



# Human rights, democracy and rule of law: Different organisations, different conceptions?

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## **Human rights, democracy and rule of law: Different organisations, different conceptions?**

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## Executive Summary

This report presents an **exploration of different conceptualisations of human rights, democracy and the rule of law within international organisations**. The report focuses on the United Nations, the African Union, the League of Arab States and the Organisation of Islamic Cooperation. The eventual aim of Work Package 3, of which this report forms part, is to provide the EU with conceptualizations of human rights, democracy and the rule of law that take into consideration the diverse conceptions found in third countries and in other international organisations.

The organisations' original purpose, moment of creation, and structure inevitably influence the development of their human rights, democracy and rule of law conceptions, and their practical engagement with these concepts. For this reason, the attention devoted by each organisation, and also, by specific bodies within them, to one or other conceptual element varies significantly.

The report starts with a detailed description of the methodology used (Chapter II). It clarifies the terminology used, and the methods of data collection and analysis. It also introduces the reader to a basic theoretical discussion of the main aspects pertaining to the conceptualisation of human rights: universality and indivisibility of human rights, and equality.

Chapter III is dedicated to the comparative analysis of the conceptions of human rights, democracy and rule of law at the level of the **United Nations**. Although there are several bodies within the UN dedicated to the elaboration, promotion and protection of human rights, democracy and rule of law, this report focuses on the resolutions adopted by the **General Assembly** and its third committee, the work of the **Security Council**, with particular focus on thematic resolutions on the protection of civilian population. The conceptions of human rights, democracy and the rule of law adopted at the **Human Rights Council**, are also explored, with particular attention to the Universal Periodic Review (UPR). Finally, the work of **Special Rapporteurs** is explored as well. The combination of mechanisms, a political one (UPR) and an expert-based one (Special Rapporteurs) has allowed for a more comprehensive review of the conceptions held at the UN.

Chapter IV explores conceptualisations of human rights, democracy and rule of law within human rights dedicated bodies of the **African Union**. This chapter largely focuses on conceptualisations emerging from the African Charter on Human and Peoples' Rights and the African Charter on Democracy, Elections and Governance. The contestations surrounding conceptualisations are effectively illustrated in relation to two cases studies: one focusing on accountability for mass atrocities, and one focusing on LGBT(I) rights. Both case studies indicate that the notions of universality of human rights, although formally recognised by the AU, in reality are deeply contested. The case on LGBT(I) rights shows the challenges to the notion of equality, and also, to the notion of indivisibility of human rights. In addition, different conceptualisations exist among the institutions of the organisation. The African Commission often takes a more progressive, universalist approach to issues than what is reflected in statements adopted by the AU political bodies.

Chapter V explores conceptualisations of human rights, democracy and rule of law within the **Organisation of Islamic Cooperation** and the **League of Arab States**. Both these organisations are first placed in their historical and institutional context. Their similarities are also discussed, namely that they have overlapping memberships; most of their Member States share a legacy of having been under colonial rule; by their own definitions these organisations are ‘identity’ based intergovernmental organisations rather than universal, regional, or ‘interest-based’ organisations; and they have experienced conflicts between two or more of their Member States. In terms of conceptions, the chapter shows that the League of Arab States has recently embraced a more universalist approach to human rights. As regards the Organisation of Islamic Cooperation, the chapter discusses how the focus on Islam has consequences in terms of conceptualisation of human rights, particularly in relation to fundamental freedoms, equality and the protection of minorities.

The report concludes with a summary of the main findings per institution and some reflections on the conceptual analysis.

## List of abbreviations

AChHPR	African Charter of Human and Peoples Rights
ACPR	African Commission of Human Rights
AFSD	Arab Fund for Social Development
ALESCO	Arab Educational, Cultural and Scientific Organisation
ALO	Arab Labour Organisation
APCHR	Permanent Arab Committee on Human Rights
AU	African Union
AWO	Arab Women Organisation
CDHRI	Cairo Declaration of Human Rights in Islam
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CFM	Council of Foreign Ministers
CHR	UN Commission on Human Rights
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families
CoE	Council of Europe
CPI	Corruption Perceptions Index
CRC	UN Convention on the Rights of the Child
CRCI	Covenant on the Rights of the Child in Islam
ECOSOC	UN Economic and Social Council
ECtHR	European Court of Human Rights
FIDH	International Federation of Human Rights
G7	Group of 7
GONGOS	Government Organised Non-Governmental Organisation
HRC	UN Human Rights Council
IBU	Islamic Broadcasting Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICIC	Islamic Committee of the International Crescent
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IDB	Islamic Development Bank
IE	Independent Expert
IE-EPHR	Independent Expert on the Question of Extreme Poverty and Human Rights
IGO	International Governmental Organisation
IICJ	International Islamic Court of Justice
IINA	International Islamic News Agency
IPHRC	Independent Permanent Human Rights Commission
ISESCO	Islamic Educational, Scientific and Cultural Organisation
ISF	Islamic Solidarity Fund
LAS	League of Arab States
LGBT(I)	Lesbian, Gay, Bisexual, Transgender and Intersex
LMIC	Lower-Middle-Income economies
NGO	Non-Governmental Organisation

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OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the High Commissioner on Human Rights
OHRHR	Office of the UN High Representative for Human Rights
OIC	Organisation of Islamic Cooperation
PLO	Palestinian Liberation Organisation
SOCHUM	Social, Cultural, and Humanitarian Committee
SOGI	Sexual Orientation and Gender Identity
SR	Special Representative
SR-EPHR	Special Rapporteur on Extreme Poverty and Human Rights
SR-FOE	Special Rapporteur on the Promotion and Protection of the Right to the Freedom of Opinion and Expression
SR-IJL	Special Rapporteur on the Independence of Judges and Lawyers
STIO	Science, Technology and Innovation Organisation
TI	Transparency International
TYPOA	Ten-Year Programme of Action
UDHR	Universal Declaration of Human Rights
UMIC	Upper-Middle-Income economies
UN	United Nations
UNDP	United Nations Development Programme
UNGA	UN General Assembly
UNHCHR	UN High Commissioner for Human Rights
UNSC	UN Security Council
UPR	Universal Periodic Review
VDPA	Vienna Declaration and Programme of Action

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## I. Introduction

### A. Aim and scope of this study

The European Union (EU) external action appears to be largely dominated by the European understanding of human rights, democracy and the rule of law. Lack of awareness about the different meanings attributed to these concepts in different places can lead to difficulties when the EU advocates the ‘universality and indivisibility of human rights’ (Article 21(1) TEU) in its relations with third countries.<sup>1</sup> This, in turn, can lead to questioning the legitimacy of the EU external action and hinder the EU’s engagement with its actors and partners. Only after considering the potential different meanings attached to these concepts by other organisations, it is possible to determine how human rights, democracy and the rule of law can be theoretically and conceptually defined for EU internal and external policies in order to be best represented and defended abroad, how questions of priority areas can be addressed and how EU policies are best organised.

The general purpose of Work Package 3, of which this deliverable forms part, is to explore the different meanings given to the concepts of human rights, democracy and the rule of law in different settings. This is a significant task, given that an in-depth comparative analysis of the meanings attributed to these concepts within the EU, third countries, and regional and international organisations is generally lacking.

Deliverable 3.1, the first building block in this work package, provided a state-of-the-art literature review of those concepts, revealing how these remain contested and are continually subject to questioning and revision.<sup>2</sup> Deliverable 3.2 focused on the conceptions of human rights, democracy and rule of law that can be found in EU internal and external action, as well as conceptions found at the Member State level (with a case study on Hungary).<sup>3</sup> Moving to ‘foreign understandings’, Deliverable 3.3 offered an analysis of the different understandings and perspectives on human rights, democracy and rule of law in several third countries with which EU has established bilateral cooperation, fostering human rights (i.e. China, India, Peru and South Africa).<sup>4</sup> The report also compared these understandings and perspectives with EU-held convictions, identifying to what extent conceptions are shared and to what extent they differ.

The task of this report is to explore how international organisations, including the United Nations (UN), the African Union (AU), the League of Arab States (LAS) and the Organisation of Islamic Cooperation (OIC) conceptualise human rights, democracy and the rule of law. Given the impact of these organisations on global and regional policy-making and the EU’s frequent dealings with these organisations, analysing their

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<sup>1</sup> See Rosa Balfour, ‘Principles of Democracy and Human Rights: A Review of the European Union’s Strategies towards its Neighbours’ in Sonia Lucarelli and Ian Manners (eds), *Values and Principles in European Union Foreign Policy* (Routledge 2006) 114-129.

<sup>2</sup> FRAME Deliverable 3.1. Available at: <http://www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf>. Accessed 8 April 2016.

<sup>3</sup> FRAME Deliverable 3.2. Available at: <http://www.fp7-frame.eu/wp-content/materiale/reports/10-Deliverable-3.2.pdf>. Accessed 8 April 2016.

<sup>4</sup> FRAME Deliverable 3.3. Available at: <http://www.fp7-frame.eu/wp-content/materiale/reports/20-Deliverable-3.3.pdf>. Accessed 8 April 2016.

understandings of these concepts bears great importance if the interaction between the EU and these organisations in relation to promotion of human rights, democracy and rule of law is to prove fruitful.

The scope of this report is limited to the exploration of these institutions' understandings of human rights, democracy and rule of law, only discussing the actual engagement and effective implementation of such formal declarations by the organisations inasmuch as these contribute to capture the meaning attributed to the concepts. Hence, the analysis provides some insight into the inconsistencies between formulation and use of the concepts, and the shortcomings that the organisations face in the implementation of those conceptions.

The structure of the report is the following. Chapter II provides detailed description of the methodology used, and discusses some of the practical and methodological choices we made. A brief discussion of the main theoretical elements guiding the analysis of human rights conceptions is also included. Chapter III is dedicated to the United Nations. It explores the conceptualisations of human rights, democracy and rule of law by the Security Council, the General Assembly, the Human Rights Council and the Special Procedures. Chapter IV examines conceptualisations within the African Union, with focus on the African Charter on Human and Peoples' Rights, and the work of the African Commission of Human Rights and the African Court of Human Rights. Chapter V is dedicated to the analysis of the League of Arab States and the Organisation of Islamic Cooperation. It outlines some of the common elements, and then discussed each organisation in detail. Lastly, Chapter VI concludes this report with final observations and an overarching reflection.

## II. Methodology

### 1. Terminology

In line with the meaning of the terms ‘concepts’ and ‘conceptions’ provided in Deliverable 3.2,<sup>5</sup> this report understands **concepts** as abstractions that designate concrete objects, like ‘table,’ or more ethereal ones, like ‘justice.’<sup>6</sup> Concepts are categories of thought used by people to group entities together. They do not have clear boundaries and they are dynamic, meaning that their content changes over time.

When there are different ways of explicating or interpreting a concept, there are different **conceptions** of the concept. For instance, exploring the concept of justice, Rawls explains that there are various conceptions of justice in different societies, all corresponding to one and the same concept.<sup>7</sup> Millikan suggest that ‘conceptions’ can be understood as various specific means to the same end, each of which is fallible, and can have many components. Conceptions, thus, may be wrong, or partial.

This is tied to the notion of contested concepts: contested concepts are those concepts of which competing conceptions exist. Human rights, democracy, and rule of law are prime examples of such contested concepts since different conceptions about them are found in different places and times.

**Conceptualisation** is the process whereby concepts are given theoretical meaning. In relation to the current report, this process of conceptualisation may involve defining the concepts abstractly in theoretical terms, or such meaning might also be developed, adjusted or modified by the practice of the organisations. **Operationalisation** moves the focus of attention from the abstract level to the empirical level. It refers to the operations or procedures needed to measure the concept(s).<sup>8</sup>

This report explores **conceptions of contested concepts**, namely human rights, democracy and rule of law within different international organisations. In doing so, the focus remains at the abstract level, paying limited attention to **operationalisation**. The eventual aim of Work Package 3 of the FRAME project, of which this report forms a part, is to provide the EU with **conceptualisations** of human rights, democracy and the rule of law that take into consideration the diverse conceptions found at national level and in other international organisations.

### 2. Research approach and methods

Four organisations are analysed for this Deliverable. The United Nations (UN), the African Union (AU), the Arab League (LAS) and the Organisation of Islamic Cooperation (OIC). Each regional organisation was assigned to different project partners considering their expertise on the respective organisations. Consequently, the United Nations were examined by three research teams within the EU, the AU was

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<sup>5</sup> FRAME Deliverable 3.2, (n 3) pp. 3-5.

<sup>6</sup> Aaron J Rappaport, ‘Conceptual Analysis in Science and Law’ (2010) University of California Working Paper, 9 [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1660715](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1660715). Accessed 19 December 2015.

<sup>7</sup> See Elisabetta Lalumera, ‘On the Explanatory Value of the Concept-Conception Distinction’ (2014) 8 *Rivista Italiana di Filosofia del Linguaggio* 73.

<sup>8</sup> See Charles W Mueller, ‘Conceptualization, Operationalization, and Measurement’ in Michael S Lewis-Beck, Alan Bryman and Tim F Liao (eds), *The SAGE Encyclopedia of Social Science Research Methods* (SAGE 2004) 162 ff.

examined by the research team based in South Africa, and the LAS and OIC were examined by the research team based in Morocco.

The analysis of conceptions of human rights, democracy and rule of law existing within each organisation followed a bottom-up approach, firstly identifying concepts used at the level of the organisation, and secondly, analysing the connection between those concepts and human rights, democracy and rule of law. The intention was to allow the researchers to explore those conceptions as they appear within the organisation without any pre-existing bias.

Consequently, the analysis consisted of two steps, following the Guidelines included in Annex 1. First, an exploratory analysis leading to a brief description of the conceptions found in each organisation. A basic enumeration of concepts derived from the findings in Deliverable 3.1, 3.2 and 5.1 and the preliminary results of 3.3 was used as a 'guide' for the type of concepts that could be explored within each organisation. The second step consisted of a detailed examination of the conceptions that are of particular relevance in each organisation. Following this approach, each researching team identified thematic areas calling for detailed exploration, resulting in small case studies within each organisation or body.

Two main data collection methods were used: desk research of primary and secondary sources, guided by specific instruments of data collection, and semi-structured interviews, as illustrated in Table 1.

**Desk research** was used for a literature desk study, including published academic articles, books and working papers. It also included the analysis of primary sources, that is, official documents such as resolutions, regulations, declarations, guidelines and reports. Partners focused the analysis of official documents **from 2009**, the year the Lisbon Treaty entered into force, **until 2015**.

Finally, **semi-structured interviews** with policy makers and organisation representatives were conducted as an element contributing to the interpretation of the findings. The interviews provide information that is otherwise unavailable (due to confidentiality issues, for example).

Methods	Sources	Guiding instrument	Content
Desk research	Laws and policies	Guidelines	Socio-legal Context
	Literature		Conceptualisations
Interviews	Policy makers	Interview protocol	Socio-legal Context
	Civil society representatives		Conceptualisations

Table 1. Data Collection

### 3. Main theoretical elements of human rights

The analysis of conceptions of human rights cannot escape a discussion of the universalism of human rights, the indivisibility of human rights, and equality. Based on Deliverable 3.1, this section provides a brief introduction to the assumptions that will guide the analysis of the organisations.

In relation to universality, it should be pointed out that international human rights protection is often criticised in the name of cultural relativism, leaving no room for cultural diversity and favouring Western culture. Tensions remain between the recognition of universal values and particular values. As it was underlined in Deliverable 3.1,<sup>9</sup> there are some notions in the academic literature that try to reconcile universal with particular values, like the term 'inclusive universality'.<sup>10</sup>

Indivisibility is one of the basic principles of international human rights protection. Indivisibility denies any hierarchy between economic, social and cultural and civil and political rights and refuses the dichotomy of positive and negative rights. It also implies the recognition that the full realisation of political and civil rights is needed for the enjoyment of economic, social and cultural rights, and vice versa.<sup>11</sup> This recognition was underlined by the 1968 Proclamation of Teheran: 'Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.'<sup>12</sup> Nickel defines indivisibility as 'the idea that no human right can be fully realized without fully realizing all other human rights.'<sup>13</sup>

The principle of indivisibility appeared in UN binding and soft law documents in the 1970s,<sup>14</sup> for example in 1977 UNGA Resolution 32/130 declared that 'all human rights and fundamental freedoms are indivisible'.<sup>15</sup> In the 1970s and 1980s the adoption and the later ratification process of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) further strengthened the principle when it listed social and civic and political rights in the same binding document.<sup>16</sup> In 1993 the Vienna Declaration listed indivisibility among the principles of international human rights protection when it declared that 'All human rights are universal, indivisible and interdependent and interrelated.' In addition, indivisibility implies that compliance with particular human rights is monitored on an equal footing.

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<sup>9</sup> FRAME Deliverable 3.1 (n 2).

<sup>10</sup> See eg Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff 2001).

<sup>11</sup> James W Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations between Human Rights' (2008) 30 Hum Rts Q 984; Daniel J Whelan, *Indivisible Human Rights: A History* (University of Pennsylvania Press 2010); Mátyás Bódig, 'Gazdasági és Szociális Jogok az ENSZ Emberi jogi Mechanizmusában: Egy Emancipációs Folyamat Tanulságai' [Economic and Social Rights in the UN Human Rights Mechanism] (2015) 14 Fundamentum 1, 8-9.

<sup>12</sup> 'Final Act of the International Conference on Human Rights' (Teheran, 22 April – 13 May 1968) UN Doc A/CONF.32/41, para 13 (Proclamation of Teheran).

<sup>13</sup> Nickel (n 11).

<sup>14</sup> Whelan (n 11) 8.

<sup>15</sup> UNGA Res 32/130 Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms' (16 December 1977) UN Doc A/RES/32/130, 1(a).

<sup>16</sup> Bódig (n 11).

Equality and non-discrimination are deeply embedded in human rights norms, claiming universal value. However, the concept of equality is contested, having multiple interpretations, from formal to more substantial views. This contestation opens the possibility of relativist interpretations equality. For instance, 'gender equality' might be applied only as in line with some countries' own interpretation of Shari'a law (Saudi Arabia). Religious equality might be hindered by non-recognition of a specific belief, while at the same time formally recognising religious minorities their freedom 'to practice their faiths' (Baha'is in Iran).<sup>17</sup>

Having said that, the understanding of equality in international human rights law, if eliminating all possibility for a more contextual interpretation, may threaten international diversity. Allowing some degree of flexibility towards different understandings of equality, could contribute to avoid the imposition of conceptions of what counts as reasonable grounds of distinction which are not truly universal. As Seibert-Fohr argues, Western value judgments in the form of international standards might end up functioning as cultural imperialism.<sup>18</sup>

Below, we discuss the conceptions of human rights, democracy and rule of law emerging at the level of the United Nations, the African Union, the Arab League and the Organisation of Islamic Cooperation.

### III. United Nations

#### A. Introduction

The United Nations (UN), created in 1945 with the adoption of the UN Charter, has 193 Member States today. During its 70 years of existence, it has faced many challenges and criticisms. The formation of the UN was meant as replacement of its failed predecessor, the League of Nations, and it was the result of a particular, historical, social and political moment. The advantages of this new organisation were the complete prohibition of the use of force between States, save in cases of self-defence, and the establishment of a system of collective security.

According to Art. 7 UN Charter, the principal organs of the UN are the General Assembly (UNGA), the Security Council (UNSC), the Economic and Social Council (ECOSOC), the Trusteeship Council (Trusteeship System; now out of use), the International Court of Justice (ICJ), and the Secretariat. Explicit references to human rights and implicit references to the rule of law appear in the very first paragraph of the Charter. The Preamble reads:

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<sup>17</sup> UNHRC 'Report of the Working Group on the Universal Periodic Review – Saudi Arabia – Addendum – Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review' (9 June 2009) UN Doc A/HRC/11/23/Add.1, para 29; UNHRC 'Draft report of the Working Group on the Universal Periodic Review - Islamic Republic of Iran' (4 March 2010) UN Doc A/HRC/WG.6/7/L.11, para 63. See also Christian Tomuschat, 'Universal Periodic Review: A New System of International Law with Specific Ground Rules?' in Ulrich Fastenrath and colleagues (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 620.

<sup>18</sup> Anja Seibert-Fohr, 'The Rise of Equality in International Law and Its Pitfalls: Learning From Comparative Constitutional Law' (2010) 35 *Brook J Int'l L* 1, 38.

'We the peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and 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, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.'<sup>19</sup>

There are crucial principles regulating the organisation and functioning of the UN and international law more generally, which are significant for the promotion and protection of human rights, democracy and the rule of law. Some of these aspects have proven controversial, and can be tracked down to the formation of the organisation, as briefly discussed below.

### 1. Background

The process of creating the UN, with multiple discussions and changes of direction, show the complexity of the international arena at the end of the World War II, and anticipates the tensions to come during the cold war. Controversies existed from the very outset.<sup>20</sup> Different proposals, envisioning different organisational principles and States' membership and participation, appeared in the negotiations of the Atlantic Charter (1941), the Dumbarton Oaks Conference (August 1944), the Yalta Conference (February 1945), and finally, the San Francisco Conference (April 1945), when the UN Charter was adopted.

The Atlantic Charter, signed by Roosevelt and Churchill, referred to 'the establishment of a wider and permanent system of general security'.<sup>21</sup> The Declaration by United Nations, signed on January 1942 by 26 States still at war, did not suggest the same type of construction, although it introduced the term 'United Nations'.<sup>22</sup> Cot highlights that Roosevelt was initially not keen on an organisation focused on international security but that, nevertheless, the advisory committee on Post-war Foreign Relations, providing guidance to Roosevelt, prevailed on this issue.<sup>23</sup> The proposed organisation was to be led by an executive committee composed of the four powers (the US, the UK, China and the Soviet Union) and seven regional representatives. Roosevelt was hesitant, sometimes preferring a decentralised regional structure, and sometimes inclined towards a unitary global body. The issue persisted until the San Francisco conference.<sup>24</sup>

<sup>19</sup> Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

<sup>20</sup> See eg Evan Luard, *A History of the United Nations*, vol 1-2 (Macmillan 1982–89); Robert C Hilderbrand, *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security* (UNC Press 1990); Oscar Schachter, 'The Charter's Origins in Today's Perspective' (1995) 89 ASIL Proc 45; Hermann Weber, 'History of the United Nations' in Rüdiger Wolfrum and Christiane Philipp (eds), *United Nations: Law, Policies and Practice*, vol 1 (Martinus Nijhoff 1995). For a more recent account, see Thomas G Weiss and others, *The United Nations and Changing World Politics* (7th edn, Westview Press 2013).

<sup>21</sup> Declaration of Principles (signed and entered into force 14 August 1941) 204 LNTS 381 (Atlantic Charter).

<sup>22</sup> Declaration by United Nations (done and entered into force 1 January 1942) 204 LNTS 381.

<sup>23</sup> Jean-Pierre Cot, 'History of the United Nations Charter' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2011) para 17 (Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law).

<sup>24</sup> *ibid* paras 18-20.

A tentative draft 'Charter of the United Nations' was put together in 1943, drawing from proposals of independent groups and smaller countries. The draft proposed a structure consisting of a Security Council, General Assembly and Secretariat, and covered issues such as voting systems, arms control, social welfare, and human rights. An eleven member Security Council would decide on security matters, reducing the domination of the Council by the four powers. Although the League of Nations appointed the Assembly and the Council with concurring responsibilities on security issues, the draft charter granted the Security Council exclusive jurisdiction for security issues and the General Assembly jurisdiction on all other matters. Furthermore, regional representation within the Council was also eliminated since the General Assembly would elect the non-permanent members of the Council from among the small States. This draft constituted the basis for the discussion in Dumbarton Oakes.

During the meetings in Dumbarton Oakes, the Soviet Union proposed peace and security through collective measures to prevent or suppress aggression; peaceful settlement of international disputes; other methods to strengthen friendly relations among States Parties, as general goals of the organisation. Wary of the concept of 'aggression', the notion of 'other breaches of the peace' was proposed and included.<sup>25</sup> The US and the UK insisted on provisions for economic and social cooperation, yet this was rejected by the Soviet Union based on the idea that that had been exactly the problem with the League of Nations, preventing it from concentrating on peace and security.<sup>26</sup>

There was agreement among the three delegations regarding the structure of the organisation (Security Council, General Assembly, an International Court of Justice and a Secretariat that could create auxiliary bodies),<sup>27</sup> yet the most controversial issues discussed related to the composition of the Security Council and the type of measures that the Council could adopt in performing its main function as guarantor of international peace (peaceful settlement, sanctions, use of force, etc). The voting system could not be agreed upon until the San Francisco Conference.<sup>28</sup>

Regarding references to human rights, these were promoted by the US, but the Soviet Union and the UK objected to any mention of the matter. The Soviet Union suggested a general reference to 'promote respect for human rights and fundamental freedoms', which was included and made it through to the final Charter.<sup>29</sup> The UK insisted in what would later become Article 2(4), which reads 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.'

China made some interesting points in their meeting with Roosevelt. They raised the possibility of abstention by a permanent member within the Security Council, and insisted on reference to international

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<sup>25</sup> See: 'Proposals for the Establishment of a General International Organization' (done 7 October 1944) in United States Department of State (ed), *Foreign Relations of the United States Diplomatic Papers 1944: General vol 1* (United States Government Printing Office Washington 1944) 890 (Dumbarton Oaks Proposals), Chapter 1, 1.

<sup>26</sup> Cot (n 23) para 32.

<sup>27</sup> Dumbarton Oakes Proposals, ch IV.

<sup>28</sup> *ibid* chapter VI, section C (which reads '[n]ote: The question of voting procedure in the Security Council is still under consideration').

<sup>29</sup> *ibid* chapter IX, section A.

law and justice in relation to the peaceful settlement of disputes. The 'political independence and territorial integrity' wording was introduced by the Chinese delegation as well.<sup>30</sup>

In the Yalta Conference, it was decided that the Organisation would be opened to the 26 States that had signed the Declaration by United Nations in 1942, but also to the 'associated States' that had broken diplomatic relations with the Axis and would declare war on at least one of the Axis powers by 1 March 1945.<sup>31</sup> The voting formula, the votes attributed to membership and the issue of trusteeships were discussed, reaching compromise among the powers, yet silenced in the final declaration. The powers officially invited all States to the San Francisco conference that would take place on April 24<sup>th</sup> 1945. It was agreed that the agenda of the Conference would be 'the Dumbarton Oaks Proposals, as supplemented at the Crimea Conference, and by the Chinese Proposals agreed to by the sponsoring Governments, and the comments thereon submitted by the participating countries.'<sup>32</sup> Roosevelt died thirteen days before the opening of the Conference.

The San Francisco Conference lasted for nine weeks, and gathered fifty delegations, twenty-four groups of non-State participants, in addition to the unofficial participation of NGOs. A total of 5000 people attended the Conference. The structure consisted of a Plenary Assembly and four general commissions responsible for a particular sector of the Charter (Preamble, trusteeships and Economic and Social Council; General Assembly; Security Council; and World Court). The texts were drafted by the technical committees, passed on to the commissions, then to the coordinating committee (representatives of the four powers and ten co-elected members) with the assistance of the committee of jurists. In case of substantial change, the text was sent back to the technical committee. After adoption by the coordinating committee, the text was submitted by the steering committee (composed of all delegations) to the Plenary Assembly for vote. Decisions required a two-thirds majority of the representatives present and voting. The working languages of the Conference were English and French.

The most ardent discussions related to membership of States, the possibility of a regional veto, right of individual or collective self-defence in case of an armed attack, matters of domestic jurisdiction, issues of colonialism and trusteeship, the powers of the General Assembly and the voting procedure within the Security Council. The UN Charter was unanimously adopted on 25 June 1945 and entered into force on 24 October 1945. The final compromises on these topics, incorporated into the Charter, will be discussed in relation to specific issues arising in relation to human rights, democracy and rule of law by the specific bodies under review in this report. A brief overview of the most salient aspects of the UN regarding those matters is included below.

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<sup>30</sup> The Chinese proposals were incorporated as 'Preliminary Discussions On The Dumbarton Oaks Proposals' during the Yalta Conference.

<sup>31</sup> See: The Yearbook of the United Nations, 1946-47 Part 1: The United Nations. Section 1: Origin and Evolution. Chapter F: The Yalta Agreement. Available at: <http://www.unmultimedia.org/searchers/yearbook/page.jsp?volume=1946-47&bookpage=9>. Access 8 April 2016.

<sup>32</sup> See 'Agenda of the Conference, available at: <http://www.unmultimedia.org/searchers/yearbook/page.jsp?volume=1946-47&bookpage=14>. Access 8 April 2016.

## 2. Institutional approach to human rights, democracy and rule of law

The UN Charter makes several references to human rights. In addition to the reference to ‘faith on human rights’ found in the preamble, the Charter expresses that one of the goals of the UN is:

‘To achieve international cooperation 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.’

This, however, has often been challenged by the rule of non-intervention incorporated in Article 2(7), which reads:

‘Nothing contained 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.’<sup>33</sup>

The extent to which human rights fall ‘essentially within the domestic jurisdiction of any state’, and are for that reason excluded from international intervention, in the sense of Art. 2 (7) UN Charter, has been the matter of dispute by some States. The review in the following sections, leaves no doubt that the UN, and the international community, is entitled to question and monitor the human rights situation within the national borders of its Member States. Consistent action following such formal recognition, particularly through the Security Council, remains nevertheless difficult.

Article 13(b) establishes that the General Assembly shall ‘initiate studies and make recommendations promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.’ Similarly, Article 55(c) mandates the UN to promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’.

In fulfilling those tasks, several declarations, conventions and treaties on human rights have been adopted. The Universal Declaration of Human Rights (UDHR) adopted by the General Assembly in 1948, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (IECSCR), signed in 1966 and in force since 1976, today known as ‘the international bill of rights’, constitute the basis for human rights protection in the world. The United Nations Commission on Human Rights, established as a sub-commission of ECOSOC and later transformed into the United Nations Human Rights Council (HRC) has an important monitoring task in this respect. The

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<sup>33</sup> UN Charter, art 2(7).

discussions on the universality of rights, the sovereignty of States and the principle of non-intervention remain even today, as the analysis of the different UN bodies below indicate.<sup>34</sup>

The UN Charter has no explicit reference to 'democracy'. This came as no surprise in 1945, considering that the negotiations were guided by the main powers, including the Soviet Union, China and the UK, which still had colonies and trusteeships. Today, however, the UN attempts to support and strengthen democracy around the world by fostering good governance, monitoring elections, supporting civil society and self-determination in decolonised countries, and assisting the drafting of new constitutions and legislation in post-conflict States.

Democracy is proclaimed as a universal and indivisible core value and principle, guiding the work of the United Nations. In 2007, the Secretary-General's Policy Committee, part of the Secretariat, requested the development of an Organisation-wide strategy that defines the approach to democracy, anchored in the three pillars of the UN: peace and security, development, and human rights. In 2009, the Group supported the development of the Secretary-General's Guidance Note on Democracy.<sup>35</sup> The meaning attributed to the concept, ranging from governance, respect for human rights and fundamental freedoms, to accountability in decision-making process and endorsement of institutions and practices, varies within different bodies, as the sections below suggest.

Finally, in relation to the rule of law, although no explicit reference is found in the Charter, it emphasises the need for respect of international law and the principle of legality. The UN has in the past years taken an explicit interest in the promotion of the rule of law. The Rule of Law Coordination and Resource Group, has been created under the supervision of the Deputy High Commissioner for Human Rights, having a coordinating task in relation to rule of law initiatives taken by the organisation in relation to Member States. Some of the thematic Special Rapporteurs, discussed below, focus on rule of law aspects specifically.

There are several bodies within the UN system dedicated to the elaboration, promotion and protection of human rights, democracy and rule of law. The elaboration of human rights norms has been largely channelled through the General Assembly and its Third Committee, passing and adopting many human rights treaties. These, in turn, have also instated expert committees charged with the interpretation of norms. Given the vast amount of literature focusing on the human rights treaties and the treaty-based bodies, this report will focus instead on the work of Charter-based bodies (meaning bodies directly or indirectly based on the UN Charter), namely the Security Council, the General Assembly, the Human Rights Council and Special Rapporteurs. Compared to the bodies explicitly mandated to promote human rights, democracy and rule of law, the work of the Security Council in relation to these concepts, given its role of guarantor of international peace and security, may appear as less relevant. However, in the past 20 years,

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<sup>34</sup> Peng Chun Chang was the Republic of China (ROC) representative for the negotiation of the UDHR whom, together with Eleanor Roosevelt, René Cassin and Charles Malik, representative of Lebanon, acted as a major driving force in making the rule of law enforceable and effective in the UDHR.

<sup>35</sup>UN, 'Guidance Note of the Secretary-General on Democracy' (15 September 2009)

[http://www.un.org/democracyfund/sites/www.un.org.democracyfund/files/file\\_attach/UNSG%20Guidance%20Note%20on%20Democracy-EN.pdf](http://www.un.org/democracyfund/sites/www.un.org.democracyfund/files/file_attach/UNSG%20Guidance%20Note%20on%20Democracy-EN.pdf). Accessed 30 March 2016.

the Council has become more and more engaged in the promotion of human rights, democracy and rule of law, and is for that reason the object of examination below. In addition, the report will explore the conceptions of human rights, democracy and the rule of law adopted at the HRC. An exploration of conceptions emerging during the Universal Peer Review (UPR) is very appealing since it provides an overview of the examined concepts from an institutional perspective, yet in direct combination with national positions held by the Member State representatives. Finally, the work of special mechanisms, providing non-binding expert opinions on specific issues, will be explored as well. The combination of both mechanisms, a political one (UPR) and an expert-based one (special Rapporteurs) allow for a more comprehensive, and perhaps challenging view of the conceptions held at the UN.

## B. Security Council

### 1. Introduction

As discussed in the introduction, the role, membership and voting mechanism within the UN Security Council (UNSC or Council) was key in the debates and negotiations towards the formation of the UN. International security, through the monopoly of the use of force and the elimination of threats to peace, was the main goal of the organisation, and as such, central to the functioning of the Council.

In relation to membership and voting system, the Council is composed of the five permanent members (the United States, Great Britain, Russia (USSR until 1992), China and France) and 10 members elected for two years, having regard to equitable geographical distribution (Art. 23 (1) UN Charter). Every permanent member has the right of veto in all decisions, with the exception of procedural matters (Art. 27 (3) UN Charter). This composition and organisation have been subject to much critique. Gowlland-Debbas calls the Council ‘an elitist political body’,<sup>36</sup> while other scholars see the permanent members’ prevalence in the Council’s decisions as reflecting the balance of power at the end of the WW-II and oblivious of the current state of the international community, with an ‘anachronistic and undemocratic’ decision-making system.<sup>37</sup> UNSC reform has become the matter of extensive discussions.<sup>38</sup> Central to the debate is the issue of increasing the Council’s effectiveness and credibility.<sup>39</sup> In the sections below, we discuss some of the consequences of Council configuration and dynamics in relation to conceptualisations, particularly in relation to human rights.

