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HUMAN RIGHTS PROTECTION:

**SHOULD THE UNITED NATIONS TO HAVE
AN INCREASING OR DIMINISHING ROLE?**

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Human Rights Protection:

Ought the United Nations To Have an Increasing or Diminishing Role?

Rosa Freedman

The United Nations: Failing to Protect Human Rights?

The United Nations was created to secure international peace and security and to ensure fundamental rights and freedoms for all human beings. This occurred in large part as a response to the horrors witnessed under Nazi Germany. Human rights forms one of the UN's three pillars and its Charter emphasises the crucial place that human rights has within the Organisation's framework. But almost seventy years on from its creation, the UN has failed to protect human rights and continues to do so, despite the billions of dollars spent every year on efforts to achieve those aims. Ever-increasing amounts of time and expertise – in UN bodies and in field missions – is devoted to addressing human rights, yet very many violations continue to be perpetrated with impunity. And those gross and systemic abuses occur across the world.

Reports last month of a 'colossal humanitarian catastrophe' in Europe have once again shone the spotlight on the grave abuses of migrants' human rights. This is not a new problem. Less than a year ago, these issues were scrutinised by the media after events on 3rd October 2013 when a boat caught fire and capsized near Italy. On board were more than 500 Eritrean men, women and children, of whom only 155 survived. While this disaster made headlines across the world it was far from an isolated tragedy as migrants struggle to reach European shores. Lampedusa has become a gateway for migrants in their thousands. The island's inhabitants stand out as compassionate and caring towards the boatloads of new arrivals; they seem to understand that these people arrive on European shores seeking

a better life than the one they left behind.¹ But their empathy stands in stark contrast to the rhetoric across much of the Global North.

Irregular migration dominates Global North media and politics. No one knows whether migration is increasing or decreasing. Unsurprisingly, we have no reliable statistics on the actual numbers of people who cross borders in irregular ways. Yet the prominence of the topic in daily life might make one think that a tidal wave of irregular migrants has arrived in Europe. Such rhetoric increasingly dehumanises irregular migrants. This increasingly negative attention might be owing to financial pressures – history shows us that with economic recession comes an increase in nationalism and xenophobia – or may be based on security concerns and the global threat of terrorism. Regardless of its causes, the result is a general failure to acknowledge, let alone uphold, the human rights of migrants.

Human rights are quite simply exactly that: the rights held by all individuals by virtue of them being human. A person does not lose his or her status as a human simply because he or she is an irregular migrant. Crossing a border in contravention of a law does not dehumanise an individual. Yet the total disregard Global North countries have for the rights of irregular migrants undermines this central notion.

Efforts are being made at the international level to protect and promote the human rights of migrants. In 1990, the General Assembly of the UN adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,² the central feature of which is to apply the same level of protection to migrants irrespective of their legal status. Some forty-six countries have ratified the Convention,³ way below the 120 states ‘for which migration is an important feature, either as origin, transit or destination countries’.⁴ None of the states from the Global North⁵ or from the rising global power of the BRICs — Brazil, Russia, India and China — have signed or ratified the Convention. Without

¹ Lizzy Davies, ‘Why Lampedusa remains an island of hope for migrants’, *Guardian*, 16 October 2013, available at <http://www.theguardian.com/world/2013/oct/16/lampedusa-island-of-hope>

² General Assembly Resolution 45/158, ‘International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families’, 18 December 1990, UN Doc. A/RES/45/158.

³ Albania, Algeria, Argentina, Azerbaijan, Bangladesh, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Guyana, Honduras, Indonesia, Jamaica, Kyrgyzstan, Lesotho, Libya, Mali, Mauritania, Mexico, Morocco, Nicaragua, Niger, Nigeria, Paraguay, Peru, Philippines, Rwanda, Senegal, Seychelles, Sri Lanka, St Vincent and the Grenadines, Syrian Arab Republic, Tajikistan, Timor-Leste, Turkey, Uganda, Uruguay.

