedom and human rights after one hundred years of struggle to regain our liberty and human dignity, by those who participated in or benefited from our subjugation, is willingly to suffer impudence.” Anwar Ibrahim, *The Pacific Century*, 157(22) FAR EASTERN ECONOMIC REVIEW 20 (1994).

⁶ See the United Nations Treaty Collection, *Status of Treaties – International Covenant on Civil and Political Rights*, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4%chapter=4%lang=en. The population assessment was completed by adding the most current estimated total population of the eighteen countries that have neither signed nor ratified the ICCPR and dividing it by the estimated population of the world.

⁷ Kofi Annan: “No Government Has the Right to Hide behind National Sovereignty in Order to Violate Human Rights,” *THE GUARDIAN*, Apr. 7, 1999.

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Yet, as Adam Hochschild believes, “some ideas are so powerful, so true to their times, and take root so deeply that even dark and violent passages . . . cannot suppress them forever.”⁸ History is the name given to choices made.⁹ Whether history will recognize these changes as veritably constituting an “age of human rights” will depend on how the choices made to date, and those likely to come, measure in relation to expectations.

The United Nations has played a central role in enabling and universalizing human-rights covenants and protocols and in ushering in the “age of human rights.” Determined “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,”¹⁰ the UN has concerned itself with human rights from the beginning, adopting the Universal Declaration of Human Rights in 1948.¹¹ Throughout, the consideration given to human rights within the UN has largely been determined by the separation of power and division of labor enshrined in its Charter as reaffirmed, amended, or reinterpreted through the practice of its principal organs since.

I. THE UNITED NATIONS CHARTER AND HUMAN RIGHTS

The UN Charter established six principal organs with differentiated but at times overlapping mandates and responsibilities. However, of the six, the Security Council is without a doubt the paramount organ, with authority to mandate binding decisions on the wider membership and extraordinary powers of enforcement that include the authorization of the use of force.¹² Because of the unique authority of the Council, its crossing of paths with human rights makes for an interesting study of at times conflicting or converging priorities and perspectives. Although tasked with the primary responsibility of maintaining international peace and security, it was only in 1960 that the Council acknowledged that systematic violations of human rights and fundamental freedoms and the general absence of the rule of law could constitute a threat to international peace and security.

Articles 13.1, 62(a), 68, and 76(c) of the Charter confer a specific human-rights mandate on three of the principal organs – the General Assembly,¹³ the Economic

⁸ Adam Hochschild, *Ending the Age of Human Rights?*, available at <http://www.tomdispatch.com/post/509>.

⁹ Philip Bobbitt, *THE SHIELD OF ACHILLES: WAR, PEACE AND THE COURSE OF HISTORY* (Anchor Books, 2002), 826.

¹⁰ United Nations, *Charter of the United Nations*, 1 U.N.T.S. XVI, entered into force Oct. 24, 1945, preamble.

¹¹ UN General Assembly Resolution 217A (III), A/RES/3/217A, Dec. 10, 1948.

¹² For a detailed commentary of the UN Charter, see Bruno Simma *et al.* (eds.), *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* (Oxford University Press, 2002, 2nd edition).

¹³ UN Charter, Article 13.1 reads: “The General Assembly shall initiate studies and make recommendations for the purpose of . . . assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

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and Social Council,¹⁴ and the Trusteeship Council,¹⁵ respectively – whereas its preamble and Articles 1.3 and 55(c)¹⁶ provide for the UN as a whole to “achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms.” Although the four chapters of the Charter that specifically deal with the Security Council make no mention of human rights, it is nonetheless indirectly tasked with contributing to this purpose. Nevertheless, during the first four decades of its existence “it did its best to avoid taking up human rights issues.”¹⁷

The Security Council has never invoked Article 1.3 or 55(c) in any resolution or presidential statement. None of its decisions seem to have been guided by the constitutional mandate conferred by the Charter regarding human rights, save for references to Article 76(c). These, however, as can be expected, address human rights and fundamental freedoms within the larger issue of self-determination or decolonization of trust territories. They also tend to focus more on the conditions that should accompany transient procedures for transfer of authority to a new sovereign nation than on permanent attributes of the political regime to follow.