Regarding the role of the Council, Article 24(1) of the UN Charter establishes that it has the ‘primary responsibility for the maintenance of international peace and security. As Fassbender points out,

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<sup>36</sup> Vera Gowlland-Debbas, ‘The Security Council as Enforcer of Human Rights’ in Bardo Fassbender (ed), *Securing Human Rights: Achievements and Challenges of the UN Security Council* (OUP 2011) 36.

<sup>37</sup> Willem van Genugten and others, *The United Nations of the Future: Globalization with a Human Face* (KIT Publishers 2006) 123-130.

<sup>38</sup> See eg Dimitris Bourantonis, *The History and Politics of UN Security Council Reform* (Routledge 2004); Ian Hurd, ‘Myths of Membership: The Politics of Legitimation in UN Security Council Reform’ (2008) 14 *Global Governance: A Review of Multilateralism and International Organizations* 199; Madeleine O Hosli and Thomas Dörfler, ‘The United Nations Security Council: The Challenge of Reform’ in Dries Lesage and Thijs Van de Graaf (eds), *Rising Powers and Multilateral Institutions* (Palgrave Macmillan 2015).

<sup>39</sup> Yehuda Z Blum, ‘Proposals for UN Security Council Reform’ (2005) 99 *AJIL* 632, 633ff and 645. See also Hosli and Dörfler (n 38).

references to human rights do not appear in the chapters addressing the Security Council and its functions and powers (chapters V, VI, VII, and VIII), since these were considered rather an issue of international economic and social collaboration.<sup>40</sup> As initially envisioned, human rights were the concern of the General Assembly and the ECOSOC. Articles 13.1, 62(a), 68, and 76(c) confer a specific human-rights mandate on the General Assembly, ECOSOC and the Trusteeship Council.

Nevertheless, Stagno Ugarte and Genser hold that even at early stages of the organisation, many considered that the Security Council would automatically encourage the protection of human rights by maintaining international peace, although always within the confines of Article 2(7) and the principle of non-intervention.<sup>41</sup> Indeed, Lauterpacht, soon after the foundation of the UN, considered that the Security Council had indeed a role in the protection of human rights, namely in cases ‘when the degree and scope of their violation are such as to constitute a threat to international peace and security’.<sup>42</sup>

Authors agree that, following external pressures, the Council has engaged in the protection of human rights.<sup>43</sup> In doing this, the connection between the initial responsibility of the Council according to the charter and human rights is key. Shraga explains:

‘A conceptual link was thus established between human rights and international peace and security, or between their serious, systematic, and massive violations and the existence of a threat to the peace; a link which was both a legal basis for the Council’s intervention and a limitation on its powers to intervene at its political discretion.’<sup>44</sup>

Exploring the evolution of the conceptualisation of ‘security’ and ‘peace’ becomes paramount for understanding the Council’s conceptualisations of human rights, and also, democracy and rule of law. In the section below, we outline the Council engagement with these notions from a historical perspective, and we subsequently explore these conceptualisations in the context of the more recent debates on the notion of humanitarian intervention and the responsibility to protect. Next, the analysis will focus on thematic resolutions post 2009 that deal with the protection of civilians in armed conflict, with a special focus on children and women; the groups which have received much attention from the Council in recent years.

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<sup>40</sup> Bardo Fassbender, ‘Introduction’ in Bardo Fassbender (ed), *Securing Human Rights: Achievements and Challenges of the UN Security Council* (OUP 2011) 2.

<sup>41</sup> Bruno Stagno Ugarte and Jared Genser, ‘Evolution of the Security Council’s Engagement on Human Rights’ in Jared Genser and Bruno Stagno Ugarte (eds), *The United Nations Security Council in the Age of Human Rights* (CUP 2014) 6.

<sup>42</sup> Hersch Lauterpacht, *International Law and Human Rights* (Steven & Sons Limited 1950) 147.

<sup>43</sup> See eg Stagno Ugarte and Genser (n 41); Fassbender (n 40); Gowlland-Debbas (n 36); and Daphna Shraga, ‘The Security Council and Human Rights—From Discretion to Promote to Obligation to Protect’ in Bardo Fassbender (ed), *Securing Human Rights: Achievements and Challenges of the UN Security Council* (OUP 2011).

<sup>44</sup> *ibid* 12.

## 2. Human rights violations and threats to peace

### a) Historical overview

During the first two decades of the UN, references to human rights, democracy and rule of law were mostly indirect ones. A first indirect acknowledgment of human rights appeared in the Statute of the Free Territory of Trieste annexed to 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.<sup>45</sup> In Resolution 21 (1947), the Council tasked the United States with promoting ‘the rights and fundamental freedoms of all elements of the population without discrimination’, including freedom of conscience, freedom of speech, press and assembly; freedom of worship and of religious teaching; and freedom of migration and movement in the islands previously under the administration of Japan when conferring its trusteeship.

In Resolution 47 (1948), the Council again addressed a number of rights and freedoms inherent to democracy by calling 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.’<sup>46</sup> Similarly, Resolution 67 (1949), referred again to freedom of assembly, speech and press in relation to democratic elections in Indonesia, pursuant to the withdrawal of The Netherlands.<sup>47</sup> The Cold War would refrain the Council from similar pronouncements.

During the Cold War, the Security Council came to a halt as regards addressing human rights, democracy and rule of law. Scarce references and indirect recognition of human rights characterised this period in which shifting views followed from the political divide among the Council members. Stagno Ugarte and Genser hold that during this period, discussions about the function of the Council in relation to human rights and the scope of the principle of non-intervention included in Article 2(7) arose in relation to the situation of Algeria and Hungary,<sup>48</sup> with the West arguing in relation to Algeria (French colony) 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,’<sup>49</sup> yet emphasising ‘the enjoyment of human rights and of fundamental freedoms...for all peoples in the Charter of the United Nations’ in relation to Hungary (under the control of the Soviet Union).<sup>50</sup>

Stagno Ugarte and Genser point out that it was only in 1960 that the Council recognised that systematic violations of human rights and fundamental freedoms and the general absence of the rule of law as threat to international peace and security.<sup>51</sup> The process of decolonisation, which drastically reshaped the

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<sup>45</sup> UNSC Res 16 ‘The Free Territory of Trieste’ (10 January 1947) UN Doc S/RES/16.

<sup>46</sup> UNSC Res 47 ‘The India-Pakistan Question’ (21 April 1948) UN Doc S/RES/47.

<sup>47</sup> UNSC Res 67 ‘The Indonesian Question’ (28 January 1949) UN Doc S/RES/67.

<sup>48</sup> Stagno Ugarte and Genser (n 41) 9.

<sup>49</sup> UNSC Draft Resolution S/3609; see Provisional Verbatim Record of the 729th and 730th Meetings (26 June 1956) S/PV.729 and S/PV.730.

<sup>50</sup> UNSC Draft Resolution S/3730.

<sup>51</sup> Stagno Ugarte and Genser (n 41) 5.

configuration of the General Assembly, is one of the major developments in this period. Although the primary forum for discussion of the process of decolonisation was the General Assembly, particularly since the adoption of Resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples, the enforcement of the right of peoples under colonial domination to self-determination became the task of the Council. Without much consistency in its decisions, the Council addressed the Unilateral Declaration of Independence by the white minority regime in the case of Southern Rhodesia,<sup>52</sup> the military operations and repression by the Portuguese forces against the African population in relation to the Portuguese Territories,<sup>53</sup> the illegal presence of South Africa in Namibia,<sup>54</sup> and more recently, the situation in East Timor and Western Sahara.<sup>55</sup> Obstructing the right of people to self-determination was considered a threat to international peace and security, calling for Chapter VII enforcement measures. However, the situation of the Western Sahara denotes the politically driven conception of the Security Council of the right of to self-determination. In this particular case, the Council considers self-determination to be conditional to the agreement of the parties by referring to a ‘mutually acceptable political solution’.<sup>56</sup>

The concept of democracy, and its full meaning has not been elaborated as such by the Council thus far. Nevertheless, Shraga points to democratic governance as a crucial concept in relation to the right to self-determination of the peoples, interconnecting human rights, democracy and rule of law, and connecting these to peace and security, consequently falling under the scope of the Council. She explains:

“The right to democratic governance, as a post-colonial manifestation of the right to self-determination, is understood as a right to governance expressive of the people’s will, based on a regular, genuine, and fair election accountable to the electorate and based on the respect for human rights and the rule of law. Beyond its promise of full participation in the political process of determining a people’s system of governance, democracy is conceived as the ultimate guarantee for the respect of all other human rights and the rule of law within and among states. It is conducive to economic, social, and cultural progress and a condition necessary, though not sufficient, for durable, sustainable peace, security, and world order.”<sup>57</sup>

The Council’s engagement in support of democracy provides some insight into its view of democracy as a concept. The Council has expressed that *coups d’état* ‘not only constitute a dangerous political downturn and serious setback to the democratic processes, but could also pose a threat to the peace, security and stability.’<sup>58</sup> The Council resorted to military force for the purpose of restoring democracy in the case of Haiti in order to remove the military junta and reinstating the democratically elected president. The

<sup>52</sup> UNSC Res 217 ‘Southern Rhodesia’ (12 November 1965) UN Doc S/RES/217; UNSC Res 232 ‘Southern Rhodesia’ (16 December 1966) UN Doc S/RES/232; and UNSC Res 253 ‘Southern Rhodesia’ (29 May 1968) UN Doc S/RES/253.

<sup>53</sup> UNSC Res 180 ‘Question Relating to Territories under Portuguese Administration’ (31 July 1963) UN Doc S/RES/180; UNSC Res 183 ‘Question Relating to Territories under Portuguese Administration’ (11 December 1963) UN Doc S/RES/183; UNSC Res 218 ‘Question Relating to Territories under Portuguese Administration’ (23 November 1965) UN Doc S/RES/218. See also UNSC Res 290 ‘Complaint by Guinea’ (23 November 1970) UN Doc S/RES/290; and UNSC Res 312 ‘Territories under Portuguese Administration’ (4 February 1972) UN Doc S/RES/312.

<sup>54</sup> UNSC Res 276 ‘The Situation in Namibia’ (30 January 1970) UN Doc S/RES/276.

<sup>55</sup> UNSC Res 1264 ‘East Timor’ (15 September 1999) UN Doc S/RES/1264.

<sup>56</sup> Ibid.

<sup>57</sup> Shraga (n 43) 16.

<sup>58</sup> UNSC ‘Statement by the President of the Security Council’ (5 May 2009) UN Doc S/PRST/2009/11.

Council position towards unconstitutional changes of government, however, seems to depend on whether the government ousted was a democratic or unconstitutionally established one. For instance, *coups d'état* in Niger, Madagascar and Honduras did not trigger a reaction by the Security Council.

Several resolutions were adopted in the Cold War period addressing human rights violations and racial discrimination. This was particularly the case in relation to the apartheid regime in South Africa. Resolution 134 (1960) pointed to equality and the elimination of racial discrimination and held that the policies of apartheid in South Africa 'might endanger international peace and security.'<sup>59</sup> Resolutions 181 (1963) and 182 (1963) adopted later that year, explicitly acknowledged 'the need to eliminate discrimination in regard to basic human rights and fundamental freedoms for all individuals.'<sup>60</sup> More resolutions on this issue were adopted during the 1980s.<sup>61</sup>

Beyond mere declaratory references to human rights in the resolutions adopted during the Cold War, the Council adopted some resolutions in relation to its coercive powers. In Resolution 161 (1961), adopted under Chapter VII, the Council noted the systematic violations of human rights and fundamental freedoms and the absence of the rule of law in the Congo.<sup>62</sup> Similarly, Resolution 253 (1968) on Southern Rhodesia imposed mandatory sanctions under Chapter VII to address human-rights concerns explicitly.<sup>63</sup> The situation in the Middle East also called for several resolutions with references to human rights during this period, ranging from the Six Day War<sup>64</sup> to the examination of settlements in the Arab territories.<sup>65</sup> The position of the Council in this respect was less assertive, recalling the Geneva Conventions.

Concurrently with the dissolution of the Soviet Union, the Security Council adopted Resolution 670 (1990)<sup>66</sup> and Resolution 688 (1991)<sup>67</sup> in relation to the invasion of Kuwait by Iraq. Although these were not adopted under Chapter VII, they established the national and individual liability for crimes, and considered the attacks on civilians as constitutive of a threat to international peace and security. Moreover, although confirming Article 2(7), Resolution 688 also called Iraq to allow access to international humanitarian organisations.

In the late Cold War period, the Council started to show a shift in the understanding of what constitute threats to peace and security. Shraga explains that, since then, the Council's conception of threats to peace moved from an exclusive consideration of international armed conflict, to include situations as diverse as a unilateral declaration of independence by a minority regime, the apartheid regime, civil wars, humanitarian crises and the flow of refugees, repression of civilian populations, and minorities in particular, serious violations of human rights and international humanitarian law, overthrow of a

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<sup>59</sup> UNSC Res 134 'Question Relating to the Situation in the Union of South Africa' (1 April 1960) UN Doc S/RES/134.

<sup>60</sup> UNSC Res 182 'Question Relating to the Policies of Apartheid of the Government of the Republic of South Africa' (4 December 1963) UN Doc S/RES/182.

<sup>61</sup> See eg UNSC Res 610 'South Africa' (13 March 1988) UN Doc S/RES/610; UNSC Res 615 'South Africa' (17 June 1988) UN Doc S/RES/615; and UNSC Res 623 'South Africa' (23 November 1988) UN Doc S/RES/623.

<sup>62</sup> UNSC Res 161 'The Congo Question' (21 February 1961) UN Doc S/RES/161.

<sup>63</sup> UNSC Res 245 'West Africa' (25 January 1968) UN Doc S/RES/245.

<sup>64</sup> UNSC Res 237 'Middle East' (14 June 1967) UN Doc S/RES/237.

<sup>65</sup> UNSC Res 446 'Territories Occupied by Israel' (22 March 1979) UN Doc S/RES/446.

<sup>66</sup> UNSC Res 670 'Iraq-Kuwait' (25 September 1990) UN Doc S/RES/670.

<sup>67</sup> UNSC Res 688 'Iraq' (4 April 1991) UN Doc S/RES/688.

democratically elected government, disintegration of States and breakdown of governmental authority, law and order, and economic strife, terrorist acts and impunity for serious violations of international humanitarian law.<sup>68</sup>

The Council recognised that ‘the absence of war and military conflicts among states does not in itself ensure international peace and security,’<sup>69</sup> pointing even to economic, social, humanitarian and ecological instability.<sup>70</sup> Significantly, the Council opened up, formally and informally, to other UN experts and advisors in relation to advance human rights.<sup>71</sup> It also established Commissions of Experts or Inquiry and international criminal tribunals<sup>72</sup> and more recently, it has referred situations to the International Criminal Court (ICC).<sup>73</sup> Moreover, the Council issued in this period the first generic resolutions, (rather than country-specific) addressing thematic agenda items. Resolutions on ‘Children and Armed Conflict,’<sup>74</sup> ‘Protection of Civilians in Armed Conflict’<sup>75</sup> and ‘Women and Peace and Security’<sup>76</sup> have been adopted regularly. These thematic resolutions, explored in detail in the sections below, could allow the Council to elaborate on concepts related to peace and security in more depth, since issues are discussed in abstract terms, without concrete consequences for specific States.

The Council was faced with a very different challenge in the second decade of the new millennium, leading to a shift of priorities and a reformulation of basic notions. Following the terrorist attacks on the US on September 11 2001, the Council adopted unanimously Resolution 1373 (2001).<sup>77</sup> Basic due process rights violations by States were legitimised with the aim of combating terrorism, by the addition of alleged terrorist to the ‘Consolidated List’ of targeted sanction created by Resolution 1269. This situation was tempered by the establishment of a Focal Point for delisting requests<sup>78</sup> and later an Office of the

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<sup>68</sup> Shraga (n 43) 12-13.

<sup>69</sup> UNSC ‘Note by the President of the Security Council’ (31 January 1992) UN Doc S/23500, 3.

<sup>70</sup> *ibid.*

<sup>71</sup> For instance, briefings by UN Special Rapporteurs, the United Nations High Commissioner for Refugees (UNHCR), the Office for the Coordination of Humanitarian Affairs (OCHA), the International Committee of the Red Cross (ICRC), the United Nations Children’s Fund (UNICEF) and the Special Representative on Children and Armed Conflict.

<sup>72</sup> See UNSC Res 780 ‘Former Yugoslavia’ (6 October 1992) UN Doc S/RES/780 (in relation to Yugoslavia); UNSC Res 935 ‘Commission of Experts to Examine Violations of International Humanitarian Law Committed in Rwanda’ (1 July 1994) UN Doc S/RES/935 (in relation to Rwanda); UNSC Res 1012 ‘International Commission of Inquiry in Burundi’ (28 August 1995) UN Doc S/RES/1012 (in relation to Burundi); and UNSC Res 1564 ‘Report of the Secretary-General on the Sudan’ (18 September 2004) UN Doc S/RES/1564 (in relation to Sudan). It further established several tribunals via its Resolutions: UNSC Res 827 ‘International Criminal Tribunal for the former Yugoslavia (ICTY)’ (25 May 1993) UN Doc S/RES/827; UNSC Res 955 ‘Establishment of the International Criminal Tribunal for Rwanda (ICTR) and Adoption of the Statute of the Tribunal’ (8 November 1994) UN Doc S/RES/955; UNSC Res 1315 ‘Sierra Leone’ (14 August 2000) UN Doc S/RES/1315 (Special Court for Sierra Leone); and UNSC Res 1757 ‘Middle East’ (30 May 2007) UN Doc S/RES/1757 (Special Tribunal for Lebanon).

<sup>73</sup> To date, situations referred relate to Darfur (UNSC Res 1564); Sudan (UNSC Res 1593) and Libya (S/RES/1970 (2011)).

<sup>74</sup> UNSC Res 1261 ‘Children and Armed Conflict’ (25 August 1999) UN Doc S/RES/1261.

<sup>75</sup> UNSC Res 1265 ‘Protection of Civilians in Armed Conflict’ (17 September 1999) UN Doc S/RES/1265.

<sup>76</sup> UNSC Res 1325 ‘Women and Peace and Security’ (31 October 2000) UN Doc S/RES/1325.

<sup>77</sup> UNSC Res 1373 ‘Threats to International Peace and Security Caused by Terrorist Acts’ (28 September 2001) UN Doc S/RES/1373.

<sup>78</sup> UNSC Res 1730 ‘General Issues Relating to Sanctions’ (19 December 2006) UN Doc S/RES/1730.

Ombudsperson.<sup>79</sup>

In relation to human rights, thus, we see that the Council has touched upon self-determination, racial discrimination and severe violations of human rights. It is possible that in time, other human rights become regarded as essential to the maintenance of peace and security, and thus the Council might incorporate them in its agenda, promoting and protecting them by force if necessary.

In relation to the rule of law, the work of the Council is ongoing. On September 24 2003, the Council adopted a thematic agenda item entitled 'Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security', which addresses the controversial issue of targeted sanctions against alleged terrorists. Rule of law, thus, appears connected to due process, highlighting the human rights dimension, as well. Thematic resolutions, discussed in the section below, also connect the promotion of peace and security with the rule of law, although sometimes inconsistently.

Since its inception, the Council has protected human rights, democracy, and rule of law as a consequence of their perceived connection to peace and security. The practical engagement of the Council on these issues, particularly in relation to human rights, has reflected not only the political tension among the members, but also the tension between the duty to maintain the international peace and security and the prohibition of interference with internal affairs. These debates, briefly discussed below, give insight into the understandings of human rights, democracy and rule of law, and the interconnections between them.

### *b) From Humanitarian intervention to R2P*

The post-Second World War era generated a debate about sovereignty and non-interference in States' domestic affairs, particularly in relation to the protection of human rights and the use of force in the protection of civilian populations at risk. This debate revolved around the doctrine of 'humanitarian intervention.' The core of the discussion related to the legality, or illegality, of a military intervention in a third State due to massive violations of human rights against the will of the target State or without the authorisation of the Security Council.

Considering this discussion in terms of conceptions, the principle of non-interference and the notion of sovereignty were being challenged, their nature as absolute notions questioned, while the concept of human rights was struggling to be recognised as a notion with equal or similar weight. This discussion took momentum by the hand of political events in the 1990s, particularly the mass atrocities in the ex-Yugoslavia and Rwanda. Kofi Annan, the then United Nations Secretary General, argued during his speech on the occasion of the presentation of the 1999 annual report to the G.A., that a narrow domestic definition of what constitutes 'national interest' may result in a limitation of the protection of human rights and effective action during humanitarian crisis just as the notion of sovereignty does.<sup>80</sup> Annan held:

'A new, more broadly defined, more widely conceived definition of national interest in the new century would, I am convinced, induce States to find far greater unity in the pursuit of such basic

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<sup>79</sup> UNSC Res 1904 'Threats to International Peace and Security Caused by Terrorist Acts' (2009) UN Doc S/RES/1904.

<sup>80</sup> UN, 'Secretary-General Presents his Annual Report to General Assembly' (20 September 1999) Press Release SG/SM/7136.

Charter values as democracy, pluralism, human rights, and the rule of law.<sup>81</sup>

Developing an international norm in favour of intervention to protect civilians, Annan argued, must be based on 'legitimate and universal principles' in order to be upheld by the international community.

The responsibility to protect (R2P) was first formulated in the report of the International Commission on Intervention on State Sovereignty in 2001, following the call by the Secretary-General.<sup>82</sup> The report considered that sovereignty is *earned* by the State when it complies with its international responsibilities, rather than an inherent right.<sup>83</sup> R2P thus emphasises the duty of the State to act to protect its own population from atrocities, and the possibility for international intervention should it fail to do so.<sup>84</sup> Five years later, the G.A. adopted the core principles of R2P at the World Summit.<sup>85</sup> The Outcome Document, however, was more restrictive than the ICISS formulation. It reduced the application of R2P to genocide, war crimes, ethnic cleansing and crimes against humanity and excluded all possibilities to intervene without Security Council authorisation.

Several Council resolutions incorporated references to R2P since then on.<sup>86</sup> Resolution 1674 (2006) on the protection of civilians in armed conflict was the first Council resolution referring to R2P generically, without circumscribing its scope to a specific situation.<sup>87</sup> Later on, Resolution 1970 (2011) on the situation in Libya, would be followed by a series of Council resolutions with similar references.<sup>88</sup>

It appears, thus, that the adopted notion of R2P is much narrower in scope than the initial consideration of the Secretary General of a possible reconfiguration of the understanding of 'national interest' as one encompassing respect for human rights, democracy and rule of law in order to prevent threats to international peace and security. R2P deals with the legal possibility to interfere in the domestic affairs of a State, if this one fails to meet the responsibility to prevent genocide, war crimes, ethnic cleansing and crimes against humanity. In the section below, we analyse references to R2P in recent Council resolutions on the protection of civilians in order to explore where references to human rights, democracy and rule of law appear, and their connection to the concept of R2P and maintenance of international peace and security.

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<sup>81</sup> *ibid.*

<sup>82</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (IDRC 2001).

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

<sup>85</sup> UNGA Res 60/1 '2005 World Summit Outcome' (24 October 2005) UN Doc A/RES/60/1.

<sup>86</sup> See Louise Arbour, *The Responsibility to Protect as a Duty of Care in International Law and Practice* (2008) 34 *Rev Int'l Stud* 445.

<sup>87</sup> UNSC Res 1674 'Protection of Civilians in Armed Conflict' (28 April 2006) UN Doc S/RES/1674.

<sup>88</sup> See eg UNSC Res 1973 'Libya' (17 March 2011) UN Doc S/RES/1973; UNSC Res 1975 'Côte d'Ivoire' (30 March 2011) UN Doc S/RES/1975; UNSC Res 1996 'Reports of the Secretary-General on the Sudan' (8 July 2011) UN Doc S/RES/1996; UNSC Res 2014 'Middle East' (21 October 2011) UN Doc S/RES/2014; UNSC Res 2016 'Libya' (27 October 2011) UN Doc S/RES/2016; UNSC Res 2040 'Libya' (12 March 2012) UN Doc S/RES/2040; UNSC Res 2085 'Mali' (20 December 2012) UN Doc S/RES/2085.

### 3. Thematic resolutions: the protection of civilians

Brooks holds that Council Resolution 1265 (1999) on the Protection of Civilians in Armed Conflict marked an explicit effort to develop a “theory” of civilian protection.<sup>89</sup> Attacks against civilians emerged as an issue hand in hand with the changing nature of armed conflict, reshaping the understanding of what amounts to threats to international peace and security. Protection of civilians, thus, became crucial for the maintenance of peace and security. The resolution noted:

“The need to address the causes of armed conflict in a comprehensive manner in order to enhance the protection of civilians on a long-term basis, including by promoting economic growth, poverty eradication, sustainable development, national reconciliation, good governance, democracy, the rule of law and respect for and protection of human rights.”<sup>90</sup>

Hence, respect and promotion of human rights, democracy and the rule of law become crucial elements for the prevention of conflict leading to sustainable protection of civilians. This is confirmed in later resolutions, including Council Resolution 1894 (2009). The responsibility of States in relation to human rights, beyond the consequences of armed conflict, is also expressed in this Resolution:

“States bear the primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law.”<sup>91</sup>

The responsibility to protect the civilian population from the consequences of armed conflict is perceived in thematic resolutions as clearly falling on the national governments and the parties involved, including non-state parties.<sup>92</sup> In this sense, the Council repeatedly confirms its ‘commitment to the principles of the political independence, sovereign equality and territorial integrity of all States, and respect for the sovereignty of all States.’<sup>93</sup> The primary function of the Council in the maintenance of international peace and security is confirmed in all thematic resolutions on protection of civilians.

The protection of civilian population includes the criminal punishment of perpetrators of crimes. As commented above, this responsibility to protect extended to four basic international crimes: genocide, war crimes, ethnic cleansing and crimes against humanity. Thematic resolutions have incorporated some specific types of crimes as falling under R2P, essential for the maintenance of international peace and security. Among them, sexual violence is considered to threaten international peace and security, and consequently, calling for sanctions and criminal responsibility.<sup>94</sup> In this regard, the Council urges States to:

<sup>89</sup> Rosa Brooks, ‘Civilians and Armed Conflict’ in Jared Genser and Bruno Stagno Ugarte (eds), *The United Nations Security Council in the Age of Human Rights* (CUP 2014).

<sup>90</sup> UNSC Res 1265 (17 September 1999) UN Doc S/RES/1265; Similarly, 1296 (2000), 1674 (2006).

<sup>91</sup> UN Security Council, *Security Council resolution 1894 (2009) [on the protection of civilians in armed conflict]*, 11 November 2009, S/RES/1894 (2009), available at: <http://www.refworld.org/docid/4b0550d42.html>. Accessed 1 April 2016.

<sup>92</sup> See: S/RES/1894 (2009), (n 91), and more recently: UN Security Council, *Security Council resolution 2222 (2015) [on protection of journalists and the issue of impunity]*, 27 May 2015, S/RES/2222 (2015), available at: <http://www.refworld.org/docid/5589347c4.html>. Accessed 1 April 2016.

<sup>93</sup> S/RES/1894 (2009) (n 91), S/RES/2222 (2015) (n 91).

<sup>94</sup> See: UN Security Council, *Security Council resolution 1888 (2009) [on acts of sexual violence against civilians in armed conflicts]*, 30 September 2009, S/RES/1888 (2009). Available at: <http://www.refworld.org/docid/4ac9aa152.html>; UN Security Council, *Security Council resolution 1882 (2009) [on*

“Undertake comprehensive legal and judicial reforms, as appropriate, in conformity with international law, without delay and with a view to bringing perpetrators of sexual violence in conflicts to justice and to ensuring that survivors have access to justice, are treated with dignity throughout the justice process and are protected and receive redress for their suffering.”<sup>95</sup>

Sexual violence is considered above all in relation to women, and to some extent children, as we discuss in the section below. Men are very rarely seen as potential victims of sexual or gender violence, although they have been recently regarded as subjected to secondary victimisation through “forced witnessing sexual violence.”<sup>96</sup>

Another specific crime mentioned in relation to R2P is forced conscription and the recruitment of child soldiers, which although it disproportionately affects boys, it is not considered as gender-based discrimination.<sup>97</sup> Girls, besides the target of sexual violence, have been recently the targets of protection against abduction. Forced disappearance has been recently recalled in Resolution 2242.<sup>98</sup>

We have mapped the thematic resolutions on the protection of civilians issued from 1-1-2009 until 31-12-2015, including those focusing on children and women. It shows attention to specific types of war crimes and crimes against humanity. In what follows, we discuss the results from this mapping.

In relation to **human rights**, we found that compared to the country specific resolutions issued in the past, no references to self-determination, death penalty, racism or racial discrimination appear in recent thematic resolutions. In fact, references to discrimination are scarce, and those are mostly related to discrimination against women. Resolution 1889 (2009) reads:

“Remaining deeply concerned about the persistent obstacles to women’s full involvement in the prevention and resolution of conflicts and participation in post conflict public life, as a result of violence and intimidation, lack of security and lack of rule of law, cultural discrimination and stigmatization, including the rise of extremist or fanatical views on women, and socio-economic factors including the lack of access to education, and in this respect, recognizing that the marginalization of women can delay or undermine the achievement of durable peace, security and reconciliation.”<sup>99</sup>

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children and armed conflict], 4 August 2009, S/RES/1882 (2009), available at:

<http://www.refworld.org/docid/4a7bdb432.html>; UN Security Council, Security Council resolution 1960 (2010) [on women and peace and security], 16 December 2010, S/RES/1960(2010), available at:

<http://www.refworld.org/docid/4d2708a02.html>; UN Security Council, Security Council resolution 2106 (2013) [on sexual violence in armed conflict], 24 June 2013, S/RES/2106 (2013), available at:

<http://www.refworld.org/docid/51d6b5e64.html>. Accessed 1 April 2016.

<sup>95</sup> Security Council resolution 1888 (2009), (n 94), 6.

<sup>96</sup> See: UN Security Council, Security Council resolution 2106 (2013) (n 94).

<sup>97</sup> E.g. UN Security Council, Security Council resolution 1612 (2005) [on children in armed conflict], 26 July 2005, S/RES/1612 (2005), available at: <http://www.refworld.org/docid/43f308d6c.html>, accessed 1 April 2016; Security Council resolution 1882 (2009), (n 94).

<sup>98</sup> See: UN Security Council resolution 2242 (2015) [on women and peace and security], 13 October 2015, S/RES/2242 (2015), 6. Available at: <http://www.refworld.org/docid/562097f44.html>. Accessed 1 April 2016.

<sup>99</sup> UN Security Council, Security Council resolution 1889 (2009) [on women and peace and security], 5 October 2009, S/RES/1889 (2009), available at: <http://www.refworld.org/docid/4acdd8512.html>. Accessed 1 April 2016.

Although there are scarce explicit references to **democracy** in recent thematic resolutions, there are references to elements indirectly linked to it. The Council has emphasised the need for protection of journalists, media professionals and associated personnel, pointing out that ‘the work of a free, independent and impartial media constitutes one of the essential foundations of a democratic society’,<sup>100</sup> urging all parties to the armed conflicts to respect their ‘professional independence and rights’.<sup>101</sup> More recently, the connection between the role of journalists and media professionals and the protection of civilians and has been clarified by the Council, which recognised that such professionals ‘can play an important role in protection of civilians and conflict prevention by acting as an early warning mechanism in identifying and reporting potential situations that could result in genocide, war crimes, ethnic cleansing and crimes against humanity.’<sup>102</sup>

Interestingly, the most recent resolution incorporates a gender perspective into the protection of journalists and media professionals:

“Further acknowledging the specific risks faced by women journalists, media professionals and associated personnel in conduct of their work, and underlining in this context the importance of considering the gender dimension of measures to address their safety in situations of armed conflict.”<sup>103</sup>

Council Resolution 2222 (2015) recognised that threats towards journalists and media professionals come not only from governments, but also from terrorist attacks. This recognition may have been inspired by the attacks on the French satirical magazine Charlie Hebdo in 2015, yet the resolution focuses on protection during armed conflict. Nevertheless, the nature of the threats differs from those considered in the earlier Council Resolution 1738.

Thematic resolutions provide explicit and indirect references to the **rule of law**. The resolutions address a number of issues connected to the rule of law during the conflict and also during the transition to peace and beyond. During the conflict, resolutions call the parties to abide by international law, particularly humanitarian law, human rights law, and since more recently, refugee law.<sup>104</sup> They also point to the role of the ICC and the recognition of crimes, particularly sexual violence, in the Rome Statute.<sup>105</sup>

In relation to the aftermath of conflict, resolutions recognise the need to assist national authorities in “strengthening” the rule of law.<sup>106</sup> In this respect, Council resolutions call for creation and restoration of accountable security institutions and independent judicial systems.<sup>107</sup> Access to justice, particularly in the

<sup>100</sup> Security Council resolution 2222 (2015), (n 92), 2.

<sup>101</sup> See: UN Security Council, Resolution 1738 (2006) Protection of Civilians in Armed Conflict, 23 December 2006, S/RES/1738 (2006), 8. Available at: <http://www.refworld.org/docid/45c30c6fc.html> . Accessed 1 April 2016.

<sup>102</sup> Security Council resolution 2222 (2015), (n 92).

<sup>103</sup> Ibid.

<sup>104</sup> See: UN Security Council, Security Council resolution 2175 (2014) [on the protection of humanitarian personnel and UN and associated personnel in armed conflict], 29 August 2014, S/RES/2175 (2014), 1, available at: <http://www.refworld.org/docid/546f0e684.html> [accessed 1 April 2016]; and S/RES/1894 (2009) (n 91).

<sup>105</sup> See: Security Council resolution 2175 (2014), Security Council resolution 2222 (2015) and Security Council resolution 1888 (2009).

<sup>106</sup> Security Council resolution 1888 (2009), (n 94) 8.

<sup>107</sup> S/RES/1894 (2009), (n 91).

case of women, needs to be ensured, and so resolutions call for a ‘gender responsive legal, judicial and security sector reform.’<sup>108</sup>

Several aspects of the rule of law appear as intrinsically linked to States’ responsibilities arising in relation to sexual violence, since they are expected to ‘build national capacity in the judicial and law enforcement systems in situations of particular concern with respect to sexual violence in armed conflict’.<sup>109</sup>

It is important to note the clear intention of the Council to engage with specialised bodies in order to gather information on specific issues. As such, the Council has requested special reports from the Secretary General, and called for input from, among others, the Working Group on Children and Armed Conflict, the Special Representative of the Secretary-General for Children and Armed Conflict, the Advisory Group of Experts for the Review of the United Nations Peace building Architecture, Special Representative of the Secretary-General on Sexual Violence in Conflict.