⁴ OHCHR, ‘A new Guide on strengthening legal protection of migrants’ rights is now available’, April 2009, available at <http://www.ohchr.org/EN/NewsEvents/Pages/GuideonStrengtheningofMigrantsrights.aspx>

⁵ Including Western European states, the US, Canada, Australia, New Zealand and Japan.

those heavyweights, politically and economically, the treaty has failed to get off the ground. The countries that most need to be bound to protect the rights of migrants are the ones that are studiously avoiding signing up to its provisions.

And there are countless other examples. Not a day goes by without news reports of grave human rights abuses in countries across all regions of the world. We are confronted with deaths and displacements in Syria; looting and killing in Sudan; rapes and amputations in the Congo; repression of dissent and ill-treatment of workers in China; disappearances and beheadings in Mexico; torture and arbitrary detention in Guantánamo Bay; racism and xenophobia in Europe; subjugation of women across the Arab world; oppression of homosexuals across Africa; and the list goes on. The question that must be asked is: why is more not being done to protect individuals from these atrocities?

The UN is mandated to develop, promote and protect human rights. That tripartite mandate exists across the UN but the Organisation largely utilises specialist human rights bodies to fulfil its duties. The main human rights body – the Human Rights Council – is not a principal organ of the UN but rather is a subsidiary body of the General Assembly. This, in itself, speaks volumes about how the UN views its human rights pillar as compared with the pillar of peace and security and that of development. The human rights machinery also includes treaty-based committees, the Special Procedures system, the Office of the High Commissioner for Human Rights, as well as having links and crossover with specialised agencies. The UN human rights machinery includes political bodies, independent experts, and staff from the Secretariat. The roles, functions and activities of the bodies vary but they all have one crucial factor in common – a lack of enforcement powers.

Lack of Enforcement Powers

Human rights bodies lack the teeth necessary to implement or enforce their decisions, resolutions, recommendations or rulings. Therefore, even if a state is determined to have perpetrated abuses, there is little that the UN human rights machinery can do to coerce the country to uphold its legal obligations. It seems counterintuitive that such bodies are not afforded enforcement powers. What is the point, one might wonder, of human rights bodies that lack the power to protect individuals on the ground? On the one hand it undermines the system, on the other hand there are very good reasons for that systemic weakness.

The development and the promotion of human rights both require states to engage with one another and with the international human rights infrastructure. Developing human rights requires agreement between many if not all countries, particularly in the process of turning soft law into enshrined legal obligations. Promoting human rights requires UN bodies and staff, as well as other states, to work with countries to ensure the understanding, awareness and capacity for implementing such obligations. Human rights bodies, then, must facilitate dialogue, technical assistance and capacity building; they must serve as fora for discussion and debate; countries must be brought together alongside experts, civil society and UN staff – all of this is only possible within an inclusive and cooperative environment. Such an environment leads to the creation of new norms, the development of existing obligations, and the promotion of human rights within all UN member states. But such an environment cannot involve enforcement powers, as those would undermine the atmosphere necessary for two thirds of the human rights mandate.

The roles and functions of the UN human rights machinery mainly are aimed at developing and promoting rights. The Human Rights Council serves as a forum for states to discuss and negotiate soft law, typically decisions and resolutions, which create or develop human rights norms. The Council holds panel discussions, sets up intergovernmental working groups, and provides other mechanisms for the creation of soft law. Those outcomes, then, are utilised by the General Assembly when passing declarations, as well as by states when negotiating and writing treaties. As a political body comprised of proportionate geographic representation, the Council's discussions are afforded significant weight by other parts of the UN. Although its decisions and resolutions are not binding, they are deemed to represent widely held views, particularly when passed by consensus or near-unanimity. The Council also focuses heavily on promoting rights, particularly through peer-support, capacity-building, technical-assistance, and through a universal review of every state's human rights record during a four year cycle. Those activities are designed to raise awareness of human rights, to support countries to comply with their obligations, and to provide opportunities for state actors to engage with the UN, its peers and civil society in the furtherance of promoting and implementing human rights. Although the atmosphere can be confrontational, ultimately countries are not bound by Council decisions and the nature of such an environment is conducive to effective development and promotion of