The initial absence or low prevalence of references to human rights in the decisions of the Council should come as no surprise. Article 2(7) played, and continues to play, a key role in determining the competence of the Council to become seized of an issue.¹⁸ At its inception, many held the view that the Security Council would automatically encourage the protection of human rights by maintaining international peace, albeit within the confines of Article 2(7) and the principle of nonintervention in matters that are essentially within the domestic jurisdiction of the state. Part of this thinking was based on the fact that other UN organs were actively discussing the Universal Declaration of Human Rights.

¹⁴ UN Charter, Article 62(a) reads: “The Economic and Social Council . . . may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.” Article 68 reads: “The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.”

¹⁵ UN Charter, Article 76(c) reads: “The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be . . . to encourage respect for human rights and for fundamental freedoms for all without distinction.”

¹⁶ UN Charter, Article 55(c) reads: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Article 1.3 reads: “The purposes of the United Nations are . . . to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

¹⁷ Sydney D. Bailey, *THE UN SECURITY COUNCIL AND HUMAN RIGHTS* (St. Martin’s Press, 1994).

¹⁸ UN Charter, Article 2(7) reads: “Nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

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An early indication of how the principle of nonintervention would subsequently weigh on the Council was its consideration of a matter referred to it by the Commission of Investigation it established under Resolution 15 (1946) to investigate alleged border violations between Greece and Albania, Bulgaria, and Yugoslavia.¹⁹ The Commission had requested that the Greek authorities postpone the execution of persons sentenced to death for political offenses, yet asked the Council²⁰ whether its request was covered by the terms of its mandate under Resolution 15. By Resolution 17 (1947), the Council resolved that the Commission was “not empowered” to request deferral of the executions unless it had “reason to believe that the examination of any such person as a witness would assist the Commission in its work, and makes its request on this ground.”²¹ What is interesting about this case is that it placed two bodies with identical configurations at odds. While the Commission – integrated with one representative per Council member – apparently felt some discomfort with the death penalty, the Council was not ready to adopt a principled position on the matter in contradiction with the principle of noninterference.

II. THE SECURITY COUNCIL AND HUMAN RIGHTS: AN ABRIDGED COLD WAR HISTORY

Before the end of the Cold War, the Council made rare and sparse substantive references to human rights. A first indirect acknowledgment of human rights appeared in Resolution 16 (1947), in which the Council accepted its responsibility to ensure the “protection of the basic human rights of the inhabitants” of the Free Territory of Trieste pursuant to the annexes of the Trieste Peace Treaty.²² Interestingly, the responsibility is spelled out not in the resolution itself, which uses the ambiguous “hereby record . . . its acceptance of the responsibilities devolving upon it,” but in the Statute of the Free Territory of Trieste annexed to the resolution.²³

The Council first identified and enumerated a series of rights and fundamental freedoms a short time after it adopted Resolution 16. In conferring trusteeship of islands previously under the administration of Japan before its defeat in World War II, the Council tasked the United States, in Resolution 21 (1947), with promoting “the rights and fundamental freedoms of all elements of the population without discrimination” while guaranteeing “freedom of conscience, and, subject only to the

¹⁹ UN Security Council Resolution 15, S/RES/15, Dec. 19, 1946. Adopted unanimously.

²⁰ UN Security Council, *Cablegram dated 6 February 1947 from the Commission of Investigation concerning Greek Frontier Incidents*, S/266, Feb. 6, 1947.

²¹ UN Security Council Resolution 17, S/RES/17, Feb. 10, 1947. Adopted 9-0-2, with Poland and the Soviet Union abstaining.

²² UN Security Council Resolution 16, S/RES/16, Jan. 10, 1947. Adopted 10-0-1, with Australia abstaining.

²³ See Simon Chesterman, *YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING* (Oxford University Press, 2005), 50–52.

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requirements of public order and security, freedom of speech, of the press, and of assembly; freedom of worship and of religious teaching; and freedom of migration and movement.”²⁴ As already mentioned, this expansive reference to human rights did not present any difficulties from an Article 2(7) perspective as it clearly fell within the scope of Article 76(c) and the trusteeship system and moreover affected a defeated “enemy state” of the UN.