It becomes apparent that within the civilian population, there are some groups that have received specific attention. Below, we briefly outline the aspects that characterise the approach taken by the Council towards children and women.

### (1) *Children*

The Council has emphasised the primary role of national Governments in providing effective protection and relief to all children affected by armed conflicts.<sup>110</sup> Resolutions acknowledge that in addition to the targeted killing and maiming of children, many occur ‘by landmines, explosive remnants of war, improvised explosive devices and other unexploded ordnance.’<sup>111</sup>

“Protection”, as commented in the previous section, includes the punishment of perpetrators of crimes. As mentioned, there are some specific types of crimes that, in the view of the Council, affect children disproportionately: sexual violence and the abduction of girls, and also the recruitment of child soldiers. The latter brings a new responsibility for the governments, in addition to stop recruitment, namely to ensure the rehabilitation and reintegration of the children:

“[The Council] urges Member States, United Nations entities and other parties concerned to ensure that child protection provisions, including those relating to the release and reintegration of children formerly associated with armed forces or armed groups, are integrated into all peace negotiations and peace agreements.”<sup>112</sup>

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<sup>108</sup> UN Security Council, Security Council resolution 2122 (2013) [on women and peace and security] , 18 October 2013, S/RES/2122 (2013), 10. Available at: <http://www.refworld.org/docid/528365a44.html>. Accessed 1 April 2016.

<sup>109</sup> Security Council resolution 1888 (2009), (n 94) 9.

<sup>110</sup> See: UN Security Council resolution 2143 (2014) [on children and armed conflict] , 7 March 2014, S/RES/2143 (2014), available at: <http://www.refworld.org/docid/533ac1164.html>. Accessed 1 April 2016.

<sup>111</sup> Security Council resolution 2143 (2014).

<sup>112</sup> Ibid, 9.

The right to education has been particularly emphasised in relation to children. In this regard, resolutions call to stop illegal attacks against schools, and also illegal possession and misuse of such buildings for belligerent activities, endangering children's and teachers' safety as well as children's education.<sup>113</sup>

## (2) Women

Council in Resolution 1325 on Women, Peace and Security, adopted in October 2000, has become the cornerstone of women's protection during and after conflict, largely discussed in literature.<sup>114</sup> It has been celebrated as a formal recognition of the challenges that women face in relation to conflicts, but it has also been criticised because of the lack of sanctions connected to violations, and the lack of a comprehensive understanding of the problem.<sup>115</sup> The resolution builds on four main aspects: prevention, protection, participation and peacebuilding. In this section, we elaborate on two interconnected and relevant aspects in terms of conceptions of human rights, democracy and rule of law: sexual violence and participation.

As commented in the sections above, sexual violence is regarded as a type of crime affecting above all women. Regardless of recent indictments of women for cases of sexual violence, they are still largely regarded as victims. The consequences of violence are seen as affecting more than the individual:

“Acts of sexual violence in such situations not only severely impede the critical contributions of women to society, but also impede durable peace and security as well as sustainable development.”<sup>116</sup>

Although the protection of women and the prevention of sexual violence are important aspects within the resolutions focusing on women, peace and security, there has also been increased attention to women's participation in conflict prevention and response. The Council highlights ‘the need for the full, equal and effective participation of women at all stages of peace processes given their vital role in the prevention and resolution of conflict and peace building.’<sup>117</sup> Rather than presented as a human rights, women's participation aims at restoring and achieving sustainable peace and security. Beyond the merit of promoting women participation, Otto warned about some of the risks that the chosen approach seems to carry:

“While the Resolution's promotion of the increased involvement of women in decision-making opens the possibility of clawing back some of the ground lost to military ways of thinking, and legitimating emancipatory understandings of peace based on gender equality and social justice, it

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<sup>113</sup> Ibid, 18.

<sup>114</sup> Among the many publications on this topic, see Chinkin and Charlseworth (2006), Otto (2004, 2006 and 2010), Shoemaker (2001), Boyd (2016), Stamnes E, Teitt S, Davies S, Nwokora Z. Responsibility To Protect And Women, Peace, And Security : Aligning The Protection Agendas [e-book]. Leiden: Brill; 2013.

<sup>115</sup> Some of the critiques relate to the limited understanding of gender constructions and the consequences in conflict, often turning gender based violence against men and individuals challenging the traditional male/female binary invisible. On this topic see: Bond (2012), Dolan (2014).

<sup>116</sup> UN Security Council, Security Council resolution 2106 (2013) (n 94).

<sup>117</sup> Security Council resolution 1889 (2009), (n 99).

also runs the risk of lending a renewed legitimacy to the old ways of getting things done, just as women's participation in the colonial civilizing mission helped to make imperialism possible.”<sup>118</sup>

Otto's fear was that women's participation points in fact 'traditionally feminised work of reintegrating over-militarised men.'<sup>119</sup> More recently, the Council seems to have embraced a meaningful understanding of participation. The most recent resolution focusing on women points to:

“The substantial link between women's meaningful involvement in efforts to prevent, resolve and rebuild from conflict and those efforts' effectiveness and long-term sustainability, as well as the need for greater resourcing, accountability, political will and attitudinal change.”<sup>120</sup>

Women's participation appear to highlight, if not a human right to participate in public life, a democratic dimension. There is recognition that in order to achieve such level of participation, several aspects need to be taken into account. Empowerment of women by, inter alia, providing economic means and promoting education, is key. These aspects are, however, not necessarily recognised as human rights but as 'needs':

“The particular needs of women and girls in post-conflict situations, including, inter alia, physical security, health services including reproductive and mental health, ways to ensure their livelihoods, land and property rights, employment, as well as their participation in decision-making and post conflict planning, particularly at early stages of post-conflict peace building.”<sup>121</sup>

#### 4. Conclusions

The emergence of human rights, democracy and the rule of law as issues of attention within the Council have not been consistent. The Council's elaboration of these concepts has been very limited, mostly carried out in the practice rather than in theoretical terms. In relation to human rights, the Council has shifted from the idea of the inviolability of Article 2(7) to one of binding obligations on states in relation to the protection of civilian populations during conflicts. This interconnection becomes inherent in the understanding of the concepts of human rights, democracy and rule of law.

This brief overview has also indicated that thematic resolutions put forward different elements of human rights, democracy and rule of law than those emerging in country-based resolutions of previous years. In relation to human rights, we found that recent thematic resolutions incorporate attention to the right to education, particularly in connection to children and illegal attacks against schools. The need to ensure and promote the political and public participation of women, particularly in the aftermath of conflict in order to achieve sustainable peace and security is also emphasised. Economic empowerment of women is also called for, particularly with regard to making women's participation possible. Yet these are not labelled as rights, or human rights.

References to democracy are normally indirect ones. We see that thematic resolutions have highlighted the role of media professionals in prevention of conflict, yet not necessarily connected to the democratic

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<sup>118</sup> Otto 2004, 2.

<sup>119</sup> Ibid.

<sup>120</sup> Security Council resolution 2242 (2015), (n 98).

<sup>121</sup> Ibid,

process. This connection, however, is present in country-based resolutions. In relation to the thematic resolutions focusing on women, participation in the peacebuilding process, which is expected to result in sustainable peace and security, takes prevalence over notions of democratic governance emerging in earlier country-based resolutions.

Finally, the rule of law is explicitly and also indirectly addressed in thematic resolutions, highlighting specific elements. The need for ratification and acting according to humanitarian law, human rights law and refugee law, is frequently mentioned. The need for a strong judiciary and a security reform are also routinely mentioned. Finally, judicial procedures in order to fight impunity, including varied justice mechanisms, are included in thematic resolutions.

The active engagement of the Council with experts, such as special representatives, may lead to new conceptions and deeper elaboration of human rights, democracy and rule of law inasmuch as they are in connection to the main role of the Council as protector of the international peace and security.

## C. General Assembly

### 1. Introduction

The UN General Assembly (UNGA or Assembly) is another of the United Nations' six principal organs and is the only UN body in which all member states are represented. It is considered 'the main deliberative, policymaking, and representative organ of the UN', meeting annually to make recommendations on issues of concern to the international community, the acceptance of new members, and UN budget allocation.<sup>122</sup> While the UNGA does possess governance and oversight powers for each of these matters, it serves first and foremost in an advisory capacity. As such, the majority of its resolutions lack (legal) enforceability. Only when decisions are rendered on procedural and budgetary issues are these considered final and binding. Regardless, one must not underestimate the political weight non-binding UNGA resolutions carry and their importance both in terms of 'standard-setting and [for] the codification of international law'.<sup>123</sup>

Article 22 UN Charter provides the UNGA with the ability to establish subsidiaries 'as it deems necessary for the performance of its functions'.<sup>124</sup> Subsidiaries can be classified into five categories: Committees, Commissions, Boards, Councils and Panels, and Working Groups and others. Subsequent to a discussion of the agenda items at the Plenary Meeting, these ancillary organs present their views on selected issues within their competence. The Third Committee, for example, provides draft resolutions on '[...] agenda items relating to a range of social, humanitarian affairs and human rights issues [...]'.<sup>125</sup> The UNGA, thus, draws on the expertise of subsidiary bodies to formulate its final recommendations. It can, in addition, call on the Special Rapporteurs and/or Independent Experts to provide input when thematic or country-

<sup>122</sup> The UN is comprised of 193 Member States as of 2015. UNGA, 'About the General Assembly: Functions and Powers' <<http://www.un.org/en/ga/about/index.shtml>> accessed 7 October 2015; UNGA, 'Functions and Powers of the General Assembly' <<http://www.un.org/en/ga/about/background.shtml>> accessed 7 October 2015. See also Arts. 17 and 20 UN Charter.

<sup>123</sup> See UNGA, 'Functions and Powers of the General Assembly' (n 16).

<sup>124</sup> Art. 22 UN Charter.

<sup>125</sup> UNGA, 'Main Committees: Third Committee (Social, Humanitarian & Cultural)' <<http://www.un.org/en/ga/third/index.shtml>> accessed 29 November 2015.

specific resolutions are to be adopted dealing with the topic of their mandate(s). Moreover, the Assembly can request these mandate-holders to specifically address issues of particular concern in their report.<sup>126</sup>

This section of Deliverable 3.4 will investigate the role of the UNGA in the conceptualisation of human rights, democracy and the rule of law. It will focus on the outcomes of Plenary Meetings and the work of the Third Committee dealing with Social, Cultural, and Humanitarian issues (SOCHUM). Despite the fact that human rights are related to the work of most – if not all – of the Main Committees, ‘the examination of human rights questions’ is particularly fundamental to the work of the SOCHUM.<sup>127</sup> Topics that SOCHUM discusses, for example, include women’s rights and children’s rights, and the elimination of racial discrimination. The Committee, in addition, addresses ‘issues related to youth, family, [and] ageing [...]’ among others.<sup>128</sup> To clarify: SOCHUM debates draft resolutions. If approved by the Committee, these drafts are then sent to the Plenary for voting.

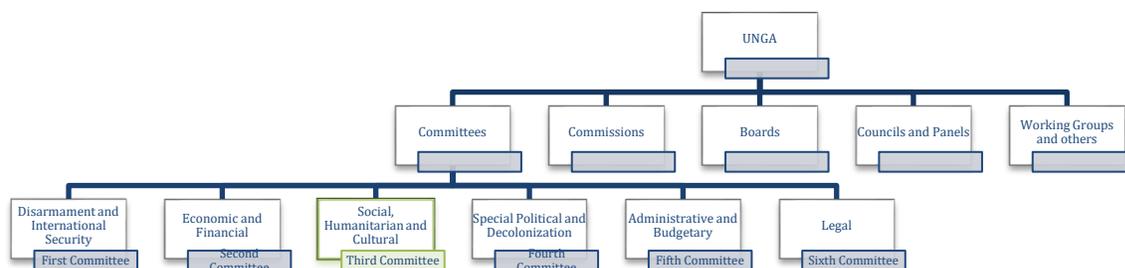


Figure 1: Position of SOCHUM within UNGA Structure.<sup>129</sup>

## 2. Conceptualization of human rights, democracy and rule of law

Historically speaking, the UNGA has had a major impact on the development of human rights concepts. Resolutions of the UNGA have been crucial in the development of human rights law. The UDHR, under the leadership of Eleanor Roosevelt, was adopted by the UNGA. The same applies to the two International Covenants, the ICCPR and the ISECR.

The UNGA, including SOCHUM, is a political organ where different views from all states are presented and deliberated on. There is thus no such thing as ‘the’ SOCHUM conceptualisation of human rights, democracy and rule of law

In what follows, as discussing all elements of these three concepts as they appear in the resolutions of SOCHUM would simply be too much, we focus on three topical areas: sexual orientation and gender identity (SOGI), what the SOCHUM terms ‘the Promotion of a Democratic and Equitable International Order’, and the rights of migrants. We have singled out SOGI rights and the rights of migrants not only

<sup>126</sup> Manfred Nowak, ‘An Introduction to the UN Human Rights System’ in Manfred Nowak, Karolina M Januszewski and Tina Hofstätter (eds), *All Human Rights For All: Vienna Manual on Human Rights* (Intersentia 2012) 82. See Section X on the Human Rights Council for an in-depth discussion of the role of Special Rapporteurs and Independent Experts.

<sup>127</sup> See UNGA, ‘Main Committees: Third Committee (Social, Humanitarian & Cultural)’ (n 125).

<sup>128</sup> *ibid.* See the UNGA website for a more comprehensive list.

<sup>129</sup> See UNGA, ‘Main Committees’ (n 125).

because this ties into the case studies of the section on the Human Rights Council (see *infra* section D.6), but also because these subjects are interesting because they show conceptual contestation. Particular attention is paid to the topic of ‘Promotion of a Democratic and Equitable International Order’ because this is particularly revealing of the ways in which the UNGA conceives of the relationship between the three concepts of human rights, democracy and rule of law, and again also because there is a lot of conceptual contestation on this topic.

#### *a) Sexual orientation and gender identity*

Unlike the HRC, discussed in section D below, the UNGA has never adopted a resolution that specifically addresses SOGI rights. That is not to say that SOGI rights have not been discussed. In December 2008, Argentina took the lead in making a statement, on behalf of sixty-six states, about human rights and SOGI.<sup>130</sup> This statement was co-sponsored by France, which at the time held the EU presidency, and the Netherlands on behalf of the EU. Paragraph 6 of the statement is as follows:

‘We condemn the human rights violations based on sexual orientation or gender identity wherever they occur, in particular the use of the death penalty on this ground, extrajudicial, summary or arbitrary executions, the practice of torture and other cruel, inhuman and degrading treatment or punishment, arbitrary arrest or detention and deprivation of economic, social and cultural rights, including the right to health;’

This passage is significant conceptually, in that it shows support for both civil and political rights and economic, social and cultural rights (naming in particular the right to health) of LGBT people. Elsewhere the statement also refers to the indivisibility of rights. As section D.6 below will show, the HRC also refers to indivisibility, but this is the only statement that refers specifically to economic, social and cultural rights.

In response to this statement, Syria led 57 states in a counterstatement on ‘the so-called notions of “sexual orientation” and “gender identity”’.<sup>131</sup> The counterstatement affirms that ‘those two notions are not and should not be linked to existing international human rights instruments.’ The statement urges ‘all Member States, the United Nations system, and non-governmental organisations to continue to devote special attention and resources to protect the family as “the natural and fundamental group unit of

<sup>130</sup> Available at: <http://arc-international.net/global-advocacy/sogi-statements/2008-joint-statement/>. Albania, Andorra, Argentina, Armenia, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Cape Verde, Central African Republic, Chile, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea-Bissau, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Montenegro, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Poland, Portugal, Romania, San Marino, Sao Tome and Principe, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Timor-Leste, United Kingdom, Uruguay, and Venezuela.

<sup>131</sup> <http://arc-international.net/global-advocacy/sogi-statements/syrian-statement/> Afghanistan, Algeria, Bahrain, Bangladesh, Benin, Brunei Darussalam, Cameroon, Chad, Comoros, Cote D’Ivoire, Democratic People’s Republic of Korea, Djibouti, Egypt, Eritrea, Ethiopia, Fiji, Gambia, Guinea, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lebanon, Libyan Arab Jamahiriya, Malawi, Malaysia, Maldives, Mali, Mauritania, Morocco, Niger, Nigeria, Oman, Pakistan, Qatar, Rwanda, Saudi Arabia, Senegal, Sierra Leone, St. Lucia, Solomon Islands, Somalia, Sudan, Swaziland, Syria, Tajikistan, Togo, Tunisia, Turkmenistan, Uganda, United Arab Emirates, United Republic of Tanzania, Uzbekistan, Yemen, and Zimbabwe.

society” in accordance with article 16 of the Universal Declaration of Human Rights.’ At the same time, the statement suggests that focusing on the rights of LGBT people constitutes a form of ‘positive discrimination on the expense of others’ rights and thus run in contradiction with the principles of non-discrimination and equality.’

These contrasting statements make clear that SOGI rights are deeply contested within the UNGA. Nevertheless, it has been argued that a consensus on SOGI issues is emerging at the UN.<sup>132</sup> The consensus is relatively narrow, namely that grave violations of human rights – such as the use of the death penalty, murder, and torture or inhuman and degrading treatment – against LGBT people should be confronted.<sup>133</sup> The core of the consensus is a condemnation of bodily harm against LGBT people. This shows in the fact that the only UNGA resolutions where sexual orientation is mentioned concern ‘extrajudicial, summary or arbitrary executions’.<sup>134</sup>

In Baisley’s account,<sup>135</sup> a condemnation of discrimination of LGBT people is also part of the emergent international human rights norms on SOGI, which she describes as follows:

‘1) the international human rights regime’s norms of universality, non-discrimination, and equality apply even to SOGI issues; (2) decriminalizing homosexuality and addressing the most grave human rights violations (e.g., use of the death penalty), should be priorities; (3) prohibitions against violence and discrimination based on sexual orientation and gender have a basis in international law; and (4) the international community has an obligation to respond to such violence and discrimination.’

Clearly, however, non-discrimination of LGBT people does not extend to all terrains – issues like same-sex marriage and same-sex adoption remain highly contested. One can wonder how far non-discrimination is really part of an emerging consensus on SOGI rights.

### **b) The rights of migrants**

In the period between 2009 and 2015 the UN GA, following reports of SOCHUM, has adopted two main lines of thematic resolutions regarding the rights of migrants: one on the ‘protection of migrants’ and one regarding ‘violence against women migrant workers’.<sup>136</sup> During this period the UN GA adopted the ‘protection of migrants’ resolutions each time without vote.<sup>137</sup> These draft resolutions are not sponsored

<sup>132</sup> Baisley, E., ‘Reaching the tipping point?: Emerging international human rights norms pertaining to sexual orientation and gender identity’, *Human Rights Quarterly* (2016) 38(1): 134-163.

<sup>133</sup> Ibid, p. 154-155.

<sup>134</sup> UN GA resolution 65/208. Extrajudicial, summary or arbitrary executions (2010); Un GA Resolution 67/168. Extrajudicial, summary or arbitrary executions (2012); UN GA 69/182. Extrajudicial, summary or arbitrary executions (2014).

<sup>135</sup> Baisley, p. 161.

<sup>136</sup> Besides these two main lines of Resolutions, is also Resolution adopted by the General Assembly on 3 October 2013, 68/4, Declaration of the High-level Dialogue on International Migration and Development; and Resolution adopted by the General Assembly on 18 December 2014, 69/187, Migrant children and adolescents.

<sup>137</sup> As will be discussed below, in section D.6, this is also the case for most of the HRC resolutions on the rights of migrants.

by the EU, but in the past years the EU always joined the consensus.<sup>138</sup> FRAME Deliverable 5.1 explained that: ‘The EU’s objective to promote the rights of migrants and refugees has been pursued largely outside of the UNGA and the HRC . . . there appears to be overall no consistent, strong engagement with the UN on this issue . . .’.<sup>139</sup> In what follows the resolutions on the protection of migrants will be discussed,<sup>140</sup> in light of the question what they reveal about the conceptualization of human rights.

These resolutions promote a rights-based approach to migration. They call on States to promote and effectively protect the human rights of migrants, regardless of their migration status. Several of the often occurring violations of the rights of migrants are pointed out in particular, such as discrimination against migrants; arbitrary arrest and detention of migrants; and trafficking and smuggling of migrants. In very careful terms, not committing the States to much, the Resolutions call upon ‘States that have not done so to consider signing and ratifying or acceding to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families’ (the ICRMW).<sup>141</sup>

From a conceptual perspective, several aspects stand out. In the first place, in line with the ICRMW, which will be discussed further below in D.6, these UN GA Resolutions do not distinguish between ‘legal’ and ‘illegal’ immigrants. On the contrary, they repeat several times that migrants’ rights should be ensured regardless of their migration status. The label of ‘illegal’ immigrants is deeply disputed in the media, scholarship and by human rights advocates. Briefly put, the argument is that people cannot be illegal and that this language is stigmatizing and encouraging human rights abuses against migrants.<sup>142</sup> The Resolutions do not take a stance on terminology (thereby avoiding hot water), but at least they do not lend support that migrants can be illegal. Moreover, in the preambles concern is expressed at ‘measures which, including in the context of policies aimed at reducing irregular migration, treat irregular migration as a criminal rather than an administrative offence, where the effect of doing so is to deny migrants the full enjoyment of their human rights and fundamental freedoms’.

Secondly, the term indivisibility is not mentioned in these Resolutions, nor is an indivisibility approach really evident. They mainly focus on the civil and political rights of migrants. As regards economic, social and cultural rights of migrants, what is recognized is migrant children’s access to education,<sup>143</sup> and several

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<sup>138</sup> See, e.g., the EU’s Explanation of Position as regards the 2010 Resolution on the protection on the rights of migrants: [http://eu-un.europa.eu/articles/en/article\\_10403\\_en.htm](http://eu-un.europa.eu/articles/en/article_10403_en.htm).

<sup>139</sup> FRAME Deliverable 5.1, p. 93, available at: <http://www.fp7-frame.eu/wp-content/materiale/reports/13-Deliverable-5.1.pdf>.

<sup>140</sup> Resolution adopted by the General Assembly on 18 December 2009, 64/166. Protection of migrants; Resolution adopted by the General Assembly on 21 December 2010, 65/212. Protection of migrants; Resolution adopted by the General Assembly on 19 December 2011, 66/172. Protection of migrants; Resolution adopted by the General Assembly on 18 December 2013, 68/179. Protection of migrants; Resolution adopted by the General Assembly on 18 December 2014, 69/167. Protection of migrants.

<sup>141</sup> This is a recurrent phrase, see ,e.g. Resolution 69/167 (2014), para. 3(e).

<sup>142</sup> See, e.g., Patrick A. Taran, ‘The need for a rights-based approach to migration in the age of globalization, in: *Migration and Human Rights: The United Nations Convention on Migrant Workers’ Rights* (Ryzard Cholewinski, Paul de Guchteneire and Antoine Pécoud eds.), 2009, p. 157: ‘Social stigmatization and outright violence is encouraged by the language of ‘illegality’ and by military terms – as if ‘illegal migrants’ were an enemy in war-like confrontation.’

<sup>143</sup> See ,e.g. Resolution 69/167 (2014), para. 5(h).

references are made to labor rights.<sup>144</sup> Other social and economic rights are hardly mentioned, there are no references to the right to health for example (apart from a reference to health and safety at work).

The first two points concerned concepts that are conspicuous in their absence from the Resolutions, namely illegality and indivisibility. What appears frequently in the text of the Resolutions, however, are references to the 'vulnerability' of migrants. Elsewhere in the FRAME project, vulnerability is analyzed more in depth as a human rights law concept in itself.<sup>145</sup> References to the vulnerability of migrants appear both in the preambulatory and operative clauses. Taking Resolution 69/167 on the protection of migrants of 2014 as an example, these are the mentions of vulnerability:

- 'avoiding approaches that might aggravate their vulnerability'
- 'migrants become more vulnerable to, inter alia, kidnapping, extortion, forced labour, sexual exploitation, physical assault, debt servitude and abandonment'
- 'growing number of migrants . . . who place themselves in a vulnerable situation by attempting to cross international borders without the required travel documents'
- 'Recognizes the particular vulnerability of migrants in transit situations'
- 'assist and support migrants stranded in vulnerable situations'
- '*Emphasizes* the importance of protecting persons in vulnerable situations, and in this regard [and then 10 sub-points are made]'
- 'Calls upon States to protect the human rights of migrant children, given their vulnerability, particularly unaccompanied migrant children'
- 'Urges States to ensure that repatriation mechanisms allow for the identification and special protection of persons in vulnerable situations, including unaccompanied children and persons with disabilities'.

This shows that allusions to the vulnerability of migrants are pervasive in the text. Several of these mentions imply that migrants are rendered vulnerable in certain situations (migrants in transit; migrants without proper papers) or migrants are vulnerable to certain human rights abuses such as kidnapping and forced labor. It is submitted that the perambulatory clause that refers to the States' concern about the 'growing number of migrants . . . who place themselves in a vulnerable situation by attempting to cross international borders without the required travel documents' is more problematic. Saying that migrants place themselves in a vulnerable situation when they attempt to cross borders without travel documents, appears to put the blame on them. It sounds like it is their individual fault. A vulnerability analysis, it has

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<sup>144</sup> Resolutions request States 'Requests all States, in conformity with national legislation and applicable international legal instruments to which they are party, to enforce labour law effectively, including by addressing violations of such law, with regard to migrant workers' labour relations and working conditions, inter alia, those related to their remuneration and conditions of health, safety at work and the right to freedom of association/ See, e.g., Resolution 69/167 (2014), para. 4(k).

<sup>145</sup> FRAME Deliverable 12.2, available at: <http://www.fp7-frame.eu/wp-content/uploads/2015/08/FRAME-Deliverable-12.2-Submitted-30-July-2015.pdf>

been argued, should consider what *renders* people vulnerable.<sup>146</sup> There is no mention in the text of what drives people to attempt to cross borders without travel documents. Actually there is hardly any analysis or recognition at all of the causes of migration, apart from a few allusions to the financial and economic crisis, the globalized economy, and – since 2013 – natural disasters.

From the list above, it is not entirely clear whether migrants are considered vulnerable as such. Most of the quotes do not lend support to this idea, as they mainly refer to migrants in vulnerable situations. Migrant children, however, especially unaccompanied migrant children, appear to be considered inherently vulnerable.

This brings us to the next point, which is that these Resolutions mention children and migrant women particularly, especially in the 5<sup>th</sup> clause which concerns the protection of persons in vulnerable situations. As regards children migrants, the principle of the best interest of the child is mentioned several times. In relation to women, the Resolutions encourage states to ‘develop international migration policies and programmes that include a gender perspective, in order to adopt the necessary measures to better protect women and girls against dangers and abuse during migration’<sup>147</sup>. Since 2013 the Resolutions also encourage States to ‘implement gender-sensitive policies and programmes for women migrant workers’.<sup>148</sup> The need to include a gender perspective on migration is also recognized and put into action in the already mentioned line of Resolutions on ‘violence against women migrant workers’.<sup>149</sup> These Resolutions state in their preamble that the ‘feminization of migration requires greater gender sensitivity in all policies and efforts related to the subject of international migration’.<sup>150</sup>

To finish this analysis of what the UN GA resolutions about the protection of migrants reveal about the conceptualization of human rights, it should be mentioned that they do not contain any references to democracy and rule of law. Arguably they do refer to elements of the rule of law, as when they call on states to respect international law, and to enforce domestic law (in this case labor law) effectively.

### *c) Promotion of a democratic and equitable international order*

The concept of democracy has been critiqued as a Western invention and democracy promotion has been derided as a form of Western domination. Charlesworth argues that: ‘The critique of democracy as a Western concept has [...] influenced the willingness of the United Nations to develop a substantive notion

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<sup>146</sup> See Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: the Promise of an Emerging Concept in European Human Rights Convention Law’ [2013] 11 I\*CON 1056.

<sup>147</sup> See, e.g. Resolution 69/167 (2014), para. 5(f).

<sup>148</sup> See, e.g. Resolution 68/179 (2013), para. 5(e).

<sup>149</sup> E.g., Resolution adopted by the General Assembly on 18 December 2013 68/137, Violence against women migrant workers.

<sup>150</sup> *ibid*, preamble.

of democracy. The approach has been to endorse democracy as a principle, but to remain vague about its content and meaning.<sup>151</sup>

Charlesworth writes that, within the UN, the concept of democracy has primarily been elaborated by the former Commission on Human Rights – now the Human Rights Council.<sup>152</sup> The former Commission adopted a series of resolutions which illustrated North-South divergence on the concept of democracy.<sup>153</sup> Resolutions backed by Northern states emphasised free and fair elections as an essential feature of democracy.<sup>154</sup> In response, another strand of resolutions promoted a ‘democratic and equitable international order’.<sup>155</sup> This topic has not remained confined to the Commission/the HRC.

Every year since 2001, SOCHUM has been adopting draft resolutions entitled ‘promotion of a democratic and equitable international order’, including the years covered by the present report (apart from 2015). Structure-wise, the resolutions remained identical over the course of six years. After recalling the importance of the numerous human rights instruments, an enumeration follows of rights and responsibilities that are crucial for the successful promotion of a democratic and equitable international order. Specific emphasis is put on the rights to:

- self-determination
- permanent sovereignty over natural wealth and resources
- development
- peace
- an international economic order based on equal participation in the decision-making process, interdependence, mutual interest, solidarity and cooperation among all states
- International solidarity, as a right of peoples and individuals;
- equitable participation of all, without any discrimination, in domestic and global decision-making

Significantly, the resolutions do not refer to free elections as a component of democracy. Instead, they refer to principles and concepts that are favoured by countries from the Global South, such as solidarity; self-determination; and permanent sovereignty over natural wealth and resources.<sup>156</sup> These resolutions also emphasise in the Preamble that ‘democracy is not only a political concept, but that it also has economic and social dimensions’.<sup>157</sup>

Substantively, the resolutions from 2009 to 2015 have not changed much. One notable development is the inclusion of references to the appointment of an Independent Expert (IE), Mr. Alfred-Maurice de Zayas, who is mandated to report to and advise the HRC on matters relating to the promotion of the

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<sup>151</sup> Charlesworth, H 2015, 'Democracy and International Law', in (ed.), *Recueil des Cours 371. Collected Courses of the Hague Academy of International Law 2014*, Brill, Leiden, pp. 43-152 at 98.

<sup>152</sup> Charlesworth, 100.

<sup>153</sup> Charlesworth, 100.

<sup>154</sup> E.g. UN doc. E/CN.4/RES/1999/57, 27 April 1999.

<sup>155</sup> E.g. UN doc. E/CN.4/RES/2001/65

<sup>156</sup> Charlesworth, 100.

<sup>157</sup> See e.g. Resolution adopted by the General Assembly on 18 December 2014 69/178, Preamble.

democratic and equitable international order.<sup>158</sup> Res 66/159 calls member states to provide the IE with the resources, both in terms of financing and information, required for ‘the effective fulfilment’ of his mandate.<sup>159</sup> Moreover, it also requests the IE to assess the implementation of the resolution itself.<sup>160</sup> Successive resolutions do not contain innovative information relating to the IE or the fulfilment of his mandate. Resolution 69/178, however, does refer to the IE report highlighting the ‘implementation of the right of self-determination [as being] crucial to the international order’.<sup>161</sup>

In addition, this resolution points to the importance of the post-2015 development agenda for the attainment of a democratic and equitable order.<sup>162</sup> In a similar context, it reaffirms the need for and urgency involved with the establishment of ‘a new international economic order based on equity, sovereign equality, interdependence, common interest and cooperation among all States [...]’.<sup>163</sup> What becomes clear is that the UNGA increasingly stresses the interrelatedness of the democratic and equitable international order with all other dimensions of the human rights framework.<sup>164</sup> That link and its central role is also evidenced in Res 68/175 where, in comparison to previous resolutions, one finds the following addition: ‘[...] *democracy includes respect for all human rights and fundamental freedoms* and [...] reaffirms the need for universal adherence to and implementation of the rule of law at both the national and international levels’.<sup>165</sup>

Thus democracy and human rights are strongly linked in this strand of resolutions – in fact, they hold that democracy includes respect for human rights – while the rule of law is acknowledged to be related, but the link to this concept appears somewhat more tenuous. What is most striking about this strand of resolutions, however, is not so much the link between democracy and human rights but the elements of democracy and human rights that it emphasises: they are social, economic, and collective in outlook.

Not surprisingly, these draft resolutions are consistently supported by states from the Global South and rejected by Western states. The 2014 draft resolution on the promotion of a democratic and equitable international order, for example, was adopted by a vote of 129 in favour to 53 against, with 6 abstentions (Armenia, Chile, Costa Rica, Mexico, Peru, Samoa). Voting against were all the EU members states, the U.S., Canada, Israel, Australia, Japan and others.<sup>166</sup> Interestingly, some Members of the European

<sup>158</sup> See UNHRC Res 18/6 (DATE) UN Doc A/HRC/RES/18/6, point 14 for a detailed enumeration of the Independent Expert’s mandate. The reports of the IE are available here:

<http://www.ohchr.org/EN/Issues/IntOrder/Pages/IEInternationalorderIndex.aspx>.

<sup>159</sup> UNGA Res 66/159 (26 March 2012) UN Doc A/RES/66/159, points 12-14.

<sup>160</sup> *ibid* point 18.

<sup>161</sup> UNGA Res 69/178 (28 January 2015) UN Doc A/RES/69/178, point 3.

<sup>162</sup> *ibid* 3.

<sup>163</sup> *ibid* 5. The words ‘a new’ is the nuance that has been added in comparison to earlier resolutions.

<sup>164</sup> One must note, however, that all the resolutions ranging from 2009-2015 also include a direct reference hereto: ‘[...] a democratic and equitable international order fosters the full realization of all human rights for all’. See eg UNGA Res 64/157 (8 March 2010) UN Doc A/RES/64/157, point 2 and UNGA Res 67/175 (28 March 2013) UN Doc A/RES/67/175, point 2.

<sup>165</sup> UNGA Res 68/175 (23 January 2014) UN Doc A/RES/68/175, 4 (emphasis added).

<sup>166</sup> The full list of no-voters is: Albania, Andorra, Australia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Micronesia (Federated States of), Monaco, Montenegro, Netherlands, New Zealand, Norway, Palau, Poland, Portugal, Republic

Parliament deplore the voting behaviour of the EU member states on this topic, noting that it is an issue of critical importance for the Global South.<sup>167</sup>

### 3. Conclusions

Comparing these three focus areas – SOGI rights, the rights of migrants and ‘the Promotion of a Democratic and Equitable International Order’ – shows a number of things.