human rights. Such an atmosphere similarly exists within the Special Procedures system of independent experts who conduct fact-finding missions, produce reports and recommendations, and identify best practices on human rights. Countries must consent to visits by those experts and then decide whether or not to implement their recommendations. Human rights committees that monitor states' compliance with treaty obligations also play strong roles in developing human rights through general comments, and promoting human rights through concluding observations on individual countries' human rights records. Again, those decisions are not binding, and states consent to the process through their decision as to whether they ratify a treaty in the first place.

Protecting Rights

UN human rights bodies also undertake activities that are useful for protecting rights, albeit to a lesser extent than promoting rights, but without enforcement powers the human rights machinery are powerless as to whether countries comply with their rulings. Human Rights Council activities aimed at protecting individuals from grave violations, whether through resolutions or discussions or special sessions that raise awareness of abuses within crisis situations, all rely either on the Security Council to take up the calls for action or on other countries to place political pressure on a grave abuser. Fact-finding and information-sharing are key for protecting human rights, but the Council itself is unable to take the necessary steps to ensure such protection. Similarly, the Special Procedures system uncovers and reveals gross and systemic violations, but the reports and interactive dialogues are but one step towards protecting individuals. While some treaty-based committees may hear individual petitions, those only occur where a state has consented to the body acting in that way and even then there are no powers to enforce a ruling.

It is clear that there are systemic weaknesses and failings in terms of the UN protecting human rights. Yet, if countries at the Organisation were committed to that mandate then the Security Council would use coercive measures for grave crisis situations, financial institutions would use leverage for other abuses, and states would exert political pressure on their peers. However, those actions rarely materialise, as we have seen time and again throughout the UN's existence. And there is only one explanation for those failings – politicisation.

Two Major Problems: Politicisation and the 'One Country One Vote' System

Politicisation, that is the pursuing of political aims unrelated to human rights, is a main reason why the UN fails to protect human rights. The UN's main bodies are often hampered, and at times paralysed, by politicisation. Countries use UN bodies to achieve political objectives. Many of those aims are not connected to the work being done within that particular body.⁶ Politicisation is partly explained by flaws with UN membership and partly by the UN being state-led, which makes it a slave to the international political environment.

The most obvious example of politicisation occurs within political bodies – such as the General Assembly and the Human Rights Council – that appear to be democratic: one country, one vote. Marvellous; except we cannot draw a true analogy to the idea of 'one person, one vote'. Some countries have tens of millions of people, perhaps even a billion. Others have a few thousand. So, 'one country, one vote' clearly is not equal when thinking about the individuals represented by each vote. Unlike the European Union, where the number of votes is roughly proportionate to the size of a country, the UN's version of democracy fails to take states' populations into account. What those bodies do is to give unrepresentative bargaining power to smaller or weaker states. Little wonder, then, that political blocs dominate the body's proceedings. Vote-trading and political games are rife, frequently undermining those bodies' credibility. States, self-interested creatures that many of them are, regularly prefer to focus on national objectives than on the altruistic nature of fulfilling the UN's purposes. Those national aims often involve supporting or protecting allied states.

Little wonder, then, that the Human Rights Council, like the General Assembly, is great at taking up populist and important causes such as ending apartheid in South Africa and returning occupied land to the Palestinian people, but rarely discusses less fashionable but equally grave situations.

⁶ See, generally, M. Lyons, D. A. Baldwin and D. W. McNemar, 'The 'Politicization' Issue in the UN Specialized Agencies', 32 *Proceedings of the Academy of Political Science* (1977), pp.81-92.