This first case was, however, soon followed by Resolution 47 (1948), which dealt with the explosive issue of Jammu and Kashmir and two member states in good standing. In Resolution 47, the Council instructed both India and Pakistan to ensure that “all subjects of the State of Jammu and Kashmir, regardless of creed, caste or party, will be safe and free in expressing their views and in voting on the question of the accession of the State and that there will be freedom of the press, speech and assembly and freedom of travel in the State, including freedom of lawful entry and exit.”²⁵ In Resolution 67 (1949), it once again enumerated a number of rights and freedoms inherent to democracy in calling for “freedom of assembly, speech and publication at all times, provided that such guarantee is not construed so as to include the advocacy of violence or reprisals,” in preparation for the “free and democratic elections”²⁶ to be held in Indonesia pursuant to the Renville Agreement and the withdrawal of The Netherlands. Similar pronouncements from the Council on the democratic entitlement and the associated human rights and fundamental freedoms would become rare as the Cold War pressed on.

As the East and the West vied for the allegiance of states during the Cold War, some of the fronts were brought to the attention of the Security Council in an effort to gain leverage, at times using human rights as the point of entry. In 1950, for example, the Soviet Union proposed that a new agenda item be adopted on the “unceasing terrorism and mass executions in Greece.” The Soviet Union asked the Council to intervene to “protect the lives of certain members of the national resistance movement who had been sentenced to death.”²⁷ The proposal was defeated by a resounding majority, with Ecuador explaining that “whatever action is required to ensure that human rights are observed as far as possible in Greece and in all other countries can be taken in the [General] Assembly.”²⁸

By 1951, some were openly complaining that they could not “in fairness be asked to forego the unimplemented stipulations of the Charter, such as those dealing with human rights.”²⁹ In 1956, however, the debate as to the appropriate role of the

²⁴ UN Security Council Resolution 21, S/RES/21, Apr. 2, 1947. Adopted unanimously.

²⁵ UN Security Council Resolution 47, S/RES/47, Apr. 21, 1948. Adopted in parts, no vote taken on text as a whole.

²⁶ UN Security Council Resolution 67, S/RES/67, Jan. 28, 1949. Adopted in parts, no vote taken on text as a whole.

²⁷ *UN Security Council Provisional Verbatim Record of the 493rd Meeting*, S/PV.493, Aug. 31, 1950.

²⁸ *UN Security Council Provisional Verbatim Record of the 493rd Meeting*, S/PV.493, Aug. 31, 1950.

²⁹ *UN Security Council Provisional Verbatim Record of the 553rd Meeting*, S/PV.553, Aug. 18, 1951. Statement by the representative of Egypt.

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Security Council in advancing human-rights norms came to a fore when it was called to consider the situations in Algeria and Hungary. Neither side of the East-West divide performed on a consistent basis, advancing at times totally contradictory positions just months apart. Regarding the situation in Algeria, the West, led by France, opposed consideration of the issue and adoption of a draft resolution (S/3609), arguing that “neither the violation of fundamental human rights nor the denial of the right of self-determination is a matter within the competence of the Security Council.”³⁰ Belgium stated that “the prohibition contained in Article 2(7) was of a categorical and general character” and that “it applied to all provisions of the Charter, including those bearing on human rights.” Taking a much more progressive stance, Iran, for example, argued that “questions bearing on violations of human rights were not a matter of purely national concern when these violations reached a certain degree of magnitude.”

Regarding the situation in Hungary, the West presented a draft resolution (S/3730) highlighting “the enjoyment of human rights and of fundamental freedoms . . . and that the general principle of those rights and freedoms is affirmed for all peoples in the Charter of the United Nations.” As the draft was vetoed by the Soviet Union, the Council adopted Resolution 120 (1956) calling an emergency special session of the General Assembly to make “appropriate recommendations” concerning the situation in Hungary.³¹ Although it was a procedural resolution, and therefore not subject to the veto, it failed to highlight human rights beyond a rather ambiguous reference to “the efforts of the Hungarian people to reassert their rights.”³²

In 1960, following the March 21 Sharpeville massacre and only after being prompted by twenty-nine member states,³³ the Council adopted Resolution 134 (1960) calling on South Africa to “initiate measures aimed at bringing about racial harmony based on equality . . . and to abandon its policies of apartheid and racial discrimination.”³⁴ Resolution 134 was adopted under Chapter VI, and therefore was not binding, failed to make an Article 39 determination, and demurred in stating that the policies of apartheid in South Africa “if continued might endanger international peace and security.” Because of the support lent to South Africa by France and the United Kingdom, both of which abstained in the vote, the resolution was noticeably weakened.