In terms of political process they let to three different results: in the case of SOGI rights no resolutions have been adopted yet, the Promotion of a Democratic and Equitable International Order has led to divided votes, and the resolutions on the rights of migrants have been adopted without vote. Different as these processes have been, this is not enough basis to conclude that the level of conceptual contestation differs greatly among these areas. It is tempting to assume that, conceptually speaking, SOGI rights are more contested than the rights of migrants. The apparent consensus on the protection of migrants in the UNGA, however, masks deep difficulties in putting these rights into practice.

Interesting to note further is that the resolutions on the protection of migrants are quite narrow in the sense that they do not approach human rights from an indivisibility angle. The December 2008 statement on SOGI rights shows support for social and economic rights, and the resolutions on the Promotion of a Democratic and Equitable International Order go even further in the sense that they prioritize elements of democracy and human rights that are social, economic, and collective in outlook.

## D. Human Rights Council

### 1. Introduction

The HRC was established in 2006 as a subsidiary body of the UNGA<sup>168</sup> and replaced its predecessor, the UN Commission on Human Rights (CHR) founded by UN Economic and Social Council (ECOSOC). The former Commission played an undeniable role in the history of international human rights protection. To acknowledge its importance it is enough to refer to the sixty-year-long history of the body that began with the chairpersonship of Eleanor Roosevelt in 1946 and with the drafting of the Universal Declaration of Human Rights (1948). At the same time, the body was often criticised by scholars and NGO representatives for various reasons: regionalisation, membership of persistent human rights violator States, the lack of

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of Korea, Republic of Moldova, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America.

<sup>167</sup> Motion for a Resolution on the EU’s priorities for the UN Human Rights Council sessions of 2016 (2015/3035(RSP)) (available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FTEXT%2BMOTION%2BB8-2016-0063%2B0%2BDOC%2BXML%2BV0%2F%2FEN&language=EN>): ‘Deplores the voting behaviour of EU Member States on a number of issues of critical importance for the Global South and where EU Member States abstained or for the most part voted down resolutions, which were ultimately adopted, such as on the repatriation of funds of illicit origin, private military and security companies, armed drones, foreign debt, the right to education, human rights and international solidarity, unilateral coercive measures, mercenaries, the right to peace, human rights of peasants, racism, people of African descent, the right to development and the promotion of a democratic and equitable world order; regrets also the continued division of the EU Member States at the UN HRC on a number of landmark thematic resolutions including on armed drones, on the right to peace, on the fight against racism and on the right to development’ (paragraph 11).

<sup>168</sup> UNGA Res 60/251 ‘Human Rights Council’ (15 March 2006) UN Doc A/RES/60/251.

political will to hold influential human rights violators accountable, and various dysfunctions of membership (States gaining membership to fence off criticism or members criticising opponents and defending themselves and allies).<sup>169</sup> Secretary-General Ban Ki-Moon underlined these dysfunctions in a 2005 report: the functioning of the Commission ‘has cast a shadow on the reputation of the United Nations system as a whole’.<sup>170</sup> Criticism led to the consensus that because of lack of credibility,<sup>171</sup> the Commission ‘should disappear’.<sup>172</sup> The way was thus paved to the creation of the Human Rights Council.

The new Council’s authority stems from the UN Charter itself, which gives it strong legitimacy. It reviews the functioning of its own institutions and reports to the UNGA. The former Commission, however, was abolished without the amendment of Article 68 of the UN Charter,<sup>173</sup> which can infringe the rule of law as well as undermine the legitimacy of the new body.<sup>174</sup>

The Council’s task is to become the primary UN forum for discussing human rights, for human rights mainstreaming, setting standards, promoting development, drafting legislation, and for monitoring implementation and intervening if needed.<sup>175</sup> The Council’s essential role in the UN human rights machinery makes its functioning particularly interesting as it should influence both the doctrinal development in jurisprudence and the activity of other UN human rights bodies, including such significant treaty bodies as the Committee on Economic, Social and Cultural Rights or the Human Rights Committee.

## 2. The organisation of the Council

The HRC is an intergovernmental body and has 47 members elected by the UN General Assembly for three-year terms with the possibility of ‘two consequent re-elections’.<sup>176</sup> In the course of electing members, the geographical distribution of States is taken into account.<sup>177</sup> This membership system is different from membership in other human rights treaty bodies (*e.g.* the Committee on Economic, Social and Cultural Rights or the Human Rights Committee) because the members of the Council are government representatives, *i.e.* politicians rather than human rights experts appointed by the governments. Just like in the case of the former Commission, it remains highly problematic that the criteria for assigning membership to the HRC does not depend on the human rights record of the State, since the founding

<sup>169</sup> Eg Paul G Laurenerve, ‘To Preserve and Build on its Achievements and to Redress its Shortcomings: The Journey from the Commission on Human Rights to the Human Rights Council’ (2007) 29 Hum Rts Q 307, 308.

<sup>170</sup> UNGA ‘Report of the Secretary-General – In Larger Freedom: Towards Development, Security and Human Rights for All’ (21 March 2005) UN Doc A/59/2005, para 182.

<sup>171</sup> Olivier De Frouville, ‘Building a Universal System for the Protection of Human Rights: The Way Forward’ in M. Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011) 242.

<sup>172</sup> *ibid.*

<sup>173</sup> UN Charter, art 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’).

<sup>174</sup> De Frouville (n 171) 246.

<sup>175</sup> FRAME Deliverable 5.1, p. 51.

<sup>176</sup> UNGA Res 60/251 (15 March 2006) UN Doc A/RES/60/251 (n 168) s 7.

<sup>177</sup> The geographical distribution of the membership is the following: Group of African states, thirteen members; Group of Asian states, thirteen members; Group of Eastern European states, six members; Group of Latin American and Caribbean states, eight members; and Group of Western European and other states, seven members.

resolution only mentions that the candidate State's commitment to human rights protection 'shall be taken into account'.<sup>178</sup> The only rule limiting membership in this respect is the possibility of suspension of membership in the case of 'gross and systematic'<sup>179</sup> human rights violations, as it happened in 2011 in the case of Libya under Qaddafi. The HRC resolutions 'are usually adopted without a vote or with a vote if there are diverging positions within the HRC'.<sup>180</sup> This process is very problematic from the viewpoint of democratic principles (e.g. accountability, transparency): it considerably weakens the democratic legitimacy of the Council, as well as the legitimacy of its resolutions. It is especially true for those resolutions that were adopted without a vote.

The Council has, however, an expert body, the Advisory Committee, which is a think-tank forum with 18 experts elected by the HRC for a period of three years (with the possibility of one-time re-election).<sup>181</sup> When electing members a geographic balance is taken into account. The functioning of the Advisory Committee, which replaced the former Sub-commission on the Promotion and Protection of Human Rights, is limited to the thematic issues determined by the Council<sup>182</sup> and, as the literature points out, there have been some negative changes in comparison with the Sub-commission, most importantly, the Committee lost some effective tools of the former Sub-Commission like the ability to initiate studies or appoint special rapporteurs or working groups.<sup>183</sup>

It is thus important that the Council adopted a resolution in April 2015 establishing a forum for issues related to human rights, democracy and the rule of law,<sup>184</sup> its first session will be held in 2016. The task of the Forum is to 'identify and analyse best practices, challenges and opportunities for States in their efforts to secure respect for [the three notions]'.<sup>185</sup>

### 3. From Commission to Council

The primary standard of scrutiny by academia in the first years of the functioning of the Council was a direct comparison with the Commission. On the one hand it is questionable how the Council could be more effective than the formal Commission since most of the instruments of the new Council are very similar to the former Commission's tools:<sup>186</sup> the system of special procedures, the complaint procedure, drafting international human rights legislation.<sup>187</sup> Within the framework of special procedures, a heritage from the Commission, independent experts examine human rights issues. The experts' mandate can be

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<sup>178</sup> Nazila Ghanea, 'From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Sideways?' (2006) 55 ICLQ 675, 700.

<sup>179</sup> UNGA Res 60/251 (15 March 2006) UN Doc A/RES/60/251 (n 168) s 3.

<sup>180</sup> FRAME Deliverable 5.1, p. 34.

<sup>181</sup> *ibid* 52.

<sup>182</sup> Bertrand Ramcharan, *The UN Human Rights Council* (Routledge 2011) 110.

<sup>183</sup> De Frouville (n 171) 245.

<sup>184</sup> UNHRC Res 28/14 'Human Rights, Democracy and the Rule of Law' (9 April 2015) UN Doc A/HRC/RES/28/14.

<sup>185</sup> *ibid* pt 1.

<sup>186</sup> Ramcharan (n 182) 98.

<sup>187</sup> See eg Ingrid Nifoi-Sutton, 'The System of the UN Special Procedures: Some Proposals for Change' in M. Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011).

thematic or country specific (within the territory of a certain State).<sup>188</sup> The HRC complaint procedure deals with consistent patterns of gross and reliably attested violations of human rights – this procedure does not apply to individual violations and is confidential.<sup>189</sup> Just like the Commission, the Council continues to draft human rights documents, and it has already some important results, *e.g.* the drafting of the Disability Convention.

On the other hand the Council has an important new tool, the Universal Period Reports (UPR),<sup>190</sup> described as the ‘flagship’ of the Council.<sup>191</sup> With the UPR the human rights records of each State is regularly reviewed. In the framework of the UPR every UN Member State (including the Council members) has to adopt every four years a twenty-page report on its own efforts in the field of human rights protection, and the reports lead to an interactive dialogue in which other States may make recommendations. The aim of the creation of this tool was to avoid former dysfunctions with the help of a credible and transparent new peer review mechanism.<sup>192</sup> (For more on the UPR, see the following subchapter.)

The participation of independent human rights NGOs in the work of international governmental organisations (IGOs) certainly contributes to the transparent functioning and democratic control of the latter. NGOs that have consultative status with ECOSOC can take part in the functioning of the HRC as observers. The literature on the HRC, however, agrees in that the overall situation for NGOs is worse than it was in the time of the Commission: NGOs are sometimes simply left out from negotiations.<sup>193</sup> Since the UPR should be based on objective and reliable information and the main sources of such information are independent NGOs, this practice is highly problematic and lamentable. The founding resolution itself ‘acknowledges’ that NGOs play an important role at the national, regional and international levels, in the promotion and protection of human rights.<sup>194</sup> Due to the lack of political interaction with NGOs, their representatives complain of marginalisation.<sup>195</sup> The Council draws the attention of States to the fact that ‘the empowerment and involvement of civil society in the practice of democracy is essential to its good functioning’.<sup>196</sup> However, this requirement should also apply to the functioning of international governmental organisations, including the Council itself. NGO involvement in the activity of IGOs is an effective tool to control the functioning of the latter, to ensure the international rule of law and to get information on the human rights situation from sources independent from governments.

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<sup>188</sup> *ibid.*

<sup>189</sup> FRAME Deliverable 5.1, p. 53.

<sup>190</sup> UNGA Res 60/251 (15 March 2006) UN Doc A/RES/60/251 (n 168).

<sup>191</sup> De Frouville (n 171) 250.

<sup>192</sup> Ghanea (n 178) 699.

<sup>193</sup> De Frouville (n 171) 249.

<sup>194</sup> UNGA Res 60/251 (15 March 2006) UN Doc A/RES/60/251 (n 168) .

<sup>195</sup> Ramcharan (n 182) 124.

<sup>196</sup> UNHRC ‘Study on Common Challenges Facing States in their Efforts to Secure Democracy and the Rule of Law from a Human Rights Perspective – Report of the United Nations High Commissioner for Human Rights’ (17 December 2012) UN Doc A/HRC/22/29, 4.11.

#### 4. Universal Periodic Review and the concept of universality

The Universal Periodic Review has become the high profile process for reviewing human rights compliance within Member States.<sup>197</sup> The UNGA resolution that created the Council defined some key elements of the process.<sup>198</sup> It should ensure ‘universality of coverage and equal treatment’ of all States, based on cooperation and ‘interactive dialogue’, through the ‘full involvement of the country concerned’.<sup>199</sup> These are important goals to ensure rule of law requirements in the functioning of the new body. The Council later adopted more detailed rules on the UPR that emphasise and specify universality.<sup>200</sup> We will proceed by briefly reviewing the various aspects and issues emerging in relation to the idea of universality of human rights.

The immediate benefit of the UPR mechanism is to have a less politically motivated selection of the States examined, even if the process itself remains largely political, as it is set in an intergovernmental setting. The primary concern with the UPR is that politicisation can lead to inconsistent assessment, derived from using different standards as well as applied differently among specific States. In this respect, the attention paid to the UPR is not so much a welcome phenomenon, but a danger for human rights, as it can override treaty mechanisms based more directly on input from independent experts, as opposed to state representatives. The UNGA hints on this problem stating at the outset that the UPR ‘shall complement and not duplicate the work of treaty bodies’.<sup>201</sup>

Olivier de Frouville argues that if one compares the UPR reports with the documents of the Human Rights Committee, the political nature of the UPR process becomes apparent.<sup>202</sup> This might not be a bad thing in itself, but this makes the process inherently biased. As a result, the UPR fails to live up to its obligations to conduct an objective and transparent assessment (as stated in HRC Resolution 5/1) as well as to the expectations surrounding the creation of the HRC. The resulting situation might also appear as worse than without the UPR as: ‘States can now play the UPR against the treaty bodies and the special procedures.’<sup>203</sup> This is because, compared to the Commission, ‘the system’s structure remains essentially the same’,<sup>204</sup> which is in turn a result of a lack of ‘vision’ in 2006, the process having been led rather by a ‘slogan’ (*i.e.* the term ‘human rights council’ implying that the transition to the Council will somehow solve the politicisation issue).<sup>205</sup> According to this reading, the commitment of the UNGA to eliminate ‘double standards and politicization’ has failed.<sup>206</sup>

Others argue that a fair review of the work of the HRC, and of the UPR in particular, should start with

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<sup>197</sup> See FRAME Deliverable 4.2, ch VI and Deliverable 5.1, chapter V, section B, for a more detailed overview of the UPR mechanism and the EU.

<sup>198</sup> UNGA Res 60/251 (15 March 2006) UN Doc A/RES/60/251 (n 168) para 5(e).

<sup>199</sup> *ibid.*

<sup>200</sup> UNHRC Res 5/1 ‘Institution-building of the United Nations Human Rights Council’ (18 June 2007) UN Doc A/HRC/RES/5/1; See also UNHRC ‘Review of the Work and Functioning of the Human Rights Council’ (12 April 2011) UN Doc A/HRC/16/21.

<sup>201</sup> UNGA Res 60/251 (15 March 2006) UN Doc A/RES/60/251 (n 168) para 5(e).

<sup>202</sup> De Frouville (n 171) 255.

<sup>203</sup> *ibid.*

<sup>204</sup> *ibid* 257.

<sup>205</sup> *ibid* 264.

<sup>206</sup> UNGA Res 60/251 (15 March 2006) UN Doc A/RES/60/251 (n 168).

finding a reasonable standard against which we can measure performance. Rather than comparing the UPR to a remote ideal of a mechanism that is both independent and powerful, it should be taken for what it is: a peer review mechanism. De la Vega and Lewis argue that ‘the success of a peer review process does not lie in its ability to win compliance through sanctions and punishment’, unlike many other international procedures following legal criteria. Instead, the authors identify three goals and argue that these should be primary benchmarks for evaluation:

‘(1) create ideas that can be used by Members to improve their national practices; (2) provide an environment for sharing ideas and practices so that Members can see how other States solve or handle difficulties; and (3) offer assistance when Member States are struggling to bring their policies into conformity with the desired norms’.<sup>207</sup>

In a way, by the very fact of having all States in due order reviewed by their equals, the ritual of UPR sends the message of universality. Walter Kälin, referring to para. 5(e) of UNGA Resolution 60/251 (creating the HRC), reckons that it is ‘hard to imagine stronger language to express the notion that States’ human rights obligations are universal’.<sup>208</sup>

Universality translates not only into the periodic, equal and universal geographic coverage.<sup>209</sup> It is also about the substance. The review is based on the UN Charter, the UDHR and other instruments, pledges and commitments applicable to the State in question. The HRC starts the list of principles for the UPR with the goal to promote ‘the universality, interdependence, indivisibility and interrelatedness of all human rights’.<sup>210</sup>

The review thus potentially encompasses all human rights. Furthermore, recommendations often relate to ratification of international human rights instruments not yet accepted by States. (Around 20% of recommendations concern the ratification of human rights instruments, making this topic the No. 1 type of UPR recommendation).<sup>211</sup> Also, State behaviour seems, at times, to prove that universality is applied even where the relevant human rights documents are not ratified, and a State under review still accepts the recommendation.<sup>212</sup>

<sup>207</sup> Constance de la Vega and Tamara N Lewis, ‘Peer Review in the Mix: How the UPR Transforms Human Rights Discourse’ in M. Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011) 366. The authors compare the UPR to other peer-review mechanisms such as those the OECD or the EU maintain (through the Open Method of Cooperation).

<sup>208</sup> Walter Kälin, ‘Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2014) 29.

<sup>209</sup> The only exception could have been Israel whom first refused to participate at the second cycle but, after moving the relevant debate from January to October 2013, decided to cooperate. See UNHRC ‘Report of the President of the Human Rights Council Submitted in Accordance with Council Decision OM/7/1 of 29 January 2013’ (5 June 2013) UN Doc A/HRC/23/CRP.1.

<sup>210</sup> UNHRC Res 5/1 (n 200) annex 1, para 3(a).

<sup>211</sup> See ‘Issue’ under Global Statistics on the UPR Info <<http://www.upr-info.org/database/statistics/>> accessed 24 August 2015. See also de la Vega and Lewis (n 207) 373, for a comparative table illustrating the recommendations with treaty references.

<sup>212</sup> See eg Kälin (n 208) 34.

The most important measure of success is undeniably the actual improvement of the human rights situation in a country. In the case of the UPR this should happen, above all, through the implementation of the recommendation received from other States. According to Walter Kälin, ‘the level of implementation of UPR recommendations is relatively high [...] presumably higher than the implementation of treaty body recommendations’, even though there are dangers in recommendations that are too vague,<sup>213</sup> require minimal action or allow implementation that remains largely symbolic. This can mostly be attributed to the workings of the peer pressure felt by the presence and contribution of high-level officials from other countries.<sup>214</sup>

## 5. Conceptualisation of human rights, democracy and the rule of law

This section will outline how the HRC conceptualises and functionalises the concepts of human rights, democracy and the rule of law. The analysis deals primarily with human rights given its nature as a human rights body, but many important issues regarding the organisational questions and functioning of the HRC are interrelated with the rule of law and with democratic principles. To take an example, the credibility of HRC procedures is interconnected with the issue of international rule of law,<sup>215</sup> and the election of the members of HRC is interrelated with democratic principles. Similarly to legal systems, international law requires non-arbitrariness and the supremacy of law.

What’s more, since the three notions – human rights, democracy and the rule of law – are interrelated,<sup>216</sup> the notions of democracy and the rule of law will inevitably be included in an analysis of human rights issues. The Human Rights Council (and former the Commission)<sup>217</sup> has adopted a number of resolutions that emphasise the interdependence between democracy and human rights, implying that the two notions can mutually reinforce each other.<sup>218</sup> As the UN High Level Declaration on the Rule of Law and the International Rule of Law underlines ‘human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the

<sup>213</sup> Note that de la Vega and Lewis identify progress in this respect through the first cycle, with recommendations becoming more specific. See de la Vega and Lewis (n 207) 371.

<sup>214</sup> Kälin (n 208) 38-39; Roland Chauville, ‘The Universal Periodic Review’s First Cycle: Successes and Failures’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2014) 93-94.

<sup>215</sup> See Simon Chesterman, ‘An International Rule of Law?’ (2008) 56 AJCL 331.

<sup>216</sup> FRAME Deliverable 3.1, p. 2.

<sup>217</sup> UNCHR Res 57 ‘The Promotion of the Right to Democracy’ (1999) UN Doc E/CN.4/RES/1999/57; UNCHR Res 47 ‘Promoting and Consolidating Democracy’ (2000) UN Doc E/CN.4/RES/2000/47; UNCHR Res 41 ‘Continuing Dialogue on Measures to Promote and Consolidate Democracy’ (2001) UN Doc E/CN.4/RES/2001/41; UNCHR Res 46 ‘Further Measures to Promote and Consolidate Democracy’ (2002) UN Doc E/CN.4/RES/2002/46; UNCHR Res 36 ‘Interdependence between Democracy and Human Rights’ (2003) UN Doc E/CN.4/RES/2003/36; UNCHR Res 30 ‘Enhancing the Role of Regional, Subregional and Other Organizations and Arrangements in Promoting and Consolidating Democracy’ (2004) UN Doc E/CN.4/RES/2004/30; UNCHR Res 32 ‘Democracy and the Rule of Law’ (2005) UN Doc E/CN.4/RES/2005/32.

<sup>218</sup> The present overview focuses mainly on resolutions on this topic adopted after the Lisbon Treaty, particularly UNHRC Res 18/15 ‘The Incompatibility between Democracy and Racism’ (14 October 2011) UN Doc A/HRC/RES/18/15; UNHRC Res 19/36 ‘Human Rights, Democracy and the Rule of Law’ (19 April 2012) UN Doc A/HRC/RES/19/36; UNHRC Res 28/14 (9 April 2015) UN Doc A/HRC/RES/28/14 (n 184).

United Nations’.<sup>219</sup> For instance, questions of access to justice, effective remedies or other procedural rights, are inseparable from the issue of the rule of law. Or, if one investigates the concept of representation and the participation of vulnerable groups, one is inevitably drawn to questions concerning the conceptualisation of democracy. The UDHR links human rights to the rule of law and the UN General Assembly underlined in several of its decisions that the rule of law is ‘an essential factor in the protection of human rights’. The same is true for democracy: a deficit in democracy might jeopardise the efficient protection of human rights.<sup>220</sup>

### a) *Formal and/or substantive definitions*

As Deliverable 3.1 presented in more detail,<sup>221</sup> there are not only thick/substantive but also thin/formal understandings of the notions of democracy and the rule of law.<sup>222</sup> In spite of substantive definitions the formal interpretations do not include moral elements (*e.g.* equality or dignity). Consequently, in a strictly formal sense a dictatorship that followed its own created legal rules could be a rule of law, too, *e.g.* a dictatorship which infringes the basis of equality.<sup>223</sup> Democracy has also diverse meanings, and very different political systems identify themselves as democracies. The terms (democracy, democratic) are not only used for liberal democracy but also for majoritarian democracy, Islamic democracy, people’s democracy, democratic centralism and so on. According to the Council ‘there is no single model of democracy and democracy does not belong to any country or region.’<sup>224</sup> Various formal and substantive interpretations of democracy appear in the functioning of the Council, it is enough to think of the fact that China, Cuba, Germany, India, Russia, and the US are all its members. Because of the aforementioned interdependence of the three notions,<sup>225</sup> some interpretations of democracy and the rule of law can foster, while others can weaken international human rights protection, which is based on ‘the inherent dignity and [...] the equal and inalienable rights of all members of the human family’.<sup>226</sup> For example, China rejected many recommendations regarding civic and political rights and at the same time the country accepted a recommendation on the rule of law and on deepening the reform of the judicial system.<sup>227</sup> The rule of law now ranks very high on China’s domestic agenda, *e.g.* the rule of law was the central theme of

<sup>219</sup> UNGA Res 67/1 ‘Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels’ (30 November 2012) UN Doc A/RES/67/1, para 5.

<sup>220</sup> Chesterman (n 215) 345; UNGA Res 61/39 ‘The Rule of Law and National and International Levels’ (4 December 2006) UN Doc A/RES/61/39.

<sup>221</sup> See FRAME Deliverable 3.1; and Chesterman (n 215) 333.

<sup>222</sup> See *eg* Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) 21 PL 467; Nicolas Hachez and Jan Wouters, ‘Promoting the Rule of Law: A Benchmarks Approach’ (2013) Leuven Centre for Global Governance Studies Working paper No 105 <<http://www.fp7-frame.eu/wp-content/materiale/wp-papers/WP105-Hachez-Wouters.pdf>> accessed 31 March 2016.

<sup>223</sup> Hachez and Wouters (n 222) 8.

<sup>224</sup> UNHRC Res 19/36 (19 April 2012) UN Doc A/HRC/RES/19/36 (n 218) 2.

<sup>225</sup> *ibid* (stating that ‘[d]emocracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing’).

<sup>226</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

<sup>227</sup> UNHRC ‘Report of the Human Rights Council on its Eleventh Session’ (16 October 2009) UN Doc A/HRC/11/37, para 522.

the 4th Plenum of the Chinese Communist Party.<sup>228</sup> That is, a State can accept human rights supporting arguments that are based on the rule of law while it can reject arguments that are based on human rights, even if they address the same issue area. Hence, it seems that the trilogy of human rights, democracy and rule of law has a particular European meaning.

*b) A substantive, human rights supporting interpretation of democracy and the rule of law*

One of the main issues is whether the formal or the substantive concept of the rule of law and democracy is used by UNHRC documents. According to some authors, if one uses the notion of international rule of law across cultures and political systems, the commonly accepted interpretation ‘will necessarily be the formal one’<sup>229</sup> – this statement could be also true for the commonly acceptable term of democracy. But on the universal level even the formal concept is already hard to achieve. Although this opinion seems to be applicable in the case of the Council Member States (which represent various political systems),<sup>230</sup> the HRC resolutions stress that the notions are interrelated and specify substantive (moral) elements. Council Resolution 19/36 ‘stresses that democracy includes respect for all human rights and fundamental freedoms’,<sup>231</sup> which means that human rights are a definitive element of democracy. The resolution links human rights to the rule of law: ‘the respect of human rights and the rule of law are essential for the stability of democratic societies’.<sup>232</sup> However, China and Cuba abstained from voting on the resolution. Sometimes Council resolutions show not the common position of States in issues related to human rights, democracy and the rule of law, but only the commonly acceptable position or the most acceptable position by the majority of Member States.

Some definitions of democracy contain moral elements that are basic principles of the international human rights protection. Council resolutions join democracy and the principle of equality by stating, for instance, that ‘human rights, democracy and the rule of law are strengthened when States work to eliminate discrimination [...] and when they strive to ensure equality between men and women in decision-making’,<sup>233</sup> or ‘democracy and racism are incompatible’.<sup>234</sup> One HRC study states that ‘democracy is a political norm predicated upon equality and justice’.<sup>235</sup> These moral interpretations of democracy based on equality obviously support international human rights protection. As Deliverable 3.2 underlined,

<sup>228</sup> Communiqué of the 4th Plenary Session of the 18th Central Committee of CPC <[http://www.china.org.cn/china/fourth\\_plenary\\_session/2014-12/02/content\\_34208801.htm](http://www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm)> accessed 18 March 2016.

<sup>229</sup> Chesterman (n 215) 342.

<sup>230</sup> UNHRC Res 19/36 (19 April 2012) UN Doc A/HRC/RES/19/36 (n 218).

<sup>231</sup> *ibid* 2, pt 1.

<sup>232</sup> *ibid* 3, pt 11.

<sup>233</sup> *ibid* 2, pt 1.

<sup>233</sup> *ibid* 2.

<sup>234</sup> *ibid* 3, pt 13 or see to this topic UNHRC Res 18/15 (14 October 2011) UN Doc A/HRC/RES/18/15 (n 218) pt 4 (on the incompatibility between democracy and racism that underlines the following: ‘the elimination of all forms of discrimination as well as diverse forms of intolerance, the promotion and protection of human rights of indigenous peoples and the respect for ethnic, cultural and religious diversity contribute to strengthening and promoting democracy and political participation’).

<sup>235</sup> UNHRC ‘Common Challenges Facing States’ (n 196) 4.

the principle of equality can underpin all three concepts by placing equal human beings at the centre of the political systems.<sup>236</sup>

With the help of such substantive interpretations, International Organisations (IOs) may influence the democratisation process of Member States.<sup>237</sup> For instance, in 1967, the EU suspended the Greek association agreements, which helped to undermine the Colonel regime.<sup>238</sup> Contemporary scholars often speak of the ‘triangular relationship’ between fundamental rights, democracy and rule of law,<sup>239</sup> implying that the three notions (in their substantive human rights supporting interpretations) function together like ‘the three legs of a stool’<sup>240</sup> (‘democratic rule of law with fundamental rights’).<sup>241</sup>

To sum up, for an international human rights organisation like the HRC it is logical to choose a substantive definition of democracy and the rule of law and define these notions with the help of the basic principles of international human rights protection (*e.g.* equality). It is important to underline that democracy, the rule of law and human rights are only aspirations,<sup>242</sup> and the soft law resolutions of the Council are legally speaking, not binding but commitments encouraging UN Member States to achieve the democratic rule of law with fundamental rights. In spite of the aspirational value of these soft law documents for strengthening a substantive definition of democracy and the rule of law, we are far from a ‘global rule of law’, an emergence of an international regulation ‘that touches individuals directly’.<sup>243</sup>

In the following sections, we explore how the concept of the international rule of law, human rights and democratic principles emerge in the documents and activity of the HRC through the example of migrants and Lesbian Gay Bisexual Transsexual and Intersex (LGBT(I)) individuals.<sup>244</sup>

The selection of case studies does not imply that persons belonging to any of the two groups, or both, need a special legal regime – although in certain cases, they do, see the body of asylum law – nor does it suggest that a truly universal application of ‘generic’ human rights, without discrimination, should offer sufficient protection to LGBT(I) persons and migrants. Either approach can be legitimate, and our goal in the following case studies is to track how arguments about human rights, the rule of international law and democracy (*e.g.* sovereignty arguments) shape the landscape of human rights in the HRC through, above

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<sup>236</sup> See FRAME Deliverable 3.2, p. 25.

<sup>237</sup> Jon C Pevehouse, ‘Democracy from the Outside-In? International Organizations and Democratization’ (2002) 56 *Int’l Org* 515ff.

<sup>238</sup> *ibid* 524.

<sup>239</sup> Sergio Carrera, Elspeth Guild and Nicholas Hernanz, ‘The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU – Towards an EU Copenhagen Mechanism’ (PE 493.031, European Parliament, 2013) <[www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE\\_ET\(2013\)493031\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)493031_EN.pdf)> accessed 11 November 2014.

<sup>240</sup> *ibid* 30.

<sup>241</sup> *ibid*.

<sup>242</sup> Chesterman (n 215) 361.

<sup>243</sup> *ibid* 355-356.

<sup>244</sup> The term LGBT is used at the HRC while the term LGBTI is used by the EU, whereas other organizations, documents use other terms (eg LGBTQI – lesbian, gay, bisexual, transgender, queer, intersexual) to denote persons specified along gender identity and sexual orientation. A more accurate description is, accordingly, SOGI, ‘sexual orientation and gender identity’, the expression used, eg, in the two HRC resolutions on the issue. Following the terminology in the earlier reports of the project, seeking a common ground between UN and EU terminology, we will use the term LGBT(I).

all, the opinions expressed by State representatives.

## 6. Case studies on vulnerable groups

### a) LGBT(I) rights

LGBT(I) rights featured most recently on the HRC agenda. In 2011, the Council adopted Resolution 17/19 on ‘human rights, sexual orientation and gender identity’ with a margin of 4 votes (23 votes for and 19 votes against the resolution with 3 abstentions).<sup>245</sup> A follow-up resolution was adopted in 2014, this time with a margin of 11 votes (25 votes for and 14 votes against with 7 abstentions).<sup>246</sup> The resolutions start off by underlining ‘the universality, interdependence, indivisibility and interrelatedness of human rights’, based on documents ranging from the UDHR, ICCPR and ICESCR to the Vienna Declaration and Programme of Action<sup>247</sup> and the UNGA resolution creating the HRC and the UPR. The direct outcome of the HRC resolution was a report prepared by the UN High Commissioner for Human Rights (UNHCHR) concerning ‘Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’ that also emphasises the universality of human rights and the principle of non-discrimination.<sup>248</sup>

Yet, the very fact of the division between countries within the Council and elsewhere might indicate that this universality itself is partial, as in an ambition not universally shared within the HRC. This phenomenon speaks to the critiques that point out the continuing politicisation after the creation of the Council (see earlier). So while the UPR process itself might contribute to a general sense that human rights are universal, in this sense LGBT(I) rights seem to be at the edge of this consensus, even if gravitating to the inside. The division that still exists follows a more or less clear geographic pattern, with the EU and the Americas – and some other countries like South Africa, Australia, Japan and Korea, Thailand – on the supporting side while, most prominently, States of the OIC in the opposition. Schlanbusch, based on data from the first reporting cycle, concludes that:

‘recommendations concerning sexual orientation/gender identity (SOGI) rights are going from the “West” to the “Global South”. [...] This could support the idea of a Western hegemony in the construction of human rights norms, however it could also be an indication of where SOGI rights are perceived to be frequently violated’.<sup>249</sup>

The issue of universality is thus especially relevant in the case of LGBT(I) rights. It seems that relying on the concept of universality, States are more likely to make and accept recommendations that are based

<sup>245</sup> UNHRC Res 17/19 ‘Human Rights, Sexual Orientation and Gender Identity’ (14 July 2011) UN Doc A/HRC/RES/17/19.

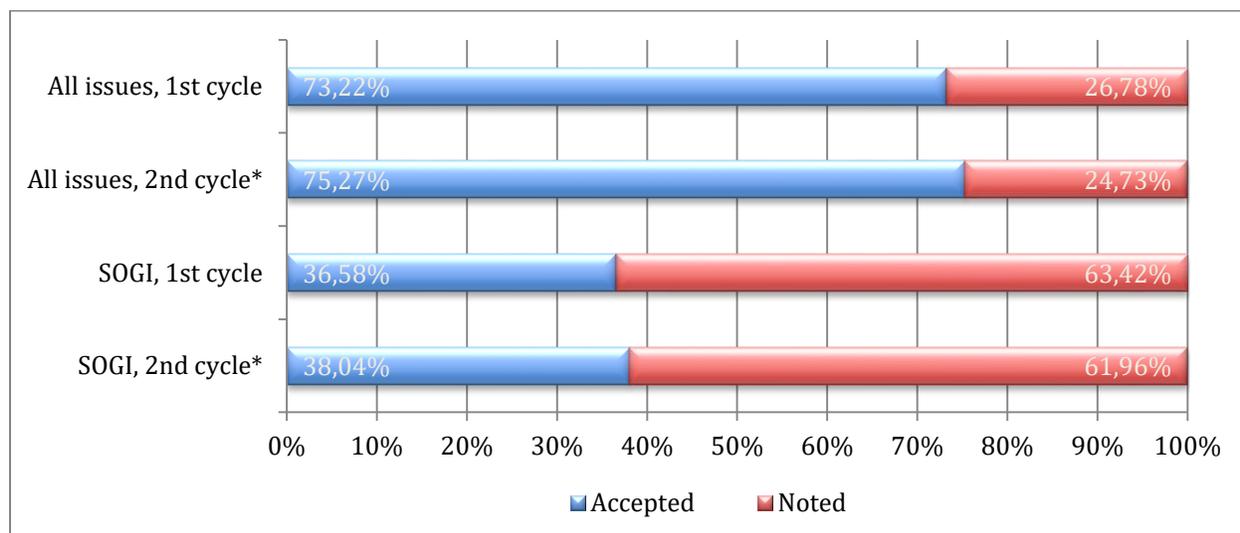
<sup>246</sup> UNHRC Res 27/32 ‘Human Rights, Sexual Orientation and Gender Identity’ (2 October 2014) UN Doc A/HRC/RES/27/32.