Between 1946 and 1992 the General Assembly adopted 569 resolutions on Southern Africa – approximately one fifth of the total recorded votes.⁷ On average, the General Assembly passed between five and ten resolutions annually on apartheid policies. By contrast, during that time the Assembly passed five resolutions on China's abuses against indigenous peoples: three on Tibet and two on Burma. Four resolutions were passed on the grave abuses committed by the USSR. This did not stop oppression and subjugation of the Chechens, Ingush, Balkars, Baltic peoples, Roma, Jews, Muslims, Romanian ethnic Hungarians, Tibetans or Uighurs.⁸ Violations against Native Americans were ignored altogether, as were similar practices and policies against the Aborigines in Australia and the Maoris in New Zealand. More recently, the 5 million dead and millions more displaced in the Democratic Republic of Congo since the turn of the millennium have resulted in an average of two resolutions at each annual General Assembly session.⁹ That can be compared with the nearly 300 resolutions (on average, 23 per session) passed about Israel during that same period of time. And those figures are reflected, and indeed worse, at the Human Rights Council.

Why the Regional Groups System Does Not Work

The Council's composition is based on proportionate geographic representation. The UN is divided into five regional groups: African Group, Asian Group, Eastern European Group, Group of Latin American and Caribbean countries (GRULAC) and Western Europe and Others Group (WEOG).¹⁰ All UN members have a seat at the General Assembly. At the other bodies, membership is limited and countries are elected for fixed terms. A certain number of seats are allocated to each of the five regional groups, often on a proportionate basis.

Countries often have more in common with their regional allies than with other states. Grouping countries according to their regions allows for a few states to sit on a body and to represent their neighbours' interests. This allows the UN to have smaller bodies, which tend

⁷ J. Mertus notes that each year approximately 20 per cent of GA resolutions relate to human rights, which underlines the disproportionate attention given to Southern Africa. J. Mertus, *The United Nations and Human Rights: A guide for a new era* (Abingdon: Taylor and Francis, 2009), p.40.

⁸ E. Heinze, 'Truth and Myth in Critical Race Theory and Latcrit: Human Rights and the Ethnocentrism of Anti-Ethnocentrism', 20(2) *National Black Law Journal* (2007), p.23.

⁹ Indeed, the majority of those focusing on the financing of the UN peacekeeping mission within that country.

¹⁰ The five regional groups were established in 1963 and are used by the UN to ensure proportionate geographic representation when apportioning seats or membership to UN bodies. See, for example, R. Thakur, *What is Equitable Geographical Distribution in the 21st Century?* (New York: United Nations University, 1999).

to work more efficiently, without excluding countries from having their interests represented. Much of the behind-the-scenes work at the UN occurs within meetings of the regional groups. Often they will discuss and negotiate internally before entering into informal and formal cross-regional dialogues.

There are significant problems with the regional group system.¹¹ Not all countries are adequately represented by their regional groups. At the extreme end of the spectrum, Israel is not a member of its natural regional group. Arab states within the Asian Group block Israel from membership, despite its geographic location within that region.¹² Israel has been afforded WEOG membership in New York since 2000 on condition that it does not seek election to UN bodies. In 2013 an announcement was made that Israel would be afforded WEOG membership in Geneva, but the terms of that membership are not the same as for all other member states. This is an extreme example of a country being failed by the regional groups system. Other countries may be sidelined by being lumped together with regional neighbours. Japan is an obvious example of a country that often aligns itself with a different regional group (WEOG) than its own (Asian Group). The bigger a region, the less likely it is that homogeneity will exist across the group. There are also the internal dynamics within regional groups. Japan and China have their own history of tensions, as do Iran and Iraq, North and South Korea, and the Balkan states. Just because these countries are connected geographically does not mean that their interests are in any way aligned. Dominant members and even subgroups within a region undermine the aim of representing all countries' interests. It is naïve – even idealistic – to think that regional groups will operate upon Marxist principles.