³⁰ *UN Security Council Provisional Verbatim Record of the 729th and 730th Meetings*, S/PV.729 and S/PV.730, June 26, 1956.

³¹ UN Security Council Resolution 120, S/RES/120, Nov. 4, 1956. Adopted 10-1-0, with the Soviet Union voting against.

³² *UN Security Council Provisional Verbatim Record of the 746th and 752nd Meetings*, S/PV.746, Oct. 28, 1956, and S/PV.752, Nov. 2, 1956.

³³ UN Security Council, *Complaint concerning South Africa (letter of 25 March 1960)*, S/4279 and Add.1, Mar. 25, 1960.

³⁴ UN Security Council Resolution 134, S/RES/134, Apr. 1, 1960. Adopted 9-0-2, with France and the United Kingdom abstaining.

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These ambiguities of language and resolve were lost in Resolution 161 (1961), when the Council took note of “with deep regret and concern the systematic violations of human rights and fundamental freedoms and the general absence of the rule of law in the Congo.”³⁵ Resolution 161 was groundbreaking in authorizing an investigation into a specific assassination – in this case, that of Prime Minister Patrice Lumumba and associates Maurice Mpolo and Joseph Okito – to identify perpetrators to be prosecuted and punished. Adopted under Chapter VII, it moreover urged the UN to take “all appropriate measures” to prevent the occurrence of civil war in the Congo, including “the use of force, if necessary, in the last resort.”

Resolution 161 was potentially a game-changing precedent, but its promise was dampened by the subsequent ad hoc considerations and calculations made by some Council members on the tensions between Articles 2(7) and 24 and Articles 55 and 56. This occurred despite the fact that an increasing number of member states argued that Article 2(7) “could not be invoked in a situation in which the violations of human rights were so serious that the United Nations Organization could not disregard it without failing in their duties as defined in Articles 1, 55 and 56.”³⁶ In 1961, for example, while considering the situation in Angola, the United Kingdom stated that “it is not, in the first place, to deal with a crisis or to prevent abuses of human rights that the Security Council has primary responsibility, but to maintain international peace and security... [W]ithout a situation likely to endanger the maintenance of international peace and security, this Council has no power to act, whatever other features any supposed crisis may have or whatever may be the extent of any abuse of human rights.”³⁷ France cautioned against stretching the meaning of international peace and security, as “this would involve the danger of attributing to any dispute or incident which occurs in a country, however regrettable and distressing it may be, a meaning and significance which it does not have.” In its defense, Portugal, participating as a concerned state, contended that “Article 24 granted specific powers to the Security Council for the discharge of those duties laid down in Chapters VI, VII, VIII, and XII. It did not include Chapter IX, where Articles 55 and 56 dealing with human rights appeared.”³⁸

By 1963, China (then represented by Taiwan at the UN) was arguing that the question of the competence of the Security Council on human rights and fundamental freedoms “had long since been settled by an impressive number of precedents.”³⁹ Before the end of the year, the Council would break new ground with the adoption of Resolutions 181 (1963) and 182 (1963) on the situation in South Africa. In Resolution 181, it would for the first time ever hint at the possibility of mandatory

³⁵ UN Security Council Resolution 161, S/RES/161, Feb. 21, 1961. Adopted 9-0-2, with France and the Soviet Union abstaining.

³⁶ UN Security Council Provisional Verbatim Record of the 851st Meeting, S/PV.851, Mar. 30, 1960.

³⁷ UN Security Council Provisional Verbatim Record of the 944th Meeting, S/PV.944, Mar. 10, 1961.

³⁸ UN Security Council Provisional Verbatim Record of the 950th Meeting, S/PV.950, June 6, 1961.

³⁹ UN Security Council Provisional Verbatim Record of the 1053rd Meeting, S/PV.1053, Aug. 5, 1963.