<sup>247</sup> Only included in UNHRC Res 27/32 (see n 246).

<sup>248</sup> UNHRC ‘Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity – Report of the United Nations High Commissioner for Human Rights’ (17 November 2011) UN Doc A/HRC/19/41.

<sup>249</sup> Mari D Schlanbusch, ‘Sexual Orientation and Gender Identity Rights in the Universal Periodic Review’ (2013), 54 <[http://www.upr-info.org/sites/default/files/general-document/pdf/-schlanbusch\\_-\\_sogi\\_rights\\_in\\_the\\_upr\\_-\\_2013.pdf](http://www.upr-info.org/sites/default/files/general-document/pdf/-schlanbusch_-_sogi_rights_in_the_upr_-_2013.pdf)> accessed 18 March 2016.

on instruments not ratified by the State under review. Yet, it also remains true that States are more likely to not accept recommendations concerning LGBT(I) rights. Looking at the statistics (see Figure 2 below), it is telling that the acceptance rate for these rights is around 40% of the total average.



**Figure 2. Diversity in universality? Total average of recommendations, and recommendations on sexual orientation and gender identity (SOGI).<sup>250</sup>**

This shows that despite the fact that non-discrimination standards are an accepted and central part of international human rights, LGBT(I) rights still create divisions or, as it is usually put, remain a ‘sensitive issue’. According to the account of Julie Billaud – working in the team at the Office of the UN High Representative for Human Rights (OHRHR) in charge of preparing documents for the UPR (first cycle)– the decision to include LGBT(I) rights under the section ‘right to privacy’ instead of ‘non-discrimination’, meant to take into account ‘the sensitivities of certain States’ regarding these rights, as an opposite decision ‘would signify an “official” recognition of LGBT rights as a universal human rights concern’.<sup>251</sup>

Concerning the standard of ‘democratic human rights with the rule of law’, this means that in many cases discriminatory law is applied and/or law is applied in a discriminative way to LGBT(I) people, and this is seen by (a decreasing but considerable) part of the HRC as in line with international human rights standards. This poses issues of human rights as well as rule of law and, when (as often) impeding the participation and integration of LGBT(I) people, it is a violation of the democratic principle as well. While the importance of equality, diversity and non-discrimination is emphasised by virtually all actors, when it comes to application in the LGBT(I) field, the division resurfaces.

To see how this division poses a challenge to universality and non-discrimination, we will briefly look into the various arguments made by opponents of LGBT(I) rights. We will mostly use arguments from the

<sup>250</sup> Source: UPR Info (n 211) Global Statistics: ‘Response’; and Issues Statistics: ‘Sexual Orientation’ and ‘Gender Identity’ (data as of 23 August 2015).

<sup>251</sup> Julie Billaud, ‘Keepers of the Truth: Producing ‘Transparent’ Documents for the Universal Periodic Review’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2014) 77.

debates around the 2011 vote on the LGBT(I) resolution at the HRC.

A common argument is that these rights are not recognised by international law and as a result they cannot bind States, which can be articulated as a rule of law argument, too.<sup>252</sup> The representative of Pakistan, speaking on behalf of the OIC, said that they were

‘very concerned that the Council had chosen to discuss very controversial notions [...] on human rights, sexual orientation and gender identity. The OIC was very concerned about attempts to include in this forum notions that had no basis in international law and international legal and human rights standards. The OIC noted with concern the attempts to create new standards and include notions that had never been agreed before’.<sup>253</sup>

A widely used rejection argument is to trump human rights with human rights and argue that cultural diversity or respect for religious convictions should be accepted as grounds for non-acceptance. The representation of Qatar ‘stressed the need to respect cultural diversity [invoking Article 29 of the UDHR] and the responsibility of States in maintaining social and democratic order’ and ‘indicated that this issue went against Islam’.<sup>254</sup> Such arguments might go hand in hand with arguments about national sovereignty (as a guarantee of international diversity), illegitimate imposition of values (particularly of Western values, as a surviving form of imperialism). According to Saudi Arabia, it ‘was not appropriate to impose these values on other countries. Cultural and religious considerations should be taken into account. It was not appropriate to impose values without considering them as counter to Sharia in Islam, and other religions’.<sup>255</sup> Presenting a similar argument almost in the name of an entire continent, Nigeria argued that:

“African countries, and more than 90 per cent of the African people did not support this draft resolution. South Africa had referred to a declaration of African leaders indicating desires to deal with human rights in an objective and non-confrontational manner and accused the resolution of disregarding the universality of human rights and putting individual conduct above international

<sup>252</sup> As Dominguez-Redondo noted, states ‘have on occasion rejected recommendations on the basis that they do not engage recognised human rights; for example, in relation to sexual discrimination and sexual orientation’. See Elvira Dominguez-Redondo, ‘The Universal Periodic Review – Is There Life Beyond Naming and Shaming in Human Rights Implementation?’ (2012) 4 NZL Rev 673; also Rosa Freedman, ‘New Mechanisms of the UN Human Rights Council’ (2011) 29 NQHR 289, 310.

<sup>253</sup> UNHRC ‘Council Establishes Mandate on Côte d’Ivoire, Adopts Protocol to Child Rights Treaty, Requests Study on Discrimination and Sexual Orientation’ (17 June 2011) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11167&LangID=E>> accessed 18 March 2016. Along the same lines, see Saudi Arabia: ‘the draft resolution was not in line with internationally agreed human rights principles.’ Bahrain: the country

‘[...] condemned the attempt to make the Council deal with controversial issues such as gender identity. This was an attempt to create new standards and new human rights by misinterpreting the existing international human rights standards. These were issues based on personal decisions and were not fundamental human rights.’

Bangladesh: ‘[t]here was no legal foundation for this draft resolution in human rights instruments’. Mauritania: the country ‘considered that this issue was not within the scope of any international treaty’.

<sup>254</sup> *ibid.* See also Pakistan: ‘[t]he international community had agreed during the Vienna Conference that while considering human rights, national, regional and cultural specificities would be taken into account’.

<sup>255</sup> *ibid.*

instruments. Notions on sexual orientation should not be imposed on countries.”<sup>256</sup>

Furthermore:

“Nigeria said it was unacceptable that countries lacked the ability to have laws on sexual orientation and countries lacked the political will to subject themselves to a true picture of democracy. It went against all norms preached in the Human Rights Council, such as transparency, accountability and democracy. This was a signal that the Human Rights Council should be careful to not again go against its roots.”<sup>257</sup>

The argument that protecting LGBT(I) rights at the international level is not simply arbitrary but also undermines human rights in general, and universality in particular, is also recurrent. For instance, ‘Nigeria believed strongly that at all work of the Human Rights Council should be focused in a way that advanced collective commitments to human rights, not that undermined human rights.’<sup>258</sup> Or Mauritania, putting it even more bluntly: ‘the resolution did not promote the advancement of human rights but rather the dehumanisation of human beings.’

Milder forms of opposition also appeared during the debate, arguing that some ‘internal diversity’ or democratic dissension does not allow support. Jordan stated that ‘the text before the Council had rendered it divided and prevented it from obtaining a joint position. Jordan regretted it could not join the consensus on this draft resolution’.<sup>259</sup>

A somewhat more practical argument is to point to other pressing issues that are allegedly ignored with the focus on LGBT(I) rights. The representative of Pakistan argued that the resolution ‘would divert the attention of the Council from other important issues.’ Or, in a harsher formulation: ‘Bangladesh was disturbed by the focus on personal sexual interests while discrimination based on race, ethnicity, religion and other issues remained ignored.’<sup>260</sup>

A similar trend appears in some of the comments on LGBT(I) related recommendations. Samoa rejected the recommendations concerning the decriminalisation of sexual activity between consenting adults<sup>261</sup> with the following reasoning:

“There have not been formal charges before the Courts based on sexual orientation and gender identity and if so, the courts would rule them out as discriminatory. [...] Decriminalizing sexual activity of sodomy is not possible at this time because of cultural sensitivities and Christian beliefs

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<sup>256</sup> *ibid.*

<sup>257</sup> *ibid.*

<sup>258</sup> *ibid.* Similarly, ‘Bangladesh believed that rights included in the Universal Declaration of Human Rights had been coded into international instruments. By introducing notions not articulated in human rights instruments, these very instruments and the human rights framework were undermined.’

<sup>259</sup> *ibid.*

<sup>260</sup> *ibid.* Also, Mauritania: ‘In addition to be a highly controversial subject on many levels, cultural, moral, religious, this issue had nothing to do with human rights, as did other issues dealt with in the Human Rights Council, such as violence against women or violations of human dignity. Imposing this issue was unacceptable’.

<sup>261</sup> UNHRC ‘Report of the Working Group on the Universal Periodic Review – Samoa’ (11 July 2011) UN Doc A/HRC/18/14, recommendations 75.38-75.41 by Canada, France, Norway and the United States respectively.

of the Samoan society.”<sup>262</sup>

While the first part of the argument raises serious doubts about the concept of the rule of law in the country, the second voices well-known concerns invoking culture and religion. In the review process concerning Tonga, Bangladesh:

“Indicated that the purpose of UPR was not to impose the values of one society on another and noted that if the traditional society of Tonga does not permit consensual sex between two men or two women, one should refrain from imposing this on them, as it is outside the purview of universally accepted human rights norms. As there is no treaty obliging Tonga to do otherwise.”

Bangladesh recommended Tonga ‘continue to criminalize consensual same sex, which is outside the purview of universally accepted human rights norms, according to Tonga’s national legislation.’<sup>263</sup> In an interesting twist, Tonga not only rejected three other recommendations, on decriminalisation, but also the Bangladesh recommendation, on upholding criminalisation, claiming that it has ‘a Christian society that believes in tolerance and respect across difference. A respect for difference allows the widest margin of appreciation to lawmakers as well as other stakeholders and encourages robust debate about equality within society.’<sup>264</sup> This unsuccessful attempt to synchronise criminalisation and tolerance nevertheless rejects the proposal of Bangladesh to continue criminalisation without considering putting an end to this policy.

While the Bangladesh proposal is a somewhat unique case of a human rights proposal arguing for a blatant violation, it shows the extent to which the UPR process relies on State input. Despite strong opposition to LGBT(I) rights, there are still States that come forward with the relevant recommendations. The question still remains how universal this approach proves to be. The very fact that the UPR largely depends on concrete recommendations made by other States can result in inconsistency, *e.g.* in raising LGBT(I) issues in some cases but not in others. For example, LGBT(I) concerns were not raised in the first cycle in cases such as Bahrain, China (although the issue did come up in the second cycle), Jordan, Pakistan or Saudi Arabia.<sup>265</sup>

Selectivity might be present also in the types of issues and types of recommendations picked by the reviewing States. Concerning the danger of recommendations that are too vague, based on data from the first cycle, LGBT(I) recommendations seem to be more specific than the average.<sup>266</sup> The increased specificity is, at least partly, a result of the fact that many recommendations ask for decriminalisation of sexual activity between consenting adults. On the other hand, this might also mean that other types of

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<sup>262</sup> UNHRC ‘Report of the Working Group on the Universal Periodic Review – Samoa – Addendum – Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review’ (21 September 2011) UN Doc A/HRC/18/14/Add.1, para 29; Natalie Baird, ‘The Universal Periodic Review: Building a Bridge between the Pacific and Geneva?’ in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2014) 195.

<sup>263</sup> UNHRC ‘Report of the Working Group on the Universal Periodic Review – Tonga’ (5 June 2008) UN Doc A/HRC/8/48, para 58. See also Kälin (n 208) 36; Schlanbusch (n 249) 36.

<sup>264</sup> UNHRC ‘Universal Periodic Review – Tonga’ (n 263) para 65. See also Baird (n 262) 196.

<sup>265</sup> Based on data from UPR Info (n 211).

<sup>266</sup> Schlanbusch (n 249).

issues remain under the carpet.<sup>267</sup>

This short overview of LGBT(I) rights at the HRC should show that despite repeated rejections of denial of rights based on cultural relativist arguments (resolutions, statements of the Secretary General and State representatives, recommendations *etc.*), the inclusion of LGBT(I) rights in the notion of universality remains a continuing challenge, and arguments about diversity, democracy and the rule of law are used on both sides of the debate. It also seems that perceptions of imposition and cultural imperialism might be reinforced by formulating opinions as a group, *i.e.* EU Member States.

### **b) Migrants' rights**

The steeply rising number of refugees and migrants arriving to Europe mainly from the Middle East and North Africa in 2015 made migration a top priority for European countries. Despite its constantly changing nature, international migration is a permanent phenomenon, and changing place of residence and wandering can often put those involved into a vulnerable position. Many areas of human rights can be invoked concerning the status of migrant people, and the Human Rights Council has always paid special attention to this group. For example, the mandate of the Special Rapporteur on the Human Rights of Migrants was created in 1999 by the Commission on Human Rights, and it was strengthened and further extended several times by the newly established HRC. Recommendations related to migrants and asylum seekers appeared already at the first UPR session, and the Council adopted its first resolution on the topic in 2008. Before elaborating on the relevant HRC resolutions, we should first look at the substance of the human rights of migrants. The risk of violating human rights may arise in a variety of forms in the context of international migration that can be categorised under three areas of common threats.<sup>268</sup>

The first set of violations concerns the enhanced vulnerability of migrants. The circumstances leading to migration (poverty, conflict, *etc.*) and the exploitive nature of human trafficking force people into human rights threatening (including life-threatening) situations. The second type of threats is the potential violations related to crossing borders and applying for asylum, for example the detention of irregular migrants or the violation of the non-refoulement principle. The third type concerns the violations of the social and political rights of migrants in relation to their status as non-citizens. While States often devote at least some attention to the first two issues, they usually tend to neglect this third set of potential violations. For instance, ensuring human rights exclusively to citizens instead of a universal approach covering all residents can jeopardise efforts of integration by those who do not have access to quick naturalisation but would nevertheless like to integrate to the society.

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<sup>267</sup> Issues can range from discrimination, violence, harassment (arrests and other harassment by police, by private actors), hate crimes, through torture, cruel and inhuman treatment, freedom of expression, assembly and association, privacy, criminalization, legal recognition (recognized partnerships: civil unions, same-sex marriages, adoption, hospital visits and other health care related decisions, name changes, inheritance, social benefits, tax benefits, social protection *etc.*, change of sex (legal recognition and financial support), discrimination in employment (outright persecution, don't ask, don't tell, no state-sponsored discrimination, legal protection against private discrimination) to support and protection to human rights defenders. Grounds of discrimination can involve (actual and perceived) sex, gender and sexual orientation.

<sup>268</sup> Kristen H Maher, 'Who Has a Right to Rights? Citizenship's Exclusions in an Age of Migration' in Alison Brysk (ed), *Globalization and Human Rights* (University of California Press 2002) 19.

As part of the FRAME research project, it has been established that the relationship between vulnerability and human rights is ambiguous, often resulting in a tension in actual policies.<sup>269</sup> Furthermore the vulnerability approach can be implemented in two ways: by listing the specific groups ('vulnerable groups approach') and by listing the identifying factor ('factors approach').<sup>270</sup> For instance, the General Approach to Migration and Mobility identifies vulnerable groups within the wider category of migrants: 'unaccompanied minors, asylum-seekers, stateless persons and victims of trafficking'.<sup>271</sup> The three areas listed above could be taken as various factors that can render the entire group or part of the group of migrants as vulnerable, depending on their background and the policies of the receiving countries.

The matter of migrant rights is not as fraught with cultural differences as, *e.g.* the above discussed LGBT(I) topic. Taking a first look at the resolutions adopted by the HRC on the topic, the general opinion on the human rights of migrants seems to be more or less consensual, as they were mostly adopted without a vote, meaning no Member State requested voting or expressly objected the acceptance of the proposed resolutions. Since 2009 the HRC has adopted several resolutions in this area, and only one of them, Resolution 17/22 on 'migrants and asylum-seekers fleeing recent events in North Africa' was accepted by voting.<sup>272</sup> It was accepted in debate with a margin of 18 votes: 30 votes for, and 14 votes against, with no abstentions.<sup>273</sup> Resolution 17/22 only highlights the danger of the fleeing and focuses on the potential life-threatening exclusion, detention, rejection and xenophobia, and asks for particular attention on the situation of people fleeing by sea both from the States and from the OHCHR. The States against the initiative were mainly the potential destination countries of Europe and also Japan, the Republic of Korea and the US. The vote, requested by the representatives of Hungary (on behalf of the EU) and of the US, is a prime example of the coordinated voting that threatens the universal emergence of human rights. Earlier research in the FRAME project (Deliverable 5.1 assessing the EU's engagement in UN bodies) has shown how, in some areas including migrants' rights, the EU's approach is often seen as 'thematically imbalanced and selective'.<sup>274</sup> This also implies that less (successful) coordination in these areas is not necessarily a problem, but might actually be seen as beneficial, from the point of view of the substantive human rights issues.

Based on the Resolution 17/22, the OHCHR presented a report at the eighteenth session of the HRC.<sup>275</sup> The report states that the flows of people leaving North Africa in response to the events between January and August 2011 are mixed flows, because 'they include people with various motivations and protection profiles, including refugees and asylum-seekers, unaccompanied and separated children, victims of trafficking, irregular migrants and smuggled migrants'.<sup>276</sup> Every migrant is entitled to the individual

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<sup>269</sup> FRAME Deliverable 12.2, p. 19.

<sup>270</sup> Of course it often happens that a combination of the two approaches is applied, see *ibid* 20.

<sup>271</sup> Commission, 'The Global Approach to Migration and Mobility' (Communication) COM(2011) 743 final, 6.

<sup>272</sup> UNHRC Res 17/22 'Migrants and Asylum-Seekers Fleeing Recent Events in North Africa' (19 July 2011) UN Doc A/HRC/RES/17/22.

<sup>273</sup> The sponsor of UNHRC Res 17/22 was Nigeria. The vote was requested by the representatives of Hungary (on behalf of European Union) and the United States of America.

<sup>274</sup> FRAME Deliverable 5.1, p. 223. For further relevant observations, see also pp 84, 88, 99, 112 and 221.

<sup>275</sup> UNHRC 'The Situation of Migrants and Asylum-Seekers Fleeing Recent Events in North Africa – Report of the United Nations High Commissioner for Human Rights' (1 September 2011) UN Doc A/HRC/18/54.

<sup>276</sup> *ibid* para 61.

consideration of his or her particular circumstances. ‘Some migrants will need the protection offered by specific legal regimes, such as refugee law or the protection of victims of trafficking. Others will need the protection of universal human rights norms that protect all persons regardless of their status.’<sup>277</sup> The report claims that this approach leads to greater protection of human rights.

The High Commissioner also draws a few recommendations to the States, including general legislative and institutional reforms, and international cooperation, to avoid detention and explore the use of alternative and non-custodial measures.<sup>278</sup> It follows therefore that there are migrants who do not fall under the protection of refugee law or the asylum system, but another aspect of the universal human rights protection system applies to them (*e.g.* rights to life, the prohibition of torture), in connection with the phase of crossing borders, and there are measures that violate the universality of human rights.

Between 2010 and 2013 four resolutions were adopted on the ‘human rights of migrants’, usually with Mexico as the main sponsor (Resolutions 15/16, 18/21, 20/03 and 23/20).<sup>279</sup> The resolutions all refer to the Universal Declaration of Human Rights, and the goal to secure ‘full respect for the human rights and fundamental freedoms of migrants’ concerning various aspects of human rights in the context of ban on discrimination based on gender, race *etc.* Some of these resolutions mention work or education related topics in the context of universality, but they are mainly focusing on typical migrants-related human rights threats, such as xenophobia-motivated hate crimes and more specifically smuggling and human trafficking. These resolutions emphasise that while the States have their sovereign right to restrict human rights and fundamental freedoms of migrants related to border security or other measures, they ‘have to comply with their obligations under international law, including international human rights law’.<sup>280</sup> The resolutions note, in this context, that treating ‘irregular migration as a criminal rather than an administrative offence [raises concerns] where the effect of doing so is to deny migrants full enjoyment of their human rights and fundamental freedoms’.<sup>281</sup> These measures and the detention of irregular migrants deny migrants the full enjoyment of human rights.

Resolution 20/03, while in line with the other resolutions, puts more emphasis on the right to education of migrants. It urges the States to promote access to education, taking into account every aspect and every potential barrier (physical, financial, cultural, and linguistic) that may lead to further inequalities. This resolution requests the Special Rapporteur on the right to education, in addition to the Special Rapporteur on the human rights of migrants, to continue their efforts in this matter.

Since then, the resolutions concerning migrants have been focusing on more specific problems. In 2014 the HRC adopted Resolution 26/21<sup>282</sup> on ‘promotion of the right of migrants to the highest attainable

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<sup>277</sup> *ibid* para 62.

<sup>278</sup> *ibid* 16-17.

<sup>279</sup> UNHRC Res 15/16 ‘Human Rights of Migrants’ (6 October 2010) UN Doc A/HRC/RES/15/16; UNHRC Res 18/21 ‘The Human Rights of Migrants’ (17 October 2011) UN Doc A/HRC/RES/18/21; UNHRC Res 20/03 ‘Human Rights of Migrants’ (16 July 2012) UN Doc A/HRC/RES/20/3; UNHRC Res 23/20 ‘Human Rights of Migrants’ (26 June 2013) UN Doc A/HRC/RES/23/20.

<sup>280</sup> UNHRC Res 15/16 (6 October 2010) UN Doc A/HRC/RES/15/16 (n 279) 3.

<sup>281</sup> UNHRC Res 23/20 (26 June 2013) UN Doc A/HRC/RES/23/20 (n 280) 2.

<sup>282</sup> UNHRC Res 26/21 ‘Promotion of the Right of Migrants to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health’ (17 July 2014) UN Doc A/DRC/RES/26/21.

standard of physical and mental health', and 26/19<sup>283</sup> on the mandate of the Special Rapporteur on the human rights of migrants. In 2015 Resolution 29/02<sup>284</sup> on 'protection of the human rights of migrants: migrants in transit' and Resolution 29/12<sup>285</sup> on 'unaccompanied migrant children and adolescents and human rights' were accepted, mandating the Advisory Committee to develop a research-based, global study on the issue of human rights of unaccompanied migrant children and adolescents.

The mainly consensually adopted resolutions may show that extending human rights measures to non-citizens is a generally admitted common goal, yet the UPR recommendations show a more complex picture. First of all it should be noted that the UPR system, unlike the resolutions, separates recommendations on asylum seekers from those on migrants. States seem to more likely not accept recommendations concerning migrants. The acceptance rate for migrant rights is around 60% of the total, but the acceptance rate for recommendations concerning asylum seekers is 63% in the first cycle and jumps over 73% in the second cycle. There is no significant difference in the first cycle, but in the second one the acceptance rate for asylum seekers related recommendations nearly reaches the average acceptance rate for all issues.

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<sup>283</sup> UNHRC Res 26/19 'Human Rights of Migrants: Mandate of the Special Rapporteur on the Human Rights of Migrants' (11 July 2014) UN Doc A/HRC/RES/26/19.

<sup>284</sup> UNHRC Res 29/02 'Protection of the Human Rights of Migrants: Migrants in Transit' (22 July 2015) UN Doc A/HRC/RES/29/2.

<sup>285</sup> UNHRC Res 29/12 'Unaccompanied Migrant Children and Adolescents and Human Rights' (22 July 2015) UN Doc A/HRC/RES/29/12.

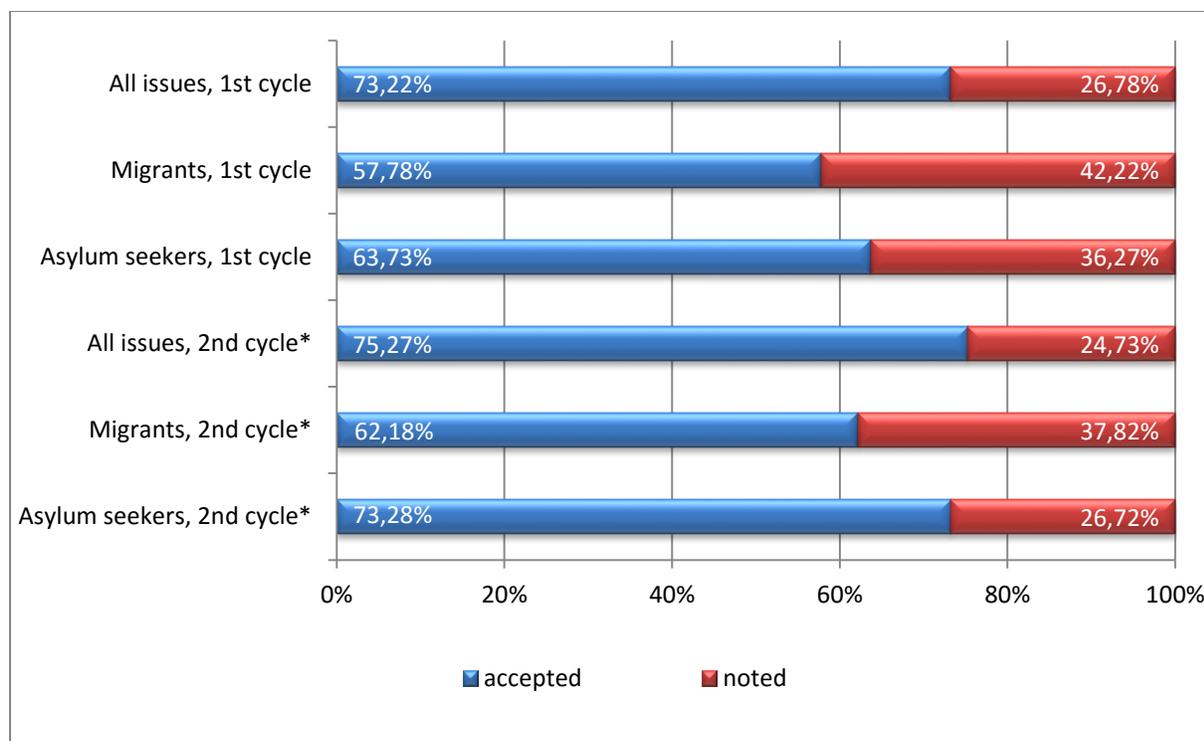


Figure 3: Recommendations, total average and recommendations on migrants and asylum seekers.<sup>286</sup>

These differences are not entirely conclusive, but the numbers strengthen our initial hypothesis. States seem to accept more likely any recommendation concerning the official method of crossing borders, concerning the special issues of asylum seekers, refugees, but less likely accept recommendations concerning migrants, concerning flow of people who want to resettle in a given State.

‘Accepted’ recommendations regarding both categories (asylum seekers and migrants) address various issues, such as the duration of the procedure, rights of children, in a few cases freedom of religion, *etc.* However, almost all of the only ‘noted’ recommendations (especially the not too specific ones) are about ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

The General Assembly adopted this convention in Resolution 45/158 on 18 December 1990.<sup>287</sup> The ICRMW entered into force on 1 July 2003.<sup>288</sup> Today it has forty-eight State parties and eighteen States which have signed but not yet ratified it. State parties are mainly from North Africa and all of the countries from Latin America (with the exception of Brazil).<sup>289</sup> As globalisation and the international circumstances continuously change the patterns of migration, it cannot be stated that the ICRMW is only an instrument of countries of origin, but it can be said, that the main countries of destination (States of the EU, the US

<sup>286</sup> Source: UPR Info Global Statistics: ‘Response’; and Issues Statistics: ‘Migrants’ and Asylum Seekers – Refugees’ (data as of 30 August 2015). Data from the second cycle up to August 2015.

<sup>287</sup> See UNGA Res 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, for the full text of the ICRMW.

<sup>288</sup> In accordance with ICRMW, art 87(1).

<sup>289</sup> See OHCHR <<http://indicators.ohchr.org/>> accessed 31 March 2016, for an overview of the status of ratifications.

or Canada) have not ratified it. Resolutions 15/16, 18/21 and 23/20 expressly called upon States to consider signing and ratifying or acceding it. The EU Member States seem to have a consensus on not ratifying the document, and to not accept any relating recommendations. In fact, while having this *de facto* consensus, the migration policy of the EU becomes one of the core issues of EU legislation.<sup>290</sup> This is the main explanation for having no EU countries ratifying the ICRMW, even though the European Parliament called on the Member States several times to ratify it. The European institutions have two main reasons to support the ratification. Firstly there are indubitable economic advantages of migrant labour-force for EU countries. Secondly ratifying this convention could send a strong message internationally about the universality of human rights: 'The fact that EU Member States fail to maintain this level of commitment when it comes to the rights of third-country nationals gives rise to critical appraisal of the consistency of their (and the EU's) internal and external human rights policies.'<sup>291</sup>

The OHCHR identifies several standpoints of the ratification debate,<sup>292</sup> but if we examine the substance of the rights included in the convention, it becomes hard to understand the outright opposition to ratification. The ICRMW does not create new human rights standards for migrants or higher standards than existing general ones that universally protect all human beings. Even irregular migrants have rights under all human rights instruments.<sup>293</sup> However it does create a human-rights based framework for regulating international migration. The main principle relates to the rule of law that requires basic procedural guarantees. The ICRMW includes more concrete formulations of the considerations, notes and requests of the above discussed resolutions and builds upon these a mandatory framework.

The ICRMW introduces some measures against the first two types of potential threats identified earlier: the violations associated with the exploited situation of migrants and the violations in connection with the procedures of crossing borders. It puts strong focus on the issues that belong to the third type of our classification, the potential violation of social rights of migrants. The Convention has the overall goal of pulling down social barriers, promoting 'full participation of everyone, including migrants, in economic and social life',<sup>294</sup> and promoting access to various social institutions. However it should be noted that the ICRMW does not regulate the political inclusion of non-citizen migrants since it does not promote increasing their political participation. According to Article 42(3), this matter stays within the area of sovereignty of the State.<sup>295</sup>

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<sup>290</sup> OHCHR, 'Rights of Migrant Workers in Europe' (2011) 15

<[http://europe.ohchr.org/Documents/Publications/Migrant\\_Workers.pdf](http://europe.ohchr.org/Documents/Publications/Migrant_Workers.pdf)> accessed 31 March 2016.

<sup>291</sup> *ibid* 17.

<sup>292</sup> *ibid* 17-26.

<sup>293</sup> *ibid* 22 (reading that '[a]ll European States concerned have ratified other core international human rights treaties that protect migrant workers' rights even when they are undocumented. In particular, European States have all ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR); and they have all ratified the European Convention on Human Rights (ECHR)').

<sup>294</sup> OHCHR, 'Statement by Committee on Migrant Workers on Migrant Workers' Rights: 10 Years of Progress but Huge Challenges Remain' (Geneva, 4 July 2013)

<<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13502&LangID=E>> accessed 31 March 2016.

<sup>295</sup> ICRMW, art 42(3) (reads '[m]igrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights').

The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) is the body monitoring the implementation of the ICRMW by its State parties. The body is currently composed of 14 ‘experts of high moral standing, impartiality and recognised competence in the field covered by the Convention’ elected for a four-year term by States parties.<sup>296</sup> The mandate of the CMW can be one of the main reasons for refusing ratification.<sup>297</sup> The CMW held its first session in March 2004 and since then it has been examining the reports submitted by the States, making observations and general comments or recommendations. The CMW has institutionalised the involvement of NGOs in the process. Ratifying States can recognise the competence of the CMW to receive communications from individuals following the violation by a State party of a right included in the convention.<sup>298</sup> The CMW puts constant pressure on States to harmonise their legislation and practice with international obligations in the field of migrant workers’ rights through its periodic reports and recommendations. The EU’s approach seems to be guided by legally framed and largely politically motivated concerns, *e.g.* the division of competences between the EU and its Member States – some Member States pointing to the EU, while the Commission pointing to the Member States on the question of ratification.<sup>299</sup> The EP, for its part, has been repeatedly calling, since 1998, on Member States to ratify the ICRMW.<sup>300</sup> This cacophony does not make it easy to make an ‘European voice’ heard in this area.

To sum up this short overview of the rights of migrants, it seems like the initial presuppositions should be corrected. The refusal to ratify the social rights-centred ICRMW by States shows that even if they are engaged in ensuring a wide scale of human rights of migrants through several other mechanisms, treaties or institutions, they refrain from accepting new mechanisms and international obligations. This attitude seems to be prevalent in connection to all three types of potential human rights threats concerning international migration, not just the third type of potential threats. This situation goes against the principle of universal and equal application of human rights. The problem is apparent in light of the substantive concepts of democracy and rule of law as well. As it was underlined in Deliverable 3.2, the liberal model of constitutional democracy is based on human rights, legal procedures based on the rule of law and equality before the law.<sup>301</sup> Violating the substantive rule of law principle in the case of migrants, by drawing a distinction between citizens and noncitizen migrants in ensuring human rights, also violates the equality before the law (including the equal protection of human rights) and the respect for fair trial and therefore leads to a violation of all three elements of the concept of democratic rule of law with human rights.

While there are other instruments which universally protect all human beings, ‘ICRMW is the only one that specifically protects and formulates the discussed human rights in a way that aims at addressing specific vulnerabilities of migrants’ and even of irregular migrants.<sup>302</sup> This apparent generality in refraining

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<sup>296</sup> In accordance with ICRMW, art 72.

<sup>297</sup> International Service for Human Rights, *Simple Guide to the UN Treaty Bodies* (ISHR 2010) 8.

<sup>298</sup> ICRMW, art 77.

<sup>299</sup> For the examples, see Euan MacDonald and Ryszard Cholewinski, ‘The ICRMW and the European Union’ in Ryszard Cholewinski, Paul De Guchteneire and Antoine Pécoud (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers’ Rights* (CUP 2009) 366 and 385 [67].

<sup>300</sup> *ibid* 385.

<sup>301</sup> See FRAME Deliverable 3.2, p. 24.

<sup>302</sup> OHCHR, ‘Rights of Migrant Workers’ (n 290) 23.

from ratification shows that in the context of transnational migration at least when international institutions are stepping forward from weak recommendations, universality is not evident; leaving the citizen based approach behind is not axiomatic.