The Imperfect System: Political Alliances

Regional groups encourage entrenched positions and significantly contribute to the politicisation of UN bodies. In order to further their collective objectives, or to protect a member's interests, regional groups often adopt bloc tactics to further their aims. These include voting together en masse and repeating statements made on behalf of the regional group in order to emphasise the internally negotiated position. The system encourages

¹¹ See, generally, B. Andemicael (ed.), *Regionalism and the United Nations* (New York: Oceana Publications Ltd, 1979).

¹² M. Dennis, 'Human Rights in 2002: The Annual Sessions of the UN Commission on Human Rights and the Economic and Social Council', 97 *American Journal of International Law* (2003), p.384.

countries to lobby one another, internally within the regional group and externally using the group's power as a bargaining tool. Often countries or groups will trade support for unrelated matters in order to ensure support for their own objectives – thus undermining the UN's mandate and work. Regional groups are also adept at protecting their members, even when they are doing things that ought to be criticised and when action ought to be taken. One harrowing example is the African Group shielding Sudan from scrutiny and action during the genocide in Darfur.

The imperfect system of regional groups is compounded by political alliances. Countries cannot be told not to have alliances with states from other regions. Geographic location is not the only factor in determining countries' natural groupings. Religion, forms of governance and political outlook are also common bonds between countries. Cuba and Venezuela have natural alliances with some Eastern European countries, owing to their similar political outlooks and forms of governance. Islamic countries from across Asia, Africa and Eastern Europe have much in common with each other; often they share more political aims with one another than they do with their regional neighbours. Those blocs have become increasingly important – perhaps even as important as regional groups¹³ – as they allow countries to flex their collective muscles in order to achieve joint objectives.

Political blocs started with the polarised East and West during the Cold War. Countries that did not fall squarely within one or other camp eventually joined together to create the Non-Aligned Movement¹⁴ to do exactly what its name suggests. The collective strength of those countries, many of which were newly decolonised and/or developing states, was far superior to the sum of its parts. That political bloc enabled those countries to further their own political objectives at a time when the Cold War dominated the international arena.¹⁵ Since the dissolution of the USSR, new political blocs have developed into significant players at the UN. The UN holds out that it is like communism in action. Except that it is more like Animal Farm. All countries are created equal, but the pigs will assert their superior equality. Of course, the identity of those pigs changes from time to time.

¹³ D. Nicol, 'Interregional Co-ordination Within the United Nations: The Role of the Commonwealth', in B. Andemicael (ed.), *Regionalism and the United Nations* (New York: Oceana Publications Ltd, 1979), p.102.

¹⁴ See, for example, G. Lundestad, *East, West, North, South: Major Developments on International Politics Since 1945* (Oxford: Oxford University Press, 1999); P. Worsley, *The Third World* (London: Weidenfeld and Nicolson, 1964); M. T. Berger, 'After the Third World? History, Destiny and the Fate of Third Worldism', 25 *Third World Quarterly* (2004), p.13.

¹⁵ See, generally, J. S. Nye, 'UNCTAD: Poor Nations' Pressure Group', in R. W. Cox and H. K. Jacobson (eds.), *The Anatomy of Influence: Decision Making in International Organization* (New Haven: Yale University Press, 1973), pp.334-70.

The European Union, with its 'common position' that all members negotiate and then are expected to promote en masse, is a striking example of how political blocs undermine the notion of 'one country, one vote'.¹⁶ The Organisation of Islamic Cooperation, which spans three of the five regional groups and has allies in Latin America, is the most powerful of all the political blocs. Not only does it have strength in numbers – 53 member states¹⁷ – but many countries within the bloc also have significant economic, military or political power.¹⁸ The OIC typically operates as a bloc in promoting its collective aims and shielding its member states from action. While some chinks have appeared in its armour, owing to the Arab Spring uprisings, the bloc is still the force to be reckoned with at the UN. The OIC ensures that Israel receives disproportionate scrutiny within UN bodies, whilst simultaneously shielding members such as Sudan, Iran, Saudi Arabia and Egypt from much needed action at most bodies. However, with no OIC member holding a permanent seat at the Security Council, that bloc relies on Russia and China to exercise their veto power to protect OIC countries. This has been a key method for blocking Security Council action on Syria during the recent conflict.

At the Human Rights Council, Sudan's government was shielded by its very many regional and political allies from significant action on the genocide that it perpetrated in Darfur. Those same states ensured that the UN all but ignored events in Egypt over recent years. China's continued abuses of its own citizens, occupation of Tibet and annexation of Taiwan are off-limits owing to that country's military, economic and political might. There are closed states, such as North Korea and Turkmenistan, where reporting of abuses is near impossible. There are holiday resorts, such as The Gambia and the Maldives, where a

¹⁶ The Treaty of Lisbon (European Union, 'Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community', 13 December 2007, 2007/C 306/01) requires EU member states to seek and advance common foreign policies (European Union, 'Consolidation Version of the Treaty on European Union', reproduced 30 March 2012, 2010/C83/01. Title V, in particular Articles 24-35). Article 34(1) TEU (ex. Article 19 (1)) provides that EU members 'shall coordinate their action in international organisations and [...] shall uphold the common positions in such forums'. EU member states were, from 1993, required to speak with one voice on foreign policy matters, which occurs by negotiating and compromising to find common ground between member states (The common position requirement was first adopted in European Union, 'Treaty on European Union (Consolidated Version), Treaty of Maastricht', 7 February 1992, *Official Journal of the European Communities* C 325/5, entered into force 1 November 1993). This requirement is particularly difficult regarding foreign policy as member states have different interests, allegiances, priorities and preferences. U. Khaliq comments that the process is rarely straightforward, in *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge: Cambridge University Press, 2008), p.88.

¹⁷ 21 Sub-Saharan African, 12 Asian, 18 Middle Eastern and North African States, 3 Eastern European and Caucasian, 2 South American, and 1 Permanent Observer Mission. See 'Organisation of the Islamic Conference; Permanent Missions of OIC Member States to the United Nations in New York', <http://www.oic-oci.org/oicv2/>

¹⁸ For a detailed exploration of the OIC, see E. Hisanoglu, *The Islamic World in the New Century: The Organisation of the Islamic Conference, 1969-2009* (London: Hurst & Co., 2010).

blind eye is turned to violations in order to enable package tourism to continue, and the oil-rich countries in the Gulf, whose power lies in the barrels of crude required by the rest of the world.

Intergovernmental bodies, like the UN, are by their very nature political. But when an institution is grossly selective, disproportionately scrutinises some countries and altogether ignores others, and demonstrates a complete lack of even-handedness, then politicisation undermines the body's credibility and ability to fulfil its mandate. A body's roles and functions, such as information-sharing, being a platform for discussion, and the political weight of its resolutions, are weakened when some countries are ignored altogether and others may simultaneously claim that they have received disproportionate scrutiny and a lack of even-handedness in their treatment. But politicisation is rife across the UN system, not just within its intergovernmental bodies but even permeating the greatly respected Special Procedures system.¹⁹ Indeed, politicisation is as significant a factor as a lack of enforcement powers in terms of the UN's failure to protect human rights.

The question that must then be asked is whether the UN has the infrastructure and mechanisms to protect human rights more effectively. It is clear that the Organisation is failing to fulfil its duties in this regard, and yet still it soldiers on. At some point the UN, its member states, civil society and the wider public must take stock of the tripartite mandate and decide whether the UN ought to withdraw from its ineffectual protection activities to focus on its development and promotion functions or whether significant reforms ought to be implemented in order to strengthen its role in protecting human rights.□

Rosa Freedman is the author of "Failing to Protect: The UN and the Politicisation of Human Rights," published by Hurst (Europe, May 2014) and Oxford University Press (North America, January 2015). <http://www.hurstpublishers.com/book/failing-to-protect/>

¹⁹ The United Nations Human Rights Council: More of the same?' 31 (2) *Wisconsin International Law Journal* (2013), pp. 208-251.