## 7. Conclusions

### a) Universality

If one focuses generally on the HRC's human rights concept, the position of the Council in some important human rights issues seems to be unequivocal. Not surprisingly, the HRC founding resolution declares that 'human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing'.<sup>303</sup>

Besides universal values, the founding resolution also underlines particular values: 'the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind'.<sup>304</sup> The case studies have showed the challenges in how the Council documents make/or try to make the universal values compatible with particular values. When conducting interviews with human rights experts, gender and LGBT(I) issues commonly came up as an area where reconciling universal enforcement and cultural differences has not been successful.<sup>305</sup> Experts also mentioned the urban ghettos with Muslim and Roma majorities in the European context.<sup>306</sup> It is a common pattern that non-European countries criticised for their LGBT(I) and gender records blame Western States for migrants' and minority rights.

It is interesting in this sense that the founding resolution refers to collective rights as well when it mentions that the Council is 'based on respect for the principle of equal rights and self-determination of peoples.' In spite of this statement international human rights protection is based on individual rights based view. This statement could be a symbolic gesture for the States with respect to sovereignty (one of the basic principles of international law), which often clashes with international human rights protection. Meanwhile, the existence of the UPR itself makes it clear that the States are not completely exempt from international human rights monitoring mechanisms.

The founding resolution emphasises the aspiration to eliminate 'double standards and politicization', which could be an effective tool to operationalise the principle of the universal protection of human rights, implying that the 'Council must address human rights abuses wherever they occur'.<sup>307</sup> In spite of this statement double standards are a problem even today: literature agrees on that the Council sometimes deals with human rights issues along political interests. The UN Secretary-General underlined a 2008 speech that Council members must rise above 'partisan posturing and regional divides'.<sup>308</sup> For double standards and politicisation the most often cited example is that the Council focuses in an imbalanced

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<sup>303</sup> UNHRC Res 19/36 (19 April 2012) UN Doc A/HRC/RES/19/36 (n 218) 1.

<sup>304</sup> UNGA Res 60/251 (15 March 2006) UN Doc A/RES/60/251 (n 168).

<sup>305</sup> This area was mentioned during three out of the five interviews conducted for this chapter.

<sup>306</sup> Interview with regional human rights NGO expert, (electronic interview, October 2015).

<sup>307</sup> Ban Ki-Moon, 'Secretary-General's Remarks to Human Rights Council' (Geneva, 12 December 2008) <<http://www.un.org/sg/statements/?nid=3609>> accessed 31 March 2016.

<sup>308</sup> *ibid.*

way on human rights abuses in Israel.<sup>309</sup> The trend of regionalisation that the activities of organisations like the EU or the OIC presents might also be a challenge to universality, and seems to hinder efficiency of influencing the agenda of the Council by State actors.<sup>310</sup> However, as one expert with work experience at the Council noted, the phenomenon of cross-regional groups counterbalances the problem of coordinated voting to some extent.<sup>311</sup>

### *b) The HRC and the indivisibility of human rights*

One can identify the following three main activities of the HRC that strengthen the principle of indivisibility of human rights:

- The Council's role in drafting international human rights documents. The Council's main result in this field was the drafting of the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights (ICESR) in 2008. With the introduction of individual complaints the Protocol makes the monitoring mechanism of social rights similar to the monitoring mechanisms of civic and political rights (*e.g.* to the first Optional Protocol of the International Covenant on Civil and Political Rights), therefore strengthens the principle of human rights.<sup>312</sup>
- The special procedures in thematic issues (further discussed in Section E below). These procedures focus on all human rights, for example the Special Rapporteur on the human rights of migrants deals with both social and civic and political rights of migrants. (The post of the rapporteur was created in 1999 with the resolution of the Commission on Human Rights.)<sup>313</sup>
- The UPR mechanism. As was mentioned above, the review process potentially encompasses all human rights without any differentiation among human rights.

To sum up, the activity of the Council fosters the idea of indivisibility, particularly through the functioning of the UPR and with drafting the Optional Protocol of ICESR. Both instruments reduced the differences between the monitoring mechanism of civic political and economic, social and cultural rights. Nevertheless, the indivisibility of rights is often challenged during the peer review process when states focus on certain types of violations considered to be more egregious than others. This is illustrated, in cases where criminalization is (still) in place, by the pattern of neglecting other types of LGBT(I) rights violations. Moreover, in the case of the UPR it is 'especially noticeable is the sharp difference between

<sup>309</sup> Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010).

<sup>310</sup> That is why it is important that in general, EU countries do not seem to be acting as one unitary block. See FRAME Deliverable 5.1, chapter V.B.

<sup>311</sup> Interview with international expert with experience in diplomatic service (national and international level, including the HRC), (electronic interview, October 2015).

<sup>312</sup> Whelan (n **Error! Bookmark not defined.**) 206.

<sup>313</sup> The special procedure was established by UNCHR Res 44 'Human Rights of Migrants' (1999) UN Doc E/CN.4/RES/1999/44. Later, the mandate of Rapporteur was extended by UNCHR Res 62 'Human Rights of Migrants' (2002) UN Doc E/CN.4/RES/2002/62; UNCHR Res 47 'Human Rights of Migrants' (2005) UN Doc E/CN.4/RES/2005/47; UNHRC Res 8/10 'Human Rights of Migrants: Mandate of Special Rapporteur on the Human Rights of Migrants' (18 June 2008) UN Doc A/HRC/RES/8/10; UNHRC Res 17/12 'Human Rights of Migrants: Mandate of the Special Rapporteur on the Human Rights of Migrants' (6 July 2011) UN Doc A/HRC/RES/17/12; UNHRC Res 26/19 (11 July 2014) UN Doc A/HRC/RES/26/19 (n 283), each time for a period of three years.

recommendations on civil and political rights and those concerning economic, social and cultural rights.<sup>314</sup> This suggests that indivisibility does not function properly in the practice of the HRC.

### *c) Questions of diversity, equality and discrimination before the HRC*

The power of the Human Rights Council lies in the fact that here national governments express their views directly on human rights issues, countries are the main actors and their overall human rights performance is the main target of scrutiny, especially in the UPR mechanism. This is counterbalanced by the problem of consistency. Political decisions depend more on coalition building than the doctrinal persuasiveness of proposals. As the universal application of equality requires consistency, this means that equality can and does suffer from the general features of the most important human rights body of the UN structure.

Equality of States is one of the organising forces of the HRC in the form of ‘sovereign equality’ (as in Article 1(3) UN Charter). This international application of democratic procedural principles with the equal voting of State representatives also makes sure there is, behind the soft law measures, an impact on developments in international hard law, if not else, through international customary law.

In situations in which countries have conflicting views on what equality requires in concrete cases, they can voice and gather support from like-minded States. This should primarily be seen as a challenge for a coherent and universal application of equality. In this respect, the case study on LGBT(I) rights has shown that applying equality in contested areas remains a challenge. Any evaluation should nevertheless take into account that even in many countries now supporting equality for sexual minorities the success of the fight for equal rights is a recent phenomenon.

Substantive interpretations of democracy and the rule of law appear in the practice and documents of the Council. The moral content of these two concepts make use of the principles of international human rights in general. Equality, indivisibility and universality inform the use of the concepts of democracy and the rule of law.

## **E. Special Procedures**

### **1. Introduction**

Following the analysis of three major UN bodies in the previous chapters, this chapter will explore the concepts of individual human rights, democracy and rule of law expressed by the Human Rights Council’s special procedures mandate-holders.

The special procedures mandate-holders (often named ‘special rapporteurs’ or ‘independent experts’ when they act as individuals, or ‘working groups’ if composed of five persons from each of the five regional groups) enjoy a special position in the UN’s human rights system. While their thematic or country mandates are established by the HRC, the mandate-holders are international experts who are fully independent in the exercise of their functions.<sup>315</sup> Therefore the views expressed by them in reports or

<sup>314</sup> FRAME Deliverable 5.1, p. 160.

<sup>315</sup> UNHRC Res 5/1 ‘Institution-building of the United Nations Human Rights Council’ (18 June 2007) UN Doc A/HRC/RES/5/1, paras 39-53; UNHRC Res 5/2 ‘Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council’ (18 June 2007) UN Doc A/HRC/RES/5/2, paras 3-4.

statements are not directly attributable to the HRC or the UN in general, even though the mandate-holders' official function might lend particular public attention and authority to their expressions. From an institutional viewpoint, they can be seen as external experts of the HRC who examine, monitor, advise and publicly report on specific thematic or country situations.<sup>316</sup> Through their competences and duties – including in particular research, contacts with governments and civil society, country visits and regular reporting – they are an important source of information for and monitoring tool of the HRC.<sup>317</sup> Thus, they have often been described as 'eyes and ears' of the Council.<sup>318</sup> Country mandate-holders are usually appointed for one year, while thematic mandate-holders are normally appointed for a period of three years. Both can be reappointed; the maximum tenure in a given function is six years.<sup>319</sup> Mandate-holders usually have to report to the HRC once a year (their specific tasks are defined in the resolutions establishing or extending their mandates) but most of them also report to the UNGA, based on requests in topical (thematic or country) resolutions adopted by the UNGA.<sup>320</sup> Both bodies can also request the mandate-holders to focus in their reports upon specific topics related to their mandate, otherwise mandate-holders are free to define for themselves possible special focus areas. To better understand the position of mandate-holders in the UN system, it is finally worth mentioning that the institution of special procedures is disputed among Member States because of the alleged 'naming and shaming' by mandate-holders and 'singling out' of some States. This has led to the 'politicisation' of some mandates, in particular country-specific mandates but also some thematic ones, such as the mandates of the special rapporteurs on torture and extrajudicial killings, resulting in heated debates and controversial resolutions in the HRC.<sup>321</sup>

Due to the limited scope of this report, the research has been narrowed down to three thematic special procedures. The mandates, which have been chosen for analysis, were selected with the aim of covering broad and possibly inter-linked perspectives on human rights, democracy and rule of law, rather than very right-specific perspectives. Therefore, the annual reports to the HRC by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (SR-FOE)<sup>322</sup>, the Special Rapporteur on the independence of judges and lawyers (SR-IJL)<sup>323</sup>, and the Special Rapporteur on extreme

<sup>316</sup> Surya P Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33 Hum Rts Q 201, 203.

<sup>317</sup> In the UN's internal institutional setting and international diplomatic protocol, the mandate-holders are regarded as being on par with Assistant Secretary-Generals, see Subedi (n 316) 212.

<sup>318</sup> See eg Ban Ki-Moon, 'Secretary-General's Remarks to Human Rights Council' (Geneva, 25 January 2011) <<http://www.un.org/sg/STATEMENTS/index.asp?nid=5051>> accessed 31 March 2016.

<sup>319</sup> (n 315) para 45.

<sup>320</sup> Manfred Nowak, 'An Introduction to the UN Human Rights System' in Manfred Nowak, Karolina M Januszewski and Tina Hofstätter (eds), *All Human Rights for All: Vienna Manual on Human Rights* (Intersentia 2012) 82.

<sup>321</sup> *ibid* 78.

<sup>322</sup> The then Human Rights Commission first established the mandate in 1993 (UNCHR Res 45 'Right to Freedom of Opinion and Expression' (1993) UN Doc E/CN.4/RES/1993/45). Mandate-holders during the period 2009-2015 were Frank William La Rue (Guatemala, from August 2008 to July 2014) and David Kaye (United States of America, since August 2014).

<sup>323</sup> The mandate was first established in 1994 (UNCHR Res 41 'Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers' (1994) UN Doc E/CN.4/RES/1994/41). The mandate-holder during the period 2009-2015 was Gabriela Knaul (Brazil, from August 2009 to July 2015).

poverty and human rights (SR-EPHR)<sup>324</sup> during the period 2009-2015 have been analysed.<sup>325</sup> The chapter aims to understand how the mandate-holders conceive specific constitutive elements of human rights, democracy and the rule of law. As all three ideas are much-debated ‘contested, dynamic and open-ended’ concepts,<sup>326</sup> defining their constitutive elements is not an easy and certainly not a conclusive task – researchers might arrive at different results on what elements to include and how exactly to define them. The constitutive elements used as parameters in this chapter have been deduced from the theoretical models outlined in the first FRAME research report of this Work Package<sup>327</sup> as well as directly from UN treaties or high-level documents such as the Vienna Declaration and Programme of Action (VDPA).<sup>328</sup> Special emphasis has been put on how the mandate-holders reflect cross-cutting issues such as equality and non-discrimination or civil society engagement and participation of citizens.

Therefore, the chapter starts with three sections, each analysing the conceptualisations of constitutive elements of human rights, democracy and the rule of law contained in the annual reports of the three special procedures mandate-holders. Following that, Section 5 will analyse in more detail two cross-cutting issues identified in the reports of the mandate-holders, which are relevant for the understanding of all three concepts: first, equality and non-discrimination and second, participation and civil society involvement. Finally, Conclusions will summarise common understandings and differences in the way mandate-holders conceive human rights, democracy and rule of law and will illustrate possible contradictions or open questions.

## 2. Human Rights

### a) Universality

The universality of human rights is one of the corner stones of the UN’s understanding of human rights, expressed already in the UDHR of 1948 (‘All human beings are born free and equal in dignity and rights’) and later underlined in international human rights treaties and the VDPA. The HRC thus frequently refers to the universality of human rights in the preambles of its resolutions, however, in the current mandates of the three mandate-holders, an explicit reference to the universality of all human rights is made only in

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<sup>324</sup> The mandate was first established in 1998 (UNCHR Res 25 ‘Human Rights and Extreme Poverty’ (1998) UN Doc E/CN.4/RES/1998/25). Mandate-holders during the period 2009-2015 were Magdalena Sepúlveda Carmona (Chile, from May 2008 to June 2014) and Philip Alston (Australia, since June 2014). The mandate was originally called Independent Expert on the question of human rights and extreme poverty. In June 2011, the HRC extended the mandate and changed its title to Special Rapporteur on extreme poverty and human rights (UNHRC Res 17/13 ‘Extreme Poverty and Human Rights’ (14 July 2011) UN Doc A/HRC/RES/17/19).

<sup>325</sup> In accordance with the overall report, the period analysed has been set from 1 December 2009 to 31 July 2015.

<sup>326</sup> Katharina Häusler and Alexandra Timmer, ‘Human Rights, Democracy and Rule of Law in EU External Action: Conceptualization and Practice’ in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights* (Intersentia 2015) 232.

<sup>327</sup> FRAME Deliverable 3.1 (n 2).

<sup>328</sup> ‘Vienna Declaration and Programme of Action’ (World Conference on Human Rights, Vienna, 25 June 1993) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>> accessed 11 August 2015.

the extension of the mandate of the SR-FOE.<sup>329</sup>

The mandate-holders themselves rarely expressly use terms such as ‘universality’ or ‘universally accepted human rights standards’ in the annual reports analysed for this chapter,<sup>330</sup> maybe also because their mandates require from them rather practical analyses than conceptual discussions. However, when read as a whole, it becomes clear that the mandate-holders ‘presume’ that all human rights are universally valid – at least for all Member States of the UN. This can be inferred from expressions such as ‘States have a legal obligation to [...]’, ‘every human being is entitled to [...]’ in their reports. The ‘presumption of universal validity’ is particularly obvious in the recommendations part of the annual reports, as most recommendations start with ‘States should [...]’, without further specifications such as ‘States parties’ or ‘contracting parties’. Whenever mandate-holders write about States’ duties, we can thus assume that they mean all States or at least all UN Member States, since a UN body adopted their mandate. If mandate-holders assume that all UN Member States bear the duties the UN human rights system prescribes<sup>331</sup> then there cannot be any doubt that they consider human rights as universally valid, even if they do not explicitly refer to this notion. Arguably, their scarce statements on the universal value of human rights might even convey the impression that within the UN only the scope of (certain) human rights is unclear or disputed but not their universal validity in general. This implicit ‘presumption of universal validity’ of human rights might be explained by mandate-holders’ embeddedness in the UN human rights system, which itself strongly underlines the principle of universality.<sup>332</sup> A mandate-holder questioning the universality of human rights would thus arguably act against the principles of the UN and its system of human rights protection.

### *b) Indivisibility*

Since the end of the Cold War and the adoption of the VDPA, the indivisibility of all human rights has been a basic principle of the UN’s human rights system, however, given that Member States partly question this principle, it is not always visible in practice.<sup>333</sup> Regarding the mandate-holders’ conceptions of human rights, conclusions on their understanding of the indivisibility principle are not easy to draw. While none of the mandate-holders challenges the concept of indivisibility, the annual reports analysed only partly

<sup>329</sup> UNHRC Res 25/2 ‘Freedom of Opinion and Expression: Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (9 April 2014) UN Doc A/HRC/RES/25/2, prmb1, para 2.

<sup>330</sup> See eg UNHRC ‘Report of the Independent Expert on the Question of Human Rights and Extreme Poverty’ (17 March 2011) UN Doc A/HRC/17/34, para 7 (referring to ‘universally accepted human rights standards’); UNHRC ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (20 April 2010) UN Doc A/HRC/14/23, para 79(k) (reading ‘any restriction or limitation must be consistent with [...] as well as with the fundamental principles of principles of universality, interdependence, equality and non-discrimination’); and UNHRC ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (4 June 2012) UN Doc A/HRC/20/17, para 32 (stating ‘universally agreed international human rights norms’).

<sup>331</sup> Cf. frequent expressions such as ‘the international human rights framework affirms the right to [...]’ in the annual reports.

<sup>332</sup> See also Section III.B (on the UNSC), Section III.B (on the UNGA), and Section **Error! Reference source not found.** on the HRC).

<sup>333</sup> Jean-Philippe Thérien and Philippe Joly, ‘“All Human Rights for All”: The United Nations and Human Rights in the Post-Cold War Era’ (2014) 36 Hum Rts Q 373, 381–82, and 395.

express a close relationship between and equal importance of civil and political, economic, social and cultural rights. The mandate-holders are focused on the rights their mandates primarily cover and these are arguably –with the exception of the SR-EPHR– either classic civil and political or economic, social and cultural rights. Nevertheless, as the mandate-holders frequently underline links between the rights they primarily cover and other human rights (see also the following paragraph on inter-relatedness), some annual reports demonstrate the indivisibility of all human rights both in theory and based on concrete examples. The 2013 annual report of the SR-EPHR focused, for example, on the right to participation of people living in poverty and thus highlighted the negative repercussions of violations of socio-economic rights on the possibility to enjoy civil and political rights.<sup>334</sup> Equally, in his 2015 annual report focused on inequality, the SR-EPHR demonstrates the ‘negative effects of economic inequalities on a range of civil, political, economic, social and cultural rights’ and recommends as one measure to combat inequality to ‘[give] economic, social and cultural rights the same prominence and priority as are given to civil and political rights’.<sup>335</sup>

### *c) Inter-relatedness and interdependence*

While in the annual reports explicit affirmations of the principles of universality and indivisibility are rare, references to the inter-relatedness and interdependence of various rights can be frequently found. In particular in the ‘focus topics’ of their annual reports, mandate holders often highlight the inter-relation of the rights covered by their mandates with other human rights. In doing so, they also demonstrate the linkages to other thematic mandates and indirectly also affirm the equal importance of all human rights. For example, in her 2011 annual report, focused on the relationship between gender and the judiciary, the SR-IJL, argued that ‘deep economic inequalities continue to seriously hamper women’s human rights and are a common obstacle for women's access to justice’.<sup>336</sup> Equally in 2011, the Independent Expert on extreme poverty and human rights (IE-EPHR) illustrated the close relatedness of all human rights in her annual report focused on a human rights-based approach to recovery from the global economic and financial crises: ‘[i]n this regard, respect for all human rights, including the rule of law, gender equality and empowerment of women, inclusive participation, freedoms of association and expression, and equal access to public services are essential for poverty reduction’.<sup>337</sup> In even clearer words, the SR-FOE portrayed the close relationship between the freedom of opinion and expression and other human rights:

‘The right to freedom of opinion and expression is as much a fundamental right on its own accord as it is an “enabler” of other rights, including economic, social and cultural rights, such as the right to education and the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly.’<sup>338</sup>

<sup>334</sup> UNHRC ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights’ (11 March 2013) UN Doc A/HRC/23/36.

<sup>335</sup> UNHRC ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights’ (27 May 2015) UN Doc A/HRC/29/31, para 50.

<sup>336</sup> *ibid* para 22.

<sup>337</sup> UNHRC (17 March 2011) UN Doc A/HRC/17/34 (n 330) para 61.

<sup>338</sup> *ibid* para 22.

Further he concluded that '[the right to freedom of opinion and expression] symbolizes, more than any other right, the indivisibility and interdependence of all human rights.'<sup>339</sup> In this context, he also argued that the access to means of communication was not only an important aspect of the freedom of opinion and expression but should also be considered as an individual economic and social right, since it was 'now seen as necessary for achieving development'.<sup>340</sup> In his opinion, '[f]reedom of opinion and expression and access to communication are tools that can contribute to the eradication of poverty. By exercising this right, poor social groups can obtain information, assert their rights and participate in the public debate concerning social and political changes that would improve their situation'.<sup>341</sup> This statement is a powerful demonstration of an understanding that economic, social and cultural rights depend on the possibility to exercise civil and political rights and vice versa.

#### d) *Duty bearers: 'tripartite obligations' and non-state actors*

From an international law perspective, the human rights conventions and covenants concluded in the framework of the UN are multilateral treaties. If a State has validly declared to be bound by a certain human rights treaty (ratified or acceded to it), it is therefore internationally responsible for fulfilling the obligations prescribed in it. States are thus the duty-bearers of international human rights law. Other than classic international treaties, however, right-holders of human rights treaties are not other States but individuals: they have an internationally recognised (and protected) right that States comply with their treaty obligations. Additionally, while public international law in general does not specify how obligations need to be fulfilled, the UN treaty bodies have developed a tripartite (in some literature also 'triangular') typology of how State parties have to live up to their obligations deriving from international human rights law: the rights guaranteed need to be respected, protected and fulfilled.<sup>342</sup> This means that States do not only have to respect (*i.e.* do not interfere with) rights but they also have to protect individuals from interferences by others (*e.g.* other individuals but also corporations or armed groups) and they have to put in place the necessary infrastructure and services for the enjoyment of these rights.

The mandate-holders fully embrace the understanding of States as primary duty bearers and the concept of 'tripartite obligations' in the annual reports analysed for this study. Their elaborations on the concrete duties regarding specific rights reveal a comprehensive understanding of States' duties. In this sense States do not only have to respect individual rights ('refrain from interfering with the enjoyment of that right'),<sup>343</sup> they also have to protect individuals against human rights abuses by others and finally, have to establish the necessary infrastructure and create an enabling environment for the full enjoyment of human rights. Examples of such a comprehensive understanding can be found in all annual reports analysed, for example when mandate-holders state that 'States must undertake to respect, protect and promote this right [to participation] for people living in poverty',<sup>344</sup> or 'States have a duty to carry out

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<sup>339</sup> UNHRC (20 April 2010) UN Doc A/HRC/14/23 (n 330) para 27.

<sup>340</sup> *ibid* para 37.

<sup>341</sup> *ibid* para 56.

<sup>342</sup> Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli and others (eds), *International Human Rights Law* (2nd edn, OUP 2014) 101.

<sup>343</sup> UNHRC (20 April 2010) UN Doc A/HRC/14/23 (n 330) para 25.

<sup>344</sup> UNHRC (11 March 2013) UN Doc A/HRC/23/36 (n 334) para 19.

exhaustive investigations into each case and to bring criminal charges against those responsible [for violence against journalists]<sup>345</sup> or ‘States have the obligation to remove socioeconomic barriers which impede access to justice’<sup>346</sup>. While mandate-holders underline the States’ obligations to comprehensively guarantee the enjoyment of human rights by all individuals under their jurisdiction, they also emphasise the need to pay particular attention to gender and to disadvantaged groups. For example, in her 2011 annual report the IE-EPHR, underlined the ‘duty of the State to prioritize the rights of the poorest and most vulnerable people’ in times of economic crisis.<sup>347</sup>

As another example of the understanding of States as primary and comprehensive duty bearers, the mandate-holders emphasise the States’ duty to protect individuals against (powerful) non-State actors. For example, the IE-EPHR concluded that ‘[i]n order for States to meet their duty to protect, the banking sector should be regulated to obligate banking institutions to serve the interests of society’.<sup>348</sup> Similarly, the SR-FOE underlined that ‘States’ human rights obligations require that they not only respect and promote the rights to freedom of expression and privacy, but protect individuals from violations of human rights perpetrated by corporate actors’.<sup>349</sup> Elsewhere he stated that ‘[t]he State has a duty to provide a regulatory environment that facilitates a diverse range of political positions and ensures that voters have access to comprehensive, accurate and reliable information about all aspects of the electoral process’ in order to avoid powerful actors and media groups dominating the political debate.<sup>350</sup>

In one instance, however, the SR-FOE additionally recognised the - limited – responsibility of non-State actors themselves, in accordance with the UN Guiding Principles on Business and Human Rights.<sup>351</sup> He argued that ‘while States are the primary duty-bearers of human rights, the Special Rapporteur underscores that corporations also have a responsibility to respect human rights, which means that they should act with due diligence to avoid infringing the rights of individuals’.<sup>352</sup> This understanding does not limit the States’ duty to protect but puts an additional responsibility on corporations to act with due diligence, particularly in situations where States are unable or unwilling to fulfil their duty to protect.<sup>353</sup>

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<sup>345</sup> UNHRC (20 April 2010) UN Doc A/HRC/14/23 (n 330) para 95.

<sup>346</sup> UNHRC ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers’ (29 April 2011) UN Doc A/HRC/17/30, para 26.

<sup>347</sup> UNHRC (17 March 2011) UN Doc A/HRC/17/34 (n 330) para 17. See also III.E.5.a) on equality and non-discrimination.

<sup>348</sup> *ibid* para 84.

<sup>349</sup> UNHRC ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (17 April 2013) UN Doc A/HRC/23/40, para 76 (in the context of the global industry focused on the exchange of surveillance technologies).

<sup>350</sup> UNHRC ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (30 May 2014) UN Doc A/HRC/26/30, para 46.

<sup>351</sup> UNHRC ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31.

<sup>352</sup> UNHRC ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (16 May 2011) UN Doc A/HRC/17/27, para 76.

<sup>353</sup> On this issue see also FRAME Deliverable 7.2 and 7.4.

### e) *Individual rights and collective dimensions*

As mentioned above, the UN human rights system and in particular, the core human rights treaties, are built on the philosophical idea that each individual as human being enjoys inalienable rights. Especially in the Western human rights tradition, the focus on the individual has a strong liberal-emancipatory component, influenced by the ideas of the Enlightenment as opposed to the absolute power of monarchs and feudal societies.<sup>354</sup> Therefore, the idea of collective or group rights has long been rejected in international law, however, in recent decades the concept has gained more ground, influenced in particular by ‘third generation’ (*i.e.* development) rights and non-Western legal traditions.<sup>355</sup> Nevertheless, it is not always easy to distinguish between individual rights exercised as a group (*e.g.* freedom to assembly) and actual group rights (*e.g.* certain minority or indigenous rights).

The ‘individualistic’ nature of the rights guaranteed by the UN human rights treaties is also reflected in the mandate-holders annual reports. They frequently refer to ‘individuals’ when speaking about right-holders or outlining the obligations of duty-bearers (‘obliged to ensure to all individuals’, ‘duty to protect individuals’). However, the mandate-holders also identify collective dimensions in the exercise of certain individual rights. In his 2010 annual report, the SR-FOE stated, for example, that ‘freedom of opinion and expression, although an individual right in the broadest sense of its enjoyment, [was] also a collective right. It endows social groups with the ability to seek and receive different types of information from a variety of sources and to voice their collective views’.<sup>356</sup>

In addition to the collective dimensions of certain rights, the mandate-holders often understand participation not only as an individual right but also as a collective right in democratic societies. For instance, in her 2013 annual report, the SR-EPHR, recommends to States to ‘[a]dopt a legal framework that includes the explicit right of individuals and groups to participate in the design, implementation and evaluation of any policy, programme or strategy that affects their rights, at the local, national and international levels’.<sup>357</sup> Furthermore, the right to act collectively to claim certain human rights is also recognised with regard to human rights defenders or civil society organisations (*cf.* the focus area on civil society involvement). In this context, the limitation of a specific right of an individual in a multiplier capacity may also have wider repercussions on society. This was illustrated by the SR-FOE: ‘An attack against a journalist is not only a violation of his or her right to impart information, but also undermines the right of individuals and society at large to seek and receive information’.<sup>358</sup> In this sense, individual rights can also have indirect collective dimensions, if the effect of an individual violation of a certain right makes it more difficult or even impossible for others to exercise their individual rights.

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<sup>354</sup> Ed Bates, ‘History’ in Daniel Moeckli and others (eds), *International Human Rights Law* (2nd edn, OUP 2014) 17–18.

<sup>355</sup> Debra L DeLaet, *The Global Struggle for Human Rights: Universal Principles in World Politics* (2nd edn, Cengage Learning 2014) 79–81.

<sup>356</sup> UNHRC (20 April 2010) UN Doc A/HRC/14/23 (n 330) para 29.

<sup>357</sup> UNHRC (11 March 2013) UN Doc A/HRC/23/36 (n 334) para 86.

<sup>358</sup> UNHRC (4 June 2012) UN Doc A/HRC/20/17 (n 330) para 54.

### 3. Democracy

#### a) *Basic understandings of democracy and forms of democratic participation: elections and direct forms of involvement*

In the annual reports analysed for this study, the mandate-holders do not make explicit statements on how they define democracy, nevertheless a number of important elements can be deduced from these texts, which allow for a better understanding of their conceptualisation. An important element of the mandate-holders' references to democracy is the interdependence between democracy and human rights (and partly also the rule of law). In her 2015 annual report, the SR-EPHR concludes, for example that '[d]emocracy and civil and political rights are closely linked to the equal division of economic and other factors that are crucial for well-being'.<sup>359</sup> Also the SR-FOE repeatedly stressed the close link and mutual importance of freedom of expression and democracy (*e.g.* 'The right to be informed and to receive information from various media is a key factor in the development of social groups. This right is a cornerstone of democracy and supports the construction of more democratic societies peopled by active citizens').<sup>360</sup> By referring to the Commonwealth (Latimer House) Principles on the Three Branches of Government, the SR-IJL equally underlined in her 2014 annual report that 'as a vital element of democracy, an independent judiciary must be built on public trust'.<sup>361</sup>

Connected to this inter-related understanding of democracy and human rights is the mandate-holders understanding of democratic participation. Where there is a thematic link to the areas they cover, mandate-holders underline the importance of elections for representative democracies and stress the necessity to hold them in accordance with human rights and rule of law principles (in particular, Article 25 ICCPR). For example, the SR-FOE dedicated his 2014 annual report to the realisation of the right to freedom of opinion and expression in electoral contexts.<sup>362</sup> However, the mandate-holders also emphasise the more general aspect of Article 25 ICCPR, namely the right to take part in the conduct of public affairs, which they understand broadly as an individual's right to participate in matters that concern her/him. For example, in the context of social protection and old age poverty, the IE-EPHR concluded that 'States must ensure the meaningful and effective participation of older persons in the design, implementation and monitoring of social pensions'.<sup>363</sup> In this framework mandate-holders also uphold direct forms of citizens' involvement in decision-making processes (*i.e.* elements of participatory

<sup>359</sup> UNHRC (27 May 2015) UN Doc A/HRC/29/31 (n 335) para 18.

<sup>360</sup> UNHRC (20 April 2010) UN Doc A/HRC/14/23 (n 330) para 88. An example that the grave violation of a human right can also threaten democracy, can be found in the mandate-holder's 2013 annual report, where he concludes that '[c]ommunications surveillance should be regarded as a highly intrusive act that potentially interferes with the rights to freedom of expression and privacy and threatens the foundations of a democratic society'. See UNHRC (17 April 2013) UN Doc A/HRC/23/40 (n 349) para 81.

<sup>361</sup> UNHRC 'Report of the Special Rapporteur on the Independence of Judges and Lawyers' (28 April 2014) UN Doc A/HRC/26/32, para 39.

<sup>362</sup> UNHRC (30 May 2014) UN Doc A/HRC/26/30 (n 350) para 20 (within which the SR referred, among others, to UNGA Res 59/201 of 20 December 2004, which declared that the freedom of association and peaceful assembly were essential elements of democracy, together with the right to vote and to be elected at genuine periodic free elections).

<sup>363</sup> UNHRC 'Report of the Special Rapporteur on Extreme Poverty and Human Rights' (31 March 2010) UN Doc A/HRC/14/31, para 113.

democracies)<sup>364</sup> and underline the importance of empowering groups, which are traditionally often excluded from such processes. For instance, the SR-FOE considered that ‘the exercise of the freedom of expression necessarily implies an increase in women’s participation in public affairs and in their involvement in decision-making on issues that may directly influence their development’.<sup>365</sup>

### *b) Transparency and accountability*

In addition to possibilities of participation, transparency of policy-making processes and the accountability of those in power are key expectations of modern democracies and partly also elements of a State’s obligation to guarantee the enjoyment of the human right to democratic participation (as laid down *e.g.* in Article 25 ICCPR). The SR-IJL defines accountability in her 2014 annual report, which is entirely dedicated to judicial accountability, as ‘[i]n its practical sense [...], in essence, a mechanism to secure the control of public power’.<sup>366</sup> As a prerequisite of accountability, citizens must have access to the relevant information on which they can base their evaluations of government action. In this sense, the SR-FOE states that ‘[i]n a democracy, the right of access to public information is fundamental in ensuring transparency’.<sup>367</sup>

The mandate-holders consider transparent policy-making and accountability of particular importance when decisions have a strong impact on the lives of individuals and/or concern fundamental priority setting regarding the budget allocation. For example, the IE-EPHR stated in her 2011 annual report that ‘[a]t the core of the human rights framework is an overarching requirement that all States take into consideration the principles of participation, transparency and accountability in the design, implementation and evaluation of State policies’. Adhering to these principles does not only strengthen the individuals’ right to democratic participation but can also help to combat opaque practices that threaten equality and democratic processes, as the IE formulated: ‘[a] human rights approach emphasizes that transparency and access to information are important safeguards against corruption and means of increasing accessibility and participation’.<sup>368</sup> Therefore, the IE concluded that ‘[i]n formulating policies in response to the crises, [...] States must allow for the broadest possible national dialogue, with effective and meaningful participation of civil society, including those who will be directly affected by such policies’.<sup>369</sup> With regard to fiscal policies she stressed in her 2014 annual report that ‘[d]ecision-making processes regarding tax and public revenues must [...] be based on full transparency and the broadest possible national dialogue, with effective and meaningful participation of civil society and those who will be directly affected by such policies, including people living in poverty.’<sup>370</sup> In her opinion, ‘[...] a human

<sup>364</sup> See also below the focus area on participation.

<sup>365</sup> UNHRC (20 April 2010) UN Doc A/HRC/14/23 (n 330) para 47.

<sup>366</sup> UNHRC (28 April 2014) UN Doc A/HRC/26/32 (n 361) para 47. On judicial accountability, see below the subsection on the independence of the judiciary.

<sup>367</sup> UNHRC (20 April 2010) UN Doc A/HRC/14/23 (n 330) para 31; Similarly, the SR on extreme poverty stated: ‘[e]ffective and meaningful participation is in turn dependent on the right to seek, receive and impart information’, see UNHRC ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights’ (22 May 2014) UN Doc A/HRC/26/28, para 21).

<sup>368</sup> UNHRC (31 March 2010) UN Doc A/HRC/14/31 (n 363) para 76.

<sup>369</sup> UNHRC (17 March 2011) UN Doc A/HRC/17/34 (n 330) paras 25-26.

<sup>370</sup> UNHRC ‘Report of the Independent Expert on the Question of Human Rights and Extreme Poverty [Amended Version]’ (21 July 2014) UN Doc A/HRC/26/28/Corr.1, para 22.

rights approach requires States to debate fiscal options openly, avoiding technocratic decisions being made behind closed doors, and instead allowing for greater transparency and participation'.<sup>371</sup>

Equally important are transparent decision-making processes when a restriction of human rights is at stake: even if the limitation might be justified in order to protect other human rights, the balance of interests should be made by a transparent and, ideally, participatory process. In this sense, the SR-FOE underlined in his latest report that '[l]egislative proposals for the revision or adoption of restrictions on individual security online should be subject to public debate and adopted according to regular, public, informed and transparent legislative process'.<sup>372</sup>

#### 4. Rule of Law

##### a) What elements of 'thick/thin' conceptions of Rule of Law are used?

Even though the mandate-holders repeatedly mention rule of law, the annual reports analysed do not include a definition of what exactly the term means for them. Rather they seem to see it as an abstract concept, which is commonly understood within the UN (similarly to human rights) and hence does not need further explanation.<sup>373</sup> For example, the IE-EPHR writes in her 2011 annual report that '[...] respect for all human rights, *including the rule of law*, gender equality and empowerment of women, inclusive participation, freedoms of association and expression, and equal access to public services are essential for poverty reduction'.<sup>374</sup> In this context, it even seems that rule of law is understood as being itself a human right or at least an integral part of human rights implementation.

What can be deduced from the contexts in which the mandate-holders use the term is that formal legality (in the sense of a 'thin' conception and as a basis of 'thick' conceptions) is of high importance to the mandate-holders and the baseline of their understanding of the rule of law. For them it means at least that State action must be grounded in law and, if applicable, follow established procedures. For example, in his 2011 annual report, the SR-FOE denounced that:

'[I]n many instances, States restrict, control, manipulate and censor content disseminated via the Internet without any legal basis, or on the basis of broad and ambiguous laws, without justifying the purpose of such actions; and/or in a manner that is clearly unnecessary and/or disproportionate to achieving the intended aim [...]'.<sup>375</sup>

Additionally, legality also means for them that human rights should be translated to and further specified by national law. For example, the IE-EPHR argued that 'States must recognize the human right to social

<sup>371</sup> UNHRC (17 March 2011) UN Doc A/HRC/17/34 (n 330) para 81.

<sup>372</sup> UNHRC 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (22 May 2015) UN Doc A/HRC/29/32, para 58.

<sup>373</sup> At one instance, the Special Rapporteur on the independence of judges and lawyers refers to the definition of rule of law given by the report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies. Not, however, for the purpose of explaining what rule of law means, but for underlining that accountability is an important feature of it. See UNHRC (28 April 2014) UN Doc A/HRC/26/32 (n 361) para 19.

<sup>374</sup> UNHRC (17 March 2011) UN Doc A/HRC/17/34 (n 330) para 61 (*Emphasis added*).

<sup>375</sup> UNHRC (16 May 2011) UN Doc A/HRC/17/27 (n 352) para 26.

security in domestic law<sup>376</sup> and that '[i]n order to ensure that social protection systems are in line with human rights standards, States should establish a solid legal and institutional framework for social protection measures at the national level.<sup>377</sup> The SR-FOE underlined the importance of solid legal structures for example when concluding that '[c]ombating impunity [...] requires strengthening respect for the rule of law and ensuring that the domestic legal framework and institutions promote the right to freedom of expression and support the establishment of free, independent and pluralistic media'.<sup>378</sup> Such a requirement that domestic law promotes human rights, however, already goes beyond a strictly formal or 'thin' understanding of the rule of law: it demands morally 'good' laws rather than simply legally valid ones.

This understanding that rule of law is not limited to the existence of formal laws is reflected in many parts of the mandate-holders' annual reports. The way they use the term 'rule of law' implies that they seem to understand it as a complex concept that is based on human rights and democracy principles but at the same time is indispensable for the realisation of the former. The recommendations and conclusions of their annual reports frequently reiterate that legal institutions need to be based on human rights principles. If the laws and legal institutions are not human-rights based, this can easily lead to human rights violations, as highlighted, for example, by the SR-FOE: 'Inadequate national legal frameworks create a fertile ground for arbitrary and unlawful infringements of the right to privacy in communications and, consequently, also threaten the protection of the right to freedom of opinion and expression'.<sup>379</sup>

### *b) Independence of the judiciary and a robust legal profession*

The importance the UN human rights system attaches to an independent judiciary is not only highlighted by the existence of the specific mandate of the SR-IJL. In fact, the other two mandate-holders also repeatedly stress in their annual reports the need for an independent justice system and appropriate guarantees for practising judicial professions. As all three mandate-holders demonstrate, these are not abstract human rights but they enable the effective exercise and enforcement of all (other) human rights by individuals. Only if human rights can be claimed before a judicial authority and individuals can trust that their claims will be examined without political or economic pressure, human rights will be enjoyed in a long run. In the words of the SR-IJL, '[...] as the enforcement of human rights ultimately depends upon the proper administration of justice, an independent, competent and impartial justice system is paramount if it is to uphold the rule of law'.<sup>380</sup> Regarding lawyers, she concluded that '[w]hile [they] are

<sup>376</sup> UNHRC (31 March 2010) UN Doc A/HRC/14/31 (n 363) paras 55 and 108.

<sup>377</sup> UNHRC (17 March 2011) UN Doc A/HRC/17/34 (n 330) para 66.

<sup>378</sup> UNHRC (4 June 2012) UN Doc A/HRC/20/17 (n 330) para 77.

<sup>379</sup> UNHRC (17 April 2013) UN Doc A/HRC/23/40 (n 349) para 3.

<sup>380</sup> UNHRC (28 April 2014) UN Doc A/HRC/26/32 (n 361) para 3. Elsewhere, she put the independence of the judiciary in an even larger context:

'An independent judiciary is fundamental for the respect of the rule of law and the development of democracy. It is also fundamental to combating corruption, to guaranteeing equal access to justice, to providing effective justice and remedies to citizens, to countering patterns or contexts of abuse and to guaranteeing health, labour rights and non-discrimination'.

See UNHRC 'Report of the Special Rapporteur on the Independence of Judges and Lawyers' (9 April 2010) UN Doc A/HRC/14/26, para 93.

not expected to be impartial in the same way as judges, they must be as free as judges from external pressure and interference'.<sup>381</sup> In the concrete context of restrictions on the freedom of expression, the SR-FOE underlined that '[l]aws imposing a restriction or limitation must set out the remedy against or mechanisms for challenging the illegal or abusive application of that limitation or restriction, which must include a prompt, comprehensive and efficient judicial review of the validity of the restriction by an independent court or tribunal'.<sup>382</sup>

The mandate-holders consider the independence of the judiciary such an important feature of the rule of law that they transpose the principle of independent decision-making also to contexts outside the court system. For example, they call for the requirement of the independence of quasi-judicial disciplinary commissions (responsible for certain professions)<sup>383</sup> or bodies allocating public goods or resources.<sup>384</sup> The more sensitive the possible inference with a right is, the more important an independent examination becomes. In this sense, the SR-FOE called in his 2013 annual report for the 'establishment of strong independent oversight bodies mandated to review the use of intrusive surveillance techniques and the processing of personal information'.<sup>385</sup> Similarly, he recommended to States to '[e]nsure that the implementation of political financing regulations is overseen, monitored and enforced by the electoral authorities, the judiciary and other independent bodies'.<sup>386</sup> While the necessary elements of (judicial) independence will depend on the context, there are some common features that usually characterise independent bodies. Referring to the ECtHR's reasoning in *Olujić v Croatia*, the SR-IJL concluded in her 2014 annual report that:

'[...] in order to establish whether a body can be considered independent, regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressure and to the question of whether the body presents an appearance of independence'.<sup>387</sup>

However, it is important to recall the purpose of judicial independence to avoid unwanted imbalances or privileges to the detriment of the rule of law. As the SR-IJL succinctly summarised:

'the enforcement of human rights ultimately depends upon the proper administration of justice, an independent, competent and impartial justice system is paramount if it is to uphold the rule of law. The independence of the judiciary is not, however, an absolute concept and it should not be used with the sole purpose of granting personal benefits and limitless powers to judges,

<sup>381</sup> UNHRC (28 April 2014) UN Doc A/HRC/26/32 (n 361) para 66.

<sup>382</sup> UNHRC (20 April 2010) UN Doc A/HRC/14/23 (n 330) para 79.

<sup>383</sup> The SR on the independence of judges and lawyers concluded that '[i]n order to avoid the improper use of accountability mechanisms [regarding judges], it is crucial that the following elements are in place: clear grounds for a removal, suspension or sanction; an independent, internal body in charge of disciplinary proceedings; [...]'. See UNHRC (28 April 2014) UN Doc A/HRC/26/32 (n 361) para 72.

<sup>384</sup> For example, the SR on the freedom of opinion and expression '[...] recommended that frequency allocation should be overseen and managed by an independent State (public-sector) body'. See UNHRC (20 April 2010) UN Doc A/HRC/14/23 (n 330) para 123.

<sup>385</sup> UNHRC (17 April 2013) UN Doc A/HRC/23/40 (n 349) para 31.

<sup>386</sup> UNHRC (30 May 2014) UN Doc A/HRC/26/30 (n 350) para 82.

<sup>387</sup> UNHRC (28 April 2014) UN Doc A/HRC/26/32 (n 361) para 83; *Olujić v. Croatia* App no 22330/05 (ECtHR, 5 May 2009) para 38.

prosecutors and lawyers [...]. Indeed, while justice operators must enjoy some privileges and immunities because of their functions and in order to ensure their independence and impartiality, they must also be accountable for their actions and conduct so that the guarantees of their independence are not abused'.<sup>388</sup>

Further she concluded that '[t]he principle of the independence of the judiciary is not aimed at benefitting judges themselves, but at protecting individuals from abuses of power and ensuring that court users are given a fair and impartial hearing'.<sup>389</sup>

Therefore, judicial independence for the benefit of the rule of law in a State would be incomplete without mechanisms to hold judges or public prosecutors accountable for failure to conduct proceedings fairly and impartially. The SR-IJL dedicated her 2014 annual report specifically to the topic of judicial accountability. In this report, she analysed the relation between judicial independence and judicial accountability, outlined basic requirements by international law and presented best practices developed by soft law instruments and individual States. She concluded, among other things, that judicial accountability was paramount for a functioning justice system respecting the rule of law, as '[i]t is imperative that the beneficiaries of the justice system can assess whether judges, prosecutors and lawyers are duly exercising their functions and responsibilities and whether the system itself is functioning independently and impartially'.<sup>390</sup>

*c) Access to justice and the right to remedy: effective judicial review, enforcement and redress*

Access to justice is one of the cornerstones of justice systems built on the rule of law. As the SR-IJL summarised:

'[...] the legal complexity and richness of the concept of access to justice lies in the fact that it is both a right in itself and the means of restoring the exercise of rights that have been disregarded or violated. As an indispensable component of specific rights such as the right to liberty and to personal safety, it is closely linked to the right to effective judicial protection (fair trial or due process), the right to an effective remedy and the right to equality.'<sup>391</sup>

This quotation shows, however, that access to justice is a complex concept that covers several different aspects and is closely related to other rights, from which it is not easily distinguishable. A previous SR-IJL dedicated a part of his 2008 annual report to distilling the key components of his understanding of access to justice. He arrived at six main components: right to a fair trial, right to an effective remedy, right to equality before the courts, equality of arms, legal assistance, and positive obligations of the State (*e.g.* establishment of the judicial system that guarantees rights).<sup>392</sup> While none of the annual reports of the current mandate-holders analysed for this research define access to justice, many of them either include

<sup>388</sup> UNHRC (28 April 2014) UN Doc A/HRC/26/32 (n 361) para 3.

<sup>389</sup> *ibid* para 59.

<sup>390</sup> *ibid* para 89.

<sup>391</sup> UNHRC (29 April 2011) UN Doc A/HRC/17/30 (n 346) para 37.

<sup>392</sup> UNHRC 'Report of the Special Rapporteur on the Independence of Judges and Lawyers' (13 May 2008) UN Doc A/HRC/8/4, paras 17-23.

some of the aforementioned components or consider these components as ‘self-standing’ rights (*cf.* the quotation above). In this regard, most of them use ‘access to justice’ as a more generic concept; however, in substance they often refer to the right to remedy as the right to seek justice of individuals whose human rights have been violated.

In international human rights law, access to an effective remedy in case of human rights violations is not only of crucial importance for the actual enjoyment of human rights, it is also a human right itself, enshrined in major international and regional human rights treaties, including in Article 2(3) of the ICCPR. Moreover, the right to remedy, or more broadly, access to justice, is also an indicator for a justice system’s ability to enforce and review laws and administrative acts and as such, it is a key component of the rule of law. Reading the mandate-holders annual reports, the high importance they attach to access to justice and the right to remedy becomes quickly visible. They frequently stress that States must hold perpetrators of human rights violations accountable and provide adequate remedies for those whose rights have been violated. For example, the IE-EPHR reiterated in her 2010 annual report that ‘[h]uman rights standards emphasize that everyone has the right to an effective remedy when his or her rights have been violated’.<sup>393</sup> Similarly, the SR-IJL underlined that ‘[...] accountability is a concept inherent to the rule of law, which is at the heart of the principles promoted by the United Nations’.<sup>394</sup> The high importance the mandate-holders attach to the access to justice and the right to remedy is reflected by the choice of ‘focus areas’ for their annual reports during the last years. As mentioned above, the SR-IJL dedicated her 2014 annual report to judicial accountability, while her 2013 annual report focused on legal aid and its importance for ensuring effective access to justice for everybody. Additionally, in her report to the 67<sup>th</sup> session of the UNGA in 2012, the SR-EPHR analysed the obstacles to access to justice for persons living in poverty.<sup>395</sup>

Apart from abstract affirmations, the mandate-holders also underlined the importance of effective judicial review and the individual’s right to remedy in a number of concrete contexts. Writing about attacks against journalists, activists and political candidates, the SR-FOE underlined, for example, that ‘States must ensure accountability through the conduct of impartial, speedy and effective investigations into such acts and bring to justice those responsible, as well as ensuring that victims have access to appropriate remedies’.<sup>396</sup> Therefore, high impunity rates for certain crimes and a lack of adequate redress mechanisms do not only run counter to the victims’ right to an effective remedy but also to the rule of law as such. The SR-IJL also highlighted the specific aspect of the State’s responsibility for providing adequate remedies for those who have been negatively affected by a wrongful conviction or other miscarriage of justice.<sup>397</sup> Such remedies are particularly important to ensure people’s trust in a justice system but they are also particularly sensitive because they have to be established in a way that is compatible with judicial independence and guarantees impartial and fair proceedings. Referring to a number of international and regional (soft law) standards the SR ‘call[ed] upon States to adopt and implement a definition of remedy for a miscarriage of justice that is comprehensive and not limited to criminal cases, in order to provide

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<sup>393</sup> UNHRC (31 March 2010) UN Doc A/HRC/14/31 (n 363) para 79.

<sup>394</sup> UNHRC (28 April 2014) UN Doc A/HRC/26/32 (n 361) para 19.

<sup>395</sup> UNGA, ‘Report of the Special Rapporteur on Poverty and Human Rights’ (9 August 2012) UN Doc A/67/278.

<sup>396</sup> UNHRC (30 May 2014) UN Doc A/HRC/26/30 (n 350) para 70.

<sup>397</sup> UNHRC (28 April 2014) UN Doc A/HRC/26/32 (n 361) paras 97-105.

effective remedies to persons whose human rights have been violated'.<sup>398</sup>

In some contexts, the mandate-holders broaden the scope of application of the access to justice or the right to remedy to non- or quasi-judicial review mechanisms, when such procedures seem equally adequate or even better suited to deal with certain grievances. The SR-IJL argued in her 2010 annual report that '[a]ccess to justice should not be understood exclusively as access to the judiciary. It also means access to less formal types of institutions and mechanisms such as national human rights institutions, ombudsmen, conciliators and mediators able to assist people to claim their rights'.<sup>399</sup>

Such review or grievance mechanisms might even go beyond individual rights and concern the formulation of policies or the process of (community) decision-making. For instance, with regard to social policy-making, the IE-EPHR noted that '[...] there must be independent and effective judicial and quasi-judicial (e.g. ombudsperson) mechanisms in place to monitor the general formulation and implementation of social policies'.<sup>400</sup> Elsewhere she concluded that the right to participation must go along with corresponding accountability mechanisms: '[...] people need access to procedures and institutions that provide redress and remedy, and mechanisms to ensure that their Government fulfils the right of access to information and the right to participation'.<sup>401</sup>

As mentioned above, access to justice in a broad sense includes substantial judicial rights, in particular the right to a fair trial – both are, however, individual rights and can also be seen as separate indicators of the rule of law. The mandate-holders refer to these rights a number of times in their annual reports, mostly in concrete contexts. In more general terms, the SR-IJL summarised that '[l]aws, plans, policies or programmes that do not give women and men the right to a fair and public hearing within a reasonable time by an independent and impartial court or tribunal previously established by the law are discriminatory'.<sup>402</sup> By referring to international human rights law, the SR-EPHR recalled that '[t]o ensure accountability and access to remedy and redress in cases where rights are violated, States parties should also ensure that all members of the public have effective access to justice, including the right to a fair trial'.<sup>403</sup>

However, the conceptual boundaries are often blurred in the reports, as components of the right to access to justice, the right to a fair trial and 'self-standing' rights are not clearly distinguished and attributed to different concepts. An example in this regard is legal aid, which the SR-IJL generally described as:

'[...] an essential component of a fair and efficient justice system founded on the rule of law. It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy. Access to legal advice and assistance is also an important safeguard that helps to ensure fairness and public trust

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<sup>398</sup> *ibid* para 105.

<sup>399</sup> UNHRC (9 April 2010) UN Doc A/HRC/14/26 (n 380) para 76.

<sup>400</sup> UNHRC (31 March 2010) UN Doc A/HRC/14/31 (n 363) para 81.

<sup>401</sup> UNHRC (11 March 2013) UN Doc A/HRC/23/36 (n 334) para 65.

<sup>402</sup> UNHRC (29 April 2011) UN Doc A/HRC/17/30 (n 346) para 38.

<sup>403</sup> UNHRC (11 March 2013) UN Doc A/HRC/23/36 (n 334) para 27.

in the administration of justice'.<sup>404</sup>

Elsewhere, however, she characterised legal aid as component of the access to justice by stating that '[a]ffirmative action, including temporary special measures by States should aim to guarantee access to justice on an equal footing by means, for example, of the granting of legal aid and assistance for the purposes of securing the effectiveness of this right.'<sup>405</sup>

## 5. Focus areas

### a) Equality and non-discrimination

Equality and non-discrimination are among the most fundamental, underlying principles of international human rights law. The UDHR and most human rights treaties emphasise in their first articles the equality of human beings and therefore state that all individuals are entitled to the rights they guarantee without any discrimination (*cf. e.g.* Article 2 ICCPR and ICESCR). In contemporary human rights doctrine, human rights are inseparable from the recognition of equality, as any other conception would question the fundamental assumption that all individuals enjoy basic rights by the mere fact of their existence.<sup>406</sup> As the SR-EPHR formulated, '[a]rguably, the main aim of human rights is transforming power dynamics between individuals in society, in order to challenge oppression, subvert the subordination and marginalization of certain groups and individuals and promote individual agency, autonomy and respect of the inherent dignity of every human being'.<sup>407</sup>

Furthermore, equality and non-discrimination play an essential role in conceptions of democracy and the rule of law. They are therefore cross-cutting issues *par excellence* and also deserve special attention because of the high importance the mandate-holders attach to these principles in the annual reports analysed. During the period analysed, the SR-FOE focused a part of his 2010 annual report on the freedom of expression for groups in need of particular attention and the role of freedom of expression in combating discrimination; and the SR-EPHR dedicated his 2015 annual report to the relationship between extreme poverty and extreme inequality. Additionally, the SR-IJL dedicated one of her annual reports each to the multifaceted relationship between gender and the judiciary (2011) and to the protection of children's rights in the justice system (2015), thereby paying particular attention to groups that are frequently discriminated against.

The mandate-holders understand equality as a comprehensive concept that does not only prohibit discrimination on certain grounds but also means that States have to promote and facilitate equal opportunities by countering factors that lead to or perpetuate inequalities. Hence, this responsibility to protect and fulfil means that States have to pay particular attention to disadvantaged groups who – due to various factors, including discrimination – might find it particularly difficult to effectively enjoy their human rights, participate in societal and political life and claim their rights with the help of judicial or non-

<sup>404</sup> UNHRC 'Report of the Special Rapporteur on the Independence of Judges and Lawyers' (15 March 2013) UN Doc A/HRC/23/43, para 20.

<sup>405</sup> UNHRC (29 April 2011) UN Doc A/HRC/17/30 (n 346) para 40.

<sup>406</sup> Cf Jarlath Clifford, 'Equality' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 431.

<sup>407</sup> UNHRC (11 March 2013) UN Doc A/HRC/23/36 (n 334) para 20.

judicial remedies.

According to their mandates and the (special) topics they have covered in their annual reports during the last years, the mandate-holders analysed State obligations with regard to the principle of equality and non-discrimination in concrete contexts. The SR-IJL, for example, repeatedly highlighted the various challenges to equality in the justice system and how States should address these challenges. Reflected also by the choice of her focus areas (see above) she paid particular attention to difficulties of disadvantaged groups. For example, in her 2011 annual report she summarised that ‘many gender-specific obstacles that stand in the way of women's equality in the administration of justice include the feminization of poverty as well as laws, policies and practices that discriminate against women’.<sup>408</sup> Furthermore, she concluded that ‘the unequal economic or social status of the litigants is usually translated into the unequal possibility of defence in trial’<sup>409</sup> because these groups of people are often unaware of their rights and cannot pay for a good lawyer or other legal advice. This is also why legal aid schemes are an important tool to ensure a fair trial and the equality of arms in civil proceedings, highlighted in the SR's 2013 annual report (*cf.* above the paragraph on access to justice). However, also seemingly general malfunctions in the administration of justice might have a stronger impact on disadvantaged groups, according to the SR's findings: ‘lack of public policies to eliminate obstacles to access to justice for all has a greater impact on groups in a vulnerable situation or living in extreme poverty, or who are culturally, economically or socially disadvantaged’.<sup>410</sup>

Equality and non-discrimination are also necessary requirements for developing or maintaining truly democratic societies. Both the SR-FOE and the SR-EPHR highlighted this fact, by pointing to situations where economic or societal inequalities can lead to the exclusion of certain groups from democratic participation. For example, the SR-EPHR stressed that ‘[d]emocracy and civil and political rights are closely linked to the equal division of economic and other factors that are crucial for well-being [...]’. However, he stated, ‘[a] major problem in both developing and developed countries is the capture of the political process by powerful groups, and the exclusion of others, leading to laws, regulations and institutions that favour the powerful’.<sup>411</sup> The SR-FOE arrived at a similar conclusion, noting that ‘[...] economic and political imbalances permit some groups to dominate the public debate to a point where divergent ideas are often excluded from public debate’.<sup>412</sup> In particular where there are poor legal frameworks or enforcement mechanisms, small segments of society may exercise political influence, ‘thereby undermining the democratic ideal’.<sup>413</sup>

In addition, the SR-FOE pointed particularly to the consequences of inequality for the plurality of opinions and political debates, as powerful economic groups might exercise a strong influence on the media sector, particularly where legal frameworks that should ensure plurality and independence are weak. As a consequence of such weak legal structures, however, ‘[t]he concentration of the media leads to a

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<sup>408</sup> UNHRC (29 April 2011) UN Doc A/HRC/17/30 (n 346) para 19.

<sup>409</sup> *ibid* para 41.

<sup>410</sup> UNHRC (15 March 2013) UN Doc A/HRC/23/43 (n 404) para 81.

<sup>411</sup> UNHRC (27 May 2015) UN Doc A/HRC/29/31 (n 335) paras 18-19. On this aspect see also below the subsection on participation.

<sup>412</sup> UNHRC (30 May 2014) UN Doc A/HRC/26/30 (n 350) para 3.

<sup>413</sup> *ibid* paras 12-14.

concentration of political power and jeopardizes democracy and the ability of all sectors of society to exercise their right to freedom of opinion and expression.<sup>414</sup> States therefore have a duty to promote pluralism, particularly during electoral processes.<sup>415</sup>

As another aspect of the importance of equality and non-discrimination, the SR-EPHR highlighted the fact that not only can economic inequality lead to political or judicial inequality but also vice versa political inequality or social discrimination can lead to economic inequality and poverty. He argued that while '[p]erfect economic equality [was] not achievable and arguably not desirable, [...] there does seem to be a consensus, [...], that every human being is entitled — at the very least — to equal opportunity'.<sup>416</sup> In reality, however, '[v]ertical and horizontal inequalities, including economic inequalities, are often closely related to discrimination. In many countries, the poorest sector of the population coincides with social and ethnic groups that experience discrimination'.<sup>417</sup> In his 2015 annual report the SR therefore dedicated a subchapter of his conclusions/recommendations to 'revitalizing the equality norm', especially in terms of access to resources. There he encouraged the UN human rights system to pay greater attention to the right to equality '[...] so that [this right] is able to add substantively to the jurisprudence of international human rights bodies in ways that it has not, thus far' and in particular, to develop notions of distributive equality.

### *b) Participation and civil society involvement*

The right to participation in public affairs, as guaranteed for example by Article 25 ICCPR, is of high importance to the mandate-holders (*cf.* above the section on Democracy). They consider this right, in particular in the sense of the '[...] right to take part and exert influence in decision-making processes that affect one's life',<sup>418</sup> as an underlying principle of human rights protection or even self-standing human right that is not limited to democratic decision-making in a narrow sense.<sup>419</sup> As the IE-EPHR and SR-EPHR formulated, '[w]ide and informed public participation in the development and implementation of [in this case] social policies is an essential feature of policies grounded in human rights standards'<sup>420</sup> and 'exercising their right to participation can be a springboard to fully claiming other rights'.<sup>421</sup> This understanding that the right to participation is a (self-standing) individual right implies that States have a legal obligation to ensure the adequate participation of (affected) individuals. If they fail to do so, there should be mechanisms in place, to hold them accountable (*cf.* above the subsections on transparency and accountability and on the access to justice and the right to remedy).<sup>422</sup>

<sup>414</sup> UNHRC (20 April 2010) UN Doc A/HRC/14/23 (n 330) para 69.

<sup>415</sup> Cf UNHRC (30 May 2014) UN Doc A/HRC/26/30 (n 350) para 81 (listing the SR's recommendations on this topic).

<sup>416</sup> UNHRC (27 May 2015) UN Doc A/HRC/29/31 (n 335) para 12.

<sup>417</sup> *ibid* para 24.

<sup>418</sup> UNHRC (11 March 2013) UN Doc A/HRC/23/36 (n 334) para 20.

<sup>419</sup> *ibid*. For example, the SR on extreme poverty and human rights defined it as a '[...] fundamental right to which individuals are inherently entitled by virtue of their humanity'.

<sup>420</sup> UNHRC (31 March 2010) UN Doc A/HRC/14/31 (n 363) para 83.

<sup>421</sup> UNHRC (11 March 2013) UN Doc A/HRC/23/36 (n 334) para 22.

<sup>422</sup> The SR on extreme poverty and human rights noted in this context: 'Accountability is a critical feature of a human rights approach to participation. Participation understood as a right implies rights holders and duty bearers who can

Evidence of the importance of the right to participation in the mandate-holders' conceptions of human rights, democracy and the rule of law can be found in many of the annual reports issued during the last years. The SR-EPHR even focused her 2013 annual report on the right to participation of people living in poverty and the mandate-holders interpret and analyse the right to participation also in many other contexts. They pay particular attention to groups that often find it difficult to participate in decision-making processes, either for practical reasons (*e.g.* lack of accessibility) or because of discrimination, and encourage States to take proactive steps to better include those groups. For example, the IE-EPHR called for special attention on the participation of older persons, especially older women,<sup>423</sup> while the SR-IJL welcomed 'initiatives to promote the participation of women in the conduct of public affairs'<sup>424</sup> given 'women's minimal participation in decision-making processes'.<sup>425</sup> Similarly, the SR-FOE considered '[...] that the exercise of the freedom of expression necessarily implies an increase in women's participation in public affairs and in their involvement in decision-making on issues that may directly influence their development'.<sup>426</sup> In this sense, 'freedom of expression is the primary channel for participation and serves as a mechanism for inclusion',<sup>427</sup> as participation requires transparent processes and adequate information.

However, the mandate-holders do not conceive the right to participation only as an individual right but also interpret it as the right of groups of (affected) individuals or even as a right of organisations representing individuals. For example, the IE-EPHR argued that '[p]articipation should be understood in a broad sense. It should include not only beneficiaries, but also civil society organizations that can play a role in advocating for the rights [...]'.<sup>428</sup> This is remarkable because human rights, as enshrined in international law, are generally conceived as individual rights, with very few exceptions of rights that are expressly formulated as collective rights (*cf.* above the subsection on individual rights and collective dimensions). While in principle, rights still remain individual rights, even if they are claimed collectively as a group of individually affected persons, the further analysis of the mandate-holders' annual reports suggests a different (and more generous) interpretation. They seem to understand the right to participation of civil society organisations as an independent right (or at least as a principle or good practice) of organisations which might only abstractly represent affected individuals. This becomes obvious, for example, when the IE-EPHR underlines that States have to '[r]ecognize the rights of civil society organizations to participate in the design, implementation and evaluation of public policy'.<sup>429</sup> Conclusions are difficult to draw though as the mandate-holders remain vague on their understanding of what civil society organisations are and how exactly their meaningful participation can be ensured in practice. For example, the IE-EPHR argued in her 2011 annual report that:

'[i]n order to satisfy their human rights obligations and thus ensure participation and transparency

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and must be held to account for failure to respect, protect and fulfil that right'. See UNHRC (11 March 2013) UN Doc A/HRC/23/36 (n 334) para 65.

<sup>423</sup> UNHRC (31 March 2010) UN Doc A/HRC/14/31 (n 363) paras 83-84.

<sup>424</sup> UNHRC (29 April 2011) UN Doc A/HRC/17/30 (n 346) para 81.

<sup>425</sup> *ibid* para 21.

<sup>426</sup> UNHRC (20 April 2010) UN Doc A/HRC/14/23 (n 330) para 47.

<sup>427</sup> *ibid* para 50.

<sup>428</sup> UNHRC (31 March 2010) UN Doc A/HRC/14/31 (n 363) para 86.

<sup>429</sup> UNHRC (11 March 2013) UN Doc A/HRC/23/36 (n 334) para 86; Cf also the quotations in the following paragraphs.

in policy formulation, States should construct permanent structures and pathways for consultation with individuals, civil society, community organizations, grass-roots movements and the academic community. They should also take measures to invest in the capacity of these groups to contribute to and participate in policy formulation'.<sup>430</sup>

It is unclear if this statement understands civil society as something different from community organisations, grass-roots movements and the academic community or if civil society is used as a more general term that encompasses all three groups (and possibly many more).<sup>431</sup> Despite this conceptual ambiguity, it becomes clear that the mandate-holders attach high importance to participatory processes that involve non-governmental representatives – independent of how broadly this group is exactly defined. Maybe mandate-holders purposely did not want to provide narrow concepts but leave it to governments and civil society actors themselves to decide who should be involved and in what ways, depending on the local context.

Examples for the important role of civil society organisations in specific policy- or decision-making processes, respectively in ensuring governmental accountability, can be found in the annual reports of all three mandate-holders during the last years. For example, in the context of national efforts to protect journalists the SR-FOE emphasised '[...] the importance of immediately creating a national mechanism to protect journalists, [...] with the participation of journalists and civil society organizations in its design, integration, functioning and evaluation'.<sup>432</sup>

However, the mandate-holders do not only stress the 'passive' side of civil society involvement (*i.e.* that governments invite civil society organisations to take part in certain process) but also the 'active' side (*i.e.* that civil society organisations engage themselves on certain topics and actively start processes). For example, the SR-FOE concluded that '[c]ivil society associations, including journalists, should engage actively with Government initiatives to establish protection mechanisms [for journalists]'.<sup>433</sup> The SR-IJL encouraged '[...] civil society organizations and national human rights institutions, and other stakeholders to establish partnerships with States to help them in addressing gender-specific barriers to the access of justice and develop a gender-sensitive administration of justice'.<sup>434</sup> Elsewhere she underlined the 'invaluable role' of civil society in the monitoring of the justice system.<sup>435</sup> As another example of active civil society engagement, the IE-EPHR stated that '[g]overnmental entities are the main providers of social protection, but often civil society entities and the private sector also contribute'.<sup>436</sup> Additionally, the SR-FOE frequently refers to the active role of civil society organisations in the context of digital communication and media, in particular in his 2011 and 2015 annual reports, focused on the freedom of

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<sup>430</sup> UNHRC (17 March 2011) UN Doc A/HRC/17/34 (n 330) para 90.

<sup>431</sup> FRAME Deliverable 7.1 and 7.2 explore the meaning and scope of the term 'civil society'.

<sup>432</sup> UNHRC (4 June 2012) UN Doc A/HRC/20/17 (n 330) para 74.

<sup>433</sup> *ibid* para 112.

<sup>434</sup> UNHRC (29 April 2011) UN Doc A/HRC/17/30 (n 346) para 90.

<sup>435</sup> UNHRC (28 April 2014) UN Doc A/HRC/26/32 (n 361) para 89 (reads '[b]y monitoring the proper functioning of the justice system, it encourages engagement through a substantive and transparent dialogue between justice operators, the other powers of the State and the general public'.

<sup>436</sup> UNHRC (31 March 2010) UN Doc A/HRC/14/31 (n 363) para 26.

opinion and expression online,<sup>437</sup> respectively on the use of encryption and anonymity in digital communications.

To facilitate civil society participation, the IE-EPHR recommended that States '[s]trengthen protection of individuals and non-governmental organizations that work with and advocate for those living in poverty; recognizing the right to act collectively; and prevent and punish any reprisal against those who exercise their right to participation'.<sup>438</sup> However, the IE also highlighted the possible risks of relying solely on the participation of civil society organisations, without involving also those directly affected:

'While NGOs, especially grass-roots organizations, have an important role to play in supporting and facilitating the participation of people living in poverty, they are not a proxy. Staff or volunteers of NGOs or civil society organizations should not automatically be seen as "representatives" or "spokespersons" for people living in poverty, but rather serve as facilitators and advocates, with the ultimate goal of allowing them to express themselves and influence decision-making on their own terms'.<sup>439</sup>

In this sense, the participation of civil society organisations might be both a right or principle in its own regard and an important tool to involve individuals and organisations not related to the governments but it is no substitute for the individual right to participation that States must ensure under international human rights law.

## 6. Conclusions

The analysis of the annual reports of the three mandate-holders in this chapter revealed that the mandate holders have a very rich and multi-faceted understanding of human rights, democracy and the rule of law. However, their understanding is very much linked to specific contexts, as they pay little attention to conceptual clarifications or definitions in their reports. This lack of conceptual discussions might be explained by their mandates, which are practically oriented and focused on very specific topics. In many occasions, they thus seem to assume common basic understandings of certain elements of human rights, democracy and the rule of law within the UN system, on which they can build their specific analyses.

Nevertheless, as has been demonstrated throughout the previous sections, the mandate-holders use most of the elements of these three concepts that have been identified by academic literature. In most cases it is difficult to clearly differentiate the various elements however, as there are many overlapping aspects, which show that the elements depend on each other to form as a whole, a meaningful understanding of human rights, democracy and the rule of law.

As experts of the HRC, the mandate holders have a strong human rights-based perspective and their conceptions of democracy and the rule of law always remain linked to the international human rights framework. However, even only compared with the rule of law (and not human rights), democracy aspects are less important in the annual reports of the mandate-holders. Considering that this might be linked to

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<sup>437</sup> 'Key trends and challenges to the right of all individuals to seek, receive and impart information and ideas of all kinds through the Internet.' See UNHRC (16 May 2011) UN Doc A/HRC/17/27 (n 352).

<sup>438</sup> UNHRC (11 March 2013) UN Doc A/HRC/23/36 (n 334) para 86.

<sup>439</sup> *ibid* para 77.

the choice of the mandates analysed –the mandate of the SR-IJL has a clear human rights focus– this is still significant because the other two mandate-holders also refer to many elements of the rule of law in their reports. While we cannot draw an explanation for this result directly from the reports, the reason might be that questions related to democratic governance are intrinsically political and thus more sensitive in the UN context. It should be noted in this regard that the HRC has as yet never established a special procedure on the right to take part in the conduct of public affairs or the right to vote.

As a general trend, it can be observed that the mandate-holders tend to understand rights and principles in broad terms, trying to highlight all facets that the interpretation of a specific right might involve –as ‘human rights-friendly’ or ‘human rights-enabling’ as possible. Such a broad interpretation can also lead to a widening of the scope of application of certain rights or principles, as we have seen, for example, regarding the independence of the judiciary, the right to remedy or the right to participation. In these cases, the mandate-holders have built on the original meaning/scope of application of the right and explained why this right or principle is also necessary in another –maybe closely related– context. Additionally, it can be observed that the mandate-holders attach high importance to the effective implementation of rights in practice and thus underline in many occasions the importance of the right to remedy or the accountability of stakeholders.

The mandate-holders ‘context-driven’ and practical approach to human rights, democracy and rule of law provides a good understanding of how the three concepts are framed in a still rather abstract but more practically oriented and thematically focused branch of the UN human rights system. In some contexts, however, the lack of conceptual clarity might hinder the comprehensive understanding of certain elements and their implementation in practice. For example, the lack of definition concerning the meaning of ‘civil society’, or at least what it should include in specific contexts, leaves a large room for interpretation, which could lead to the exclusion of certain groups, respectively to the inclusion of groups, which are not independent of the government.

## IV. African Union

### A. Conceptions of human rights, democracy and rule of law

#### 1. Introduction

The African Union (AU) has 54 Member States<sup>440</sup> and include among its objectives unity and solidarity, defence of sovereignty, political and socio-economic integration, promotion of common African positions in international affairs, international cooperation, peace, security and stability, promotion of democratic principles and human rights, sustainable development, raised living standards, coordinate and harmonise policies of sub-regional organisations, promotion of research and promotion of good health.<sup>441</sup> Some of

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<sup>440</sup> The only independent African State which is not a member of the AU is Morocco which withdrew from the AU’s predecessor, the OAU, in 1984, following the admittance of the Sahrawi Arab Democratic Republic (Western Sahara) to the OAU, a territory which is occupied by Morocco.

<sup>441</sup> Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) OAU Doc CAB/LEG/23.15, art 3 (AU Constitutive Act). The AU Assembly of Heads of State and Government held its inaugural meeting in July 2002.

these objectives were included already in the Charter of the Organization of African Unity (OAU)<sup>442</sup> but when the AU replaced the OAU in 2002, the promotion of human rights, the rule of law and democracy in the Member States were put squarely on the agenda of the new organisation. For example, Article 4(m) of the Constitutive Act of the AU provides that the Union shall respect 'democratic principles, human rights, the rule of law and good governance'.

The main instruments in relation to human rights, rule of law and democracy in the African Union are the African Charter on Human and Peoples' Rights (AChPR), adopted in 1981 and entered into force in 1986, and the African Charter on Democracy, Elections and Governance (African Democracy Charter), adopted in 2007 and entered into force in 2012. The ACHPR is complemented by a Protocol on the Rights of Women in Africa (Maputo Protocol).<sup>443</sup> The ACHPR has been ratified by all AU Member States except the newest member, South Sudan.

The main AU human rights monitoring mechanism is the African Commission on Human and Peoples' Rights (ACHPR), which has a broad promotional and protective mandate, and the more recent African Court on Human and Peoples' Rights (African Court).<sup>444</sup> There is also the African Committee on the Rights and Welfare of the Child which monitors compliance with the African Charter on the Rights and Welfare of the Child.<sup>445</sup>

The African Commission's role is to uphold and promote the human rights standards as enshrined in the African Charter, ensuring that each State abides its human rights obligations. The Commission has at its disposal three main instruments to encourage States to respect their human rights obligations: the examination of State reports; the passing of resolutions and the consideration of communications from Member States or individuals. The Commission has also established various special mechanisms akin to the special procedures in the UN and Inter-American system. The Commission's special rapporteurs and working groups are created at the initiative of the Commission rather than by the political bodies of the AU, illustrating how the Commission can work as an independent force in conceptualising human rights at the continental level. The implementation of the African Democracy Charter is monitored by the AU Commission.<sup>446</sup>

This chapter starts with an overview of how human rights, the rule of law and democracy is conceptualised

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<sup>442</sup> Charter of the Organization of African Unity (adopted 25 May 1963, entered into force 13 September 1963) 479 UNTS 39 (OAU Charter).

<sup>443</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) OAU Doc CAB/LEG/66.6 (Maputo Protocol).

<sup>444</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) OAU Doc OAU/LEG/EXP/AFCHPR/PROT(III).

<sup>445</sup> See African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49.

<sup>446</sup> African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012) <[http://www.achpr.org/files/instruments/charter-democracy/aumincom\\_instr\\_charter\\_democracy\\_2007\\_eng.pdf](http://www.achpr.org/files/instruments/charter-democracy/aumincom_instr_charter_democracy_2007_eng.pdf)> accessed 30 March 2016, art 45 (Democracy Charter). The AU Commission which is the executive branch of the AU and based in Addis Ababa, Ethiopia, should be distinguished from the African Commission on Human and Peoples' Rights, the AU's human rights monitoring body, which has its Secretariat in Banjul, The Gambia.

in AU instruments. This overview is followed by case studies on accountability for mass atrocities and protection from discrimination based on sexual orientation or gender identity. The report has been compiled through a literature review and analysis of relevant primary documents. This methodology is complemented by selected interviews to fill gaps in the literature with regard to the LGBT(I) rights case study.

## 2. Human rights

In November 1979, at the opening of the meeting of African experts tasked with drafting what became the African Charter on Human and Peoples' Rights the then President of Senegal, Leopold Sedar Senghor noted:

“As Africans, we shall neither copy, nor strive for originality, for the sake of originality. We must show imagination and effectiveness. We could get inspirations from our beautiful and positive traditions. Therefore, you must keep constantly in mind our values of civilization and the real needs of Africa.”<sup>447</sup>

The resulting African Charter is unique among general human rights treaties in that it covers civil and political rights, socio-economic rights and peoples' rights.<sup>448</sup>

The AU Constitutive Act endorses a universalist conception of human rights through reference to the UN Charter, the UDHR as well as the AChHPR.<sup>449</sup> It should, however, be noted that the ACHPR makes reference to traditional values<sup>450</sup> and that this concept has recently been used by the AU policy organs to challenge the universality of human rights in particular in the context of the rights of LGBT(I) persons (see Section B.2).

The African Commission or the Court have still to interpret what is meant by 'traditional values' in the AChHPR. In its declaration on shared values adopted in 2011, the AU Assembly emphasised 'the significance of democratic governance, popular participation, the rule of law, human and peoples' rights and sustainable socio-economic development'.<sup>451</sup> These are values that AU Member States have no problem agreeing with in principle. However, practical application of international commitments is a

<sup>447</sup> Leopold S Senghor, 'Opening Address by the President of the Republic of Senegal' (Meeting of African Experts preparing the draft African Charter, Dakar, 28 November 1979).

<sup>448</sup> On the African Charter see eg Magnus Killander, 'African Human Rights Law in Theory and Practice' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010); Frans Viljoen, *International Human Rights Law in Africa* (2nd edn, OUP 2012).

<sup>449</sup> See AU Constitutive Act, arts 3(e) and 3(h).

<sup>450</sup> *ibid* Preamble (stating that '[t]aking into consideration the virtues of their historical traditions and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights), art 17(3) (indicating that '[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State'), art 18(2) (which highlights that '[t]he State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community'), and art 29(7) (which enumerates that '[t]he individual shall have the duty 'to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society').

<sup>451</sup> AU Declaration 1(XVI) 'Declaration on the Theme of the Summit: "Towards Greater Unity and Integration through Shared Values"' (30 January 2011) Assembly/AU/Decl.1(XVI).

different story in many AU Member States. Viljoen has coined the term ‘rightoric’ where States are not serious about implementing human rights but are adopting the language of human rights ‘in order to misinform, to obfuscate, and to serve public relations purposes’.<sup>452</sup>

While the importance of African traditions is recognised in the AChHPR, it is also an instrument largely consistent with UN instruments such as the UDHR and the two covenants. Protection of dignity is provided for in Article 5 ACHPR, which highlights slavery and torture and ill treatment as undignified. The ACHPR does not outlaw the death penalty but there is a trend towards the abolishment of the death penalty in Africa and an additional protocol has been proposed.<sup>453</sup> However, some States remain ardent supporters of the death penalty.<sup>454</sup> Freedom of religion is protected, as is freedom of expression and freedom of association and assembly.

Equality before the law is protected under Article 3 AChHPR, yet remains a challenge in practice. The African Commission has developed detailed guidelines on fair trial and legal assistance in Africa but free legal assistance is in most States only provided in cases where the death penalty may be imposed.<sup>455</sup> However, in some States civil society is active and provides free legal services. There are also numerous legal aid clinics linked to law faculties across the continent.<sup>456</sup> Nonetheless, access to justice remains a challenge for a broad section of society. This is in part because States lack the political will to live up to the legal framework adopted at the continental level, but in part also as a result of lack of resources.<sup>457</sup> The lack of political will and the lack of resources are both challenges of implementation and the lack access to justice in many parts of Africa can therefore generally not be seen as a challenge to the conceptualisation of access to justice.

The right to political participation is provided for under Article 13 AChHPR. The African Democracy Charter is another important instrument in this context which will be discussed further below. The first merits judgment of the African Court dealt with the right of an independent candidate to stand for election in Tanzania.<sup>458</sup> The African Commission has also in its jurisprudence highlighted the importance of political participation.<sup>459</sup> There remain many challenges to the implementation of the right across the African continent but this is generally as a result of lack of political will by national leaders rather than due to conceptual differences between the AU as a collective and other parts of the world.

While the AChHPR emphasises the importance of socio-economic rights in its preamble, the only socio-

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<sup>452</sup> Viljoen (n 448) xii.

<sup>453</sup> African Commission on Human and Peoples’ Rights, ‘General Comment No 3 on the Right to Life (Article 4)’ <<http://www.achpr.org/instruments/general-comments-right-to-life>> accessed 30 March 2016.

<sup>454</sup> ‘Some Member States expressed reservation regarding the Cotonou Declaration on the Continental Conference on the Abolition of the Death Penalty in Africa’, see African Union Permanent Representatives’ Committee 13th Ordinary Session, (7 - 8 June 2015) PRC/Rpt(XXX), para 125.

<sup>455</sup> United Nations Office on Drugs and Crime, *Access to Legal Aid in Criminal Justice Systems in Africa – Survey Report* (UN 2011) 63.

<sup>456</sup> *ibid* 17.

<sup>457</sup> *ibid* 13.

<sup>458</sup> *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher Mtikila v The United Republic of Tanzania*, App 009 and 011/2011 (14 June 2013) [Judgment on the Merits].

<sup>459</sup> See eg *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

economic rights provided for in the Charter are the right to property, work, health and education.<sup>460</sup> The right to an adequate standard of living is not included as a self-standing right in the AChHPR. More detailed socio-economic rights provisions are provided for in the African Charter on the Rights and Welfare of the Child and the Protocol to the AChHPR on the Rights of Women in Africa.

The rights to safe drinking water, to sanitation and to food are not explicitly provided for in the ACHPR. However, the Commission has through its case law incorporated the right to food as an implicit right in the Charter,<sup>461</sup> and water, sanitation and food are included in its guidelines on socio-economic rights, largely along the lines of the relevant general comments of the UN Committee on Economic, Social and Cultural Rights.<sup>462</sup> The AU has adopted numerous other initiatives for example CAADP in relation to food security.<sup>463</sup> It has been argued that the reason for the lack of a full set of socio-economic rights in the AChHPR was due to lack of implementation capacity. Then as now there is no real conceptual distinction between how socio-economic rights are interpreted by AU human rights bodies and by UN treaty monitoring bodies and special procedures.<sup>464</sup>

Collective rights in the AChHPR include equality of peoples, self-determination, free disposal of wealth and natural resources, peace and security and satisfactory environment. These are listed in the 'peoples' rights' section of the ACHPR (Articles 19-24). These are provided for in much greater detail in the ACHPR than in the UN covenants which only include the right to self-determination and the right to dispose of natural wealth and resources.<sup>465</sup>

The AChHPR is the only international treaty to provide for the right to development. Article 22 of the Charter provides:

“All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”

The Commission explored the meaning of the right to development in the *Endorois* case dealing with forced displacement of an indigenous community.<sup>466</sup> The Commission held that ‘the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the respondent State did not adequately provide for the Endorois in the development process’ in violation of Article 22 of the AChHPR.<sup>467</sup> As in most of its case law the Commission relied on case law and human rights instruments

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<sup>460</sup> ACHPR, arts 14-17.

<sup>461</sup> *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

<sup>462</sup> African Commission on Human and Peoples' Rights, 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' <<http://www.achpr.org/instruments/economic-social-cultural/>> accessed 30 March 2016 (ACHPR Principles and Guidelines).

<sup>463</sup> For more information on the Comprehensive Africa Agriculture Development Programme (CAADP), see <<http://www.caadp.net/>> accessed 30 March 2016.

<sup>464</sup> See eg ACHPR Principles and Guidelines (n 462).

<sup>465</sup> ICCPR, art 1 ; ICESCR, art 1.

<sup>466</sup> *Centre for Minority Rights Development and Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

<sup>467</sup> *ibid* para 298.

adopted by UN experts and other regional bodies such as the Inter-American Court. The protection of indigenous peoples' rights by the African Commission is despite the fact that many African States 'have questioned the conceptual and strategic applicability of the concept to the African context.'<sup>468</sup> This resistance to the concept is based on the idea that all (black) Africans are indigenous and the concept of indigenous peoples as applied in other parts of the world (original inhabitants) is unsuitable in the African context. The African Commission has addressed this through focusing on marginalisation and self-identification as the most important elements in determining who constitutes an indigenous people in Africa.<sup>469</sup>

With regard to the protection of other 'vulnerable groups', Article 18 of the AChHPR bundles together the protection of women, children, older persons and persons with disabilities. The African Children's Charter was adopted in 1990 to complement the UN Convention on the Rights of the Child. The Maputo Protocol to the AChHPR on the Rights of Women in Africa was adopted to extend the protection provided to women in Article 18 of the AChHPR. The text of the Maputo Protocol goes further than the protection set out in CEDAW, even though it should be noted that much of the Maputo Protocol is in line with interpretation of CEDAW by the CEDAW Committee in its general recommendations. A notable difference in approach is with regard to polygamy. While the CEDAW Committee has held that polygamy violates the prohibition of discrimination based on gender,<sup>470</sup> the Maputo Protocol States that monogamy is the preferred form of marriage without requiring States to abolish the practice of polygamy.<sup>471</sup>

Many African States have ratified the UN Convention on the Rights of Persons with Disabilities and there is currently a debate on whether there is a need for a specific African human rights instrument on the protection of persons with disabilities.<sup>472</sup>

Persons belonging to sexual minorities are a particularly vulnerable group in the African context and are discussed in one of the case studies below.

Refugees are protected under the OAU Refugee Convention, which provides a broader definition of refugees than the UN Convention.<sup>473</sup> Many African States have to deal with huge influxes of refugees. The AChHPR clearly prohibits mass expulsion and provides that non-nationals 'legally admitted' may only be

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<sup>468</sup> Viljoen (n 448) 230.

<sup>469</sup> *ibid* 231.

<sup>470</sup> UN Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 21: Equality in Marriage and Family Relations' (1994) UN Doc A/49/38.1, para 14.

<sup>471</sup> Maputo Protocol, art 6(c).

<sup>472</sup> For an argument that there are reasons to adopt a protocol to the ACHPR on the rights of persons with disabilities in Africa to complement the CRPD, see Serges AD Kamga, 'A Call for a Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2013) 21 AJICL 219. For the view that the focus should be on implementation of the CRPD rather than further norm development, see Frans Viljoen and Japhet Biegon, 'The Feasibility and Desirability of an African Disability Rights Treaty: Further Norm-Elaboration or Firmer Norm-Implementation?' (2014) 30 SAJHR 345.

<sup>473</sup> The convention provides a similar provision as the UN Refugee convention but adds: 'The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'

expelled ‘in accordance with the law’.<sup>474</sup> This is in line with international refugee law. The African Commission’s case law illustrates that there is not a difference in conceptualisation with regard to refugees at the AU level but that there is a lack of political will in some Member States to implement the commitment. This discrepancy between rhetoric and reality is clearly present all over the world. The debate taking place in some African States on how to deal with ‘economic migrants’ and terrorists posing as refugees is clearly reminiscent of debates in Europe and elsewhere. However, there has been little debate on these issues at the AU level. It should also be noted that Africa is also the only continent with a treaty on Internally Displaced Persons (IDPs), the AU Convention for the Protection and Assistance of Internally Displaced Persons adopted in 2009.

The African Democracy Charter is not explicit when it comes to representation and participation of vulnerable groups, except for women.<sup>475</sup> However, it does provide that ‘State Parties shall respect ethnic, cultural and religious diversity, which contributes to strengthening democracy and citizen participation.’<sup>476</sup>

### 3. Rule of law

Legality, in the sense that government and individuals are bound by law, is quite weakly developed in Africa in particular in relation to holding the government accountable through the law.<sup>477</sup> Accountability is linked to access to justice which was discussed above in the section dealing with human rights. The particular issue of accountability for mass atrocities will be discussed in a case study below. The democratic process of enacting laws is endorsed by the AU. However, parliaments in Africa are generally weak.<sup>478</sup>

Article 26 of the ACHPR provides for independent judiciary. Article 22 of the Democracy Charter obliges States to provide ‘a conducive environment for independent and impartial national monitoring or observation mechanisms’. As noted above with regard to many human rights there is a strong distinction between the commitment in international instruments such as these, and most often national constitutions, and the reality on the ground. Again this lack of implementation at the national level cannot be seen as a different conceptualisation of what would constitute ‘independent’ and ‘impartial’ but must be seen in the context of what supports regime survival or lack of capacity which may also undermine judicial independence even where the political will is there.

With regard to good governance, Article 32 of the Democracy Charter provides:

“State Parties shall strive to institutionalize good political governance through: 1. Accountable, efficient and effective public administration; 2. Strengthening the functioning and effectiveness

<sup>474</sup> ACHPR, art 12.

<sup>475</sup> *ibid* art 29.

<sup>476</sup> *ibid* art 8(3).

<sup>477</sup> Ada O Okoye, ‘The Rule of Law and Sociopolitical Dynamics in Africa’ in Paul T Zeleza and Philip J McConaughay (eds), *Human Rights, the Rule of Law, and Development in Africa* (UPP 2011) 74.

<sup>478</sup> See eg Renske Doorenspleet, ‘Citizen’s Support for Legislature and Democratic Consolidation: A Comparative Study with Specific Focus on Mali’ in MA Mohamed Salih (ed), *African Parliaments: Between Governance and Government* (Palgrave Macmillan 2005); Jotham C Momba, ‘Evolution of Parliament-Executive Relations in Zambia’ in MA Mohamed Salih (ed), *African Parliaments: Between Governance and Government* (Palgrave Macmillan 2005).

of parliaments; 3. An independent judiciary; 4. Relevant reforms of public institutions including the security sector; 5. Harmonious relationships in society including civil-military relations; 6. Consolidating sustainable multiparty political systems; 7. Organising regular, free and fair elections; and 8. Entrenching and respecting the principle of the rule of law.”

The objectives of the Charter include transparency and access to information but not much detail is provided in the operative part of the Charter. Good economic and corporate governance is provided for in Article 33 which include a commitment to transparency in public finance management. The African Commission has adopted a model law on access to information and there is a movement across the continent towards increased access to information.<sup>479</sup>

#### 4. Democracy

In July 2000 the OAU adopted the Constitutive Act of the AU. At the same summit the OAU adopted the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration). This expanded on the provision in the AU Constitutive Act prohibiting unconstitutional change of government. Further guidelines on democratisation to AU Member States were provided when the AU adopted the Declaration on Principles Governing Democratic Elections in Africa in 2002 and through the African Charter on Democracy, Elections and Governance adopted in 2007 (entered into force 2012).

Unconstitutional change of government is defined in the Democracy Charter (Article 23) as:

1. Any putsch or coup d'état against a democratically elected government;
2. Any intervention by mercenaries to replace a democratically elected government;
3. Any replacement of a democratically elected government by armed dissidents or rebels;
4. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
5. Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.

One of the objectives of the African Democracy Charter is to '[p]romote the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments'.<sup>480</sup> One of the contested issues in Africa currently is whether it is undemocratic to amend constitutions to allow incumbent presidents to contest for additional terms.<sup>481</sup>

According to the Democracy Charter State Parties shall '[c]reate conducive conditions for civil society organizations to exist and operate within the law'.<sup>482</sup> The claw-back clause 'within the law' should be

<sup>479</sup> African Commission on Human and Peoples' Rights, 'Model Law on Access to Information for Africa' <[http://www.achpr.org/files/news/2013/04/d84/model\\_law.pdf](http://www.achpr.org/files/news/2013/04/d84/model_law.pdf)> accessed 30 March 2016.

<sup>480</sup> Democracy Charter, art 2(3).

<sup>481</sup> See eg Emmanuel Gyimah-Boadi, 'Africa's Waning Democratic Commitment' (2015) 26 J Dem 101.

<sup>482</sup> Democracy Charter, art 12(3).

interpreted similarly to how the African Commission has interpreted the claw-back clauses in the ACHPR.<sup>483</sup> Thus national law that for example does not allow international donor funding for human rights NGOs should be held to not be 'within the law', interpreted as law that is consistent with international human rights law.<sup>484</sup>

## B. Case studies

The two case studies included in this chapter aims to illustrate issues on which the AU and the EU has taken different approaches in part due to different conceptualisation of the underlying rights. In the case of prevention of and accountability for mass atrocities the main contested issues are military intervention and immunity for political leaders. It can be seen as a contestation of different views on what approaches to mass atrocities are best to ensure lasting peace. In the case of LGBT(I) rights the contestation is about different conceptualisations of human dignity and morality. Both case studies illustrate that it is difficult to talk about clear conceptualisation at the continental level. Different stakeholders take different views but what emanates from the highest echelons of the AU is clearly contesting the EU's conception on these issues.

### 1. Conceptualising prevention of and accountability for mass atrocities

The idea of African solutions to African problems has been a major driving force for the AU's stance of seeking resolutions to the many conflicts ceaselessly ravaging the continent. Following the independence of many African countries in the 1950s and 1960s, the OAU maintained a principle of non-interference with the internal affairs of Member States.<sup>485</sup> This was essential for the newly independent countries so as not to have a semblance of what obtained under colonial rule.<sup>486</sup> However, this same principle of non-interference became a hindrance to the OAU in maintaining peace and pursuing accountability for crimes on the continent.<sup>487</sup> Therefore, after the AU succeeded the OAU, the former changed the agenda in a bid to better tackle mass atrocities and assist Member States in realising their responsibility to protect. The approach of the AU therefore switched from that of non-interference to one of non-indifference as clearly reflected in Article 4(h) of the Union's Constitutive Act.<sup>488</sup> One of its core objectives became the maintenance of peace, security and stability on the continent with the possibility to intervene in the internal affairs of a Member State in cases of genocide, war crimes and crimes against humanity.<sup>489</sup>

While the international community only arrived at establishing the Responsibility to Protect as a principle during the 2005 World Summit, the African Union had since 2000 incorporated the principle in its

<sup>483</sup> See eg *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995), para 15.

<sup>484</sup> See eg on Ethiopia, Simengnish Y Mengesha, 'Ethiopia: Silencing Dissent' (2016) 27 J Dem 89, 91.

<sup>485</sup> OAU Charter, art III(2).

<sup>486</sup> The OAU was established on 25 May 1963 and Article II of its Charter lists the eradication of all forms of colonialism as one of its purposes.

<sup>487</sup> Marvin N Ankrah, *Conflict Resolution in Africa: The Case of the Organization of African Unity (OAU)* (Anchor Academic Publishing 2014) 27.

<sup>488</sup> AU Constitutive Act, art 4(h) (grants the Union the right to intervene in the affairs of Member States in relation to grave circumstances such as genocide, war crimes and crimes against humanity).

<sup>489</sup> *ibid* art 3(f).

Constitutive Act (Article 4(h)). Article 4(h) proceeds on the understanding that every Member State of the AU has the responsibility to protect its citizens from mass atrocities and failure to do so will authorise the AU to intervene. Further to this was the 2005 AU *Ezulwini Consensus* which endorsed the use of force during grave circumstances by the UN Security Council in upholding the responsibility to protect.<sup>490</sup> These are significant because demonstrate the AU's commitment to ending mass atrocities in Africa.

The AU has embarked on series of intervention missions to territories like Darfur, Somalia, Democratic Republic of Congo and so on. It has in a few instances imposed sanctions such as travel bans and asset freeze against persons impeding peace on the continent.<sup>491</sup> The AU has, however, been unable to on its own quell conflicts without relying on international support, be it in the contribution of French troops to the war in Mali, or the funding of its organs by the EU, its goal of a capable, independent Africa is compromised by its high reliance on external help. This lack of material resources is different from where there have been conceptual differences on what an intervention should entail such as with regard to the UN Security Council mandated NATO intervention in Libya in 2011.<sup>492</sup>

Intervention may in some cases prevent further atrocities. However, this does not remove the question of how to deal with the perpetrators of atrocities which have taken place. Accountability efforts in the form of criminal accountability have mainly been driven by the UN: the Special Court for Sierra Leone<sup>493</sup> and the International Criminal Tribunal for Rwanda.<sup>494</sup> Even with the celebrated trial of former Chadian leader - Hissène Habré which has been seen as a collaborative effort between the AU and the Senegalese government, the €8.6million budget was co-funded by the EU.<sup>495</sup>

Does this imply that the AU lacks the political will to pursue accountability, because of having a different conception of accountability, or it lacks the capacity? Or could it be both? The AU has established a number of institutions to address the issue of impunity and accountability on the continent. The ACHPR has over time issued recommendations to States on their obligations to protect and promote human rights. During the 56th Ordinary Session of the ACHPR, Dr. Khabele Matlosa, Director for Political Affairs of the AU Commission acknowledged that bad governance and the culture of impunity is what has led to the spate of mass atrocities, genocide and other crimes against humanity on the continent.<sup>496</sup> To counter this will require effective accountability mechanisms and democratic governance - two elements which are yet to be well entrenched among African States. A further challenge is that, despite the quite

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<sup>490</sup> Executive Council 7th Extraordinary Session, 'The Common African Promotion on the Proposed Reform of the United Nations: "The Ezulwini Consensus"' (7 – 8 March 2005) Ext/EX.CL/2(VII), para B(i)6.

<sup>491</sup> For example, travel bans and asset freezing were imposed on the leaders of the rebellion in Comoros. See Sylvia U Agu and VOS Okeke, 'The African Union (AU) and the Challenges of Conflict Resolution in Africa' (2013) BJ Arts & Soc Sci 281.

<sup>492</sup> Alex de Waal, 'African Roles in the Libyan Conflict of 2011' (2013) 89 Int'l Aff 365.

<sup>493</sup> Approved by the UN in January 2002 and commenced trials on 3 June, 2004, the Court was to try those responsible for the Sierra Leone's 10-year civil war.

<sup>494</sup> The Tribunal was established by the UN Security Council to prosecute persons for crimes perpetrated during the 1994 Rwandan genocide.

<sup>495</sup> FIDH, 'Chronology of Hissène Habré Case'. Available at: <https://www.fidh.org/International-Federation-for-Human-Rights/Africa/chad/hissene-habre-case/chronology-of-the-hissene-habre-case>. Accessed 7 September 2015.

<sup>496</sup> Khabele Matlosa, 'Opening Statement by the Director for Political Affairs of the African Union Commission' (56th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, 21 April 2015).

progressive recommendations issued by the African Commission in many cases, compliance remains very low.<sup>497</sup>

The African Court has undergone a number of modifications in order to make it a more effective instrument for achieving greater accountability for human violations on the continent. In doing this, it complements the mandate of the ACHPR and hands down binding decisions. Its first ruling on 31 May 2011 was a landmark decision issued against the regime of former leader of Libya - Muammar Gaddafi. The court in its decision declared that massive human rights violations had been carried out by Gaddafi and ordered provisional measures.<sup>498</sup> As will be discussed later on, the jurisdiction of this court has been expanded to include the prosecution of international crimes perpetrated by African leaders, rebel groups and multi-national corporations, which is by far the most extensive jurisdiction ever to be given to an international criminal court, though it has not yet been operationalised since the Protocol providing this jurisdiction has not yet entered into force.<sup>499</sup>

The arrest of senior State officials of some AU Member States, in Europe, has at times caused tension between the AU and the EU.<sup>500</sup> Indeed the issue of whether senior State officials should be put on trial for alleged mass atrocities while still in office has been a serious bone of contention between the AU on the one side and some EU Member States on the other as discussed further below. The AU in 2012 adopted the African Union Model National Law on Universal Jurisdiction over International Crimes.<sup>501</sup> Section 4 of the law grants national courts the jurisdiction over any person alleged to have committed any crime within the concerned State's territory or abroad. This law, by its provisions, recognises that certain crimes are of great concern to the international community that they must not go unpunished. Section 16 on immunities is vague providing that jurisdiction is subject to 'national and international law on immunities'.

The International Criminal Court (ICC) has made mass atrocities in Africa the focus of its mandate. This has led to the open hostility between the AU and the ICC in what has been perceived as 'selective prosecution' since the ICC has been seen as 'conveniently' seized with matters only from Africa.<sup>502</sup> This scenario has further propagated the notion that the ICC is not an impartial judge but a neo-colonial project. Consequently, on 3 July 2009, the AU Assembly during its 13th Ordinary Session adopted a

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<sup>497</sup> Lirette Louw, 'An Analysis of State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights' (LLD thesis, University of Pretoria, 2005) IV.

<sup>498</sup> *African Commission v Libya*, App 004/2011 (25 March 2011) [Order for Provisional Measures].

<sup>499</sup> Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014, not yet in force) (Malabo Protocol).

<sup>500</sup> See eg ISS, 'PSC Stands with Rwanda on Universal Jurisdiction' (10 July 2015)

<<https://www.issafrica.org/pscreport/addis-insights/psc-stands-with-rwanda-on-universal-jurisdiction>> accessed 30 March 2016.

<sup>501</sup> EX.CL/731 (XXI) c July 2012.

<sup>502</sup> All the cases that have been commenced at the ICC have been against African States; from Uganda and Kenya (which have been terminated) to the Democratic Republic of Congo, Sudan, Central African Republic (CAR), Libya, Cote D'Ivoire and Mali. More recently, initiated on 24 September 2014, is the second case against CAR which was based on a self-referral. See ICC, 'Situations and Cases', available at: [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx). Accessed 31 August 2015.

resolution which called on African States not to cooperate with the ICC.<sup>503</sup> The moral integrity of the ICC has been called into question with accusations that its cases are not 'being pursued on the basis of the universal demands of justice, but according to the political expediency of pursuing cases that will not cause the Court and its main financial supporters any concerns.'<sup>504</sup> It is important to note that the AU and its Member States do not argue that accountability is unimportant but that there is unfair selectivity in how international justice is enforced.

In dismissing the bias sentiments expressed by some African leaders, South African Nobel Prize winner - Desmond Tutu stated: 'Justice is in the interest of victims, and the victims of these crimes are Africans. To imply that the prosecution is a plot by the West is demeaning to Africans and understates the commitment to justice we have seen across the continent.'<sup>505</sup> In as much as the AU decision of non-cooperation with the ICC has attracted criticism, it is difficult to ignore the allegations of selective justice being claimed by the AU. According to some African governments, a court that does not apply the law universally does not qualify to be called a court.<sup>506</sup>

Despite its resolution of non-cooperation, the AU remains conflicted as reflected in the splintered responses to the ICC. African States in some instances have been seen to still pay allegiance to the ICC. Case in point is Côte d'Ivoire which in 2014 handed Charles Ble Goude over to the ICC for crimes committed during the 2010 - 2011 post-election violence.<sup>507</sup> Botswana has also publicly disagreed with the AU resolution and declared its commitment to the ICC process.<sup>508</sup>

The most controversial issue in AU-ICC relations has been the trial of sitting African heads of State and senior State officials. The Sudanese President Omar al-Bashir was indicted following referral of the situation in Darfur by the UN Security Council. The Kenyan President and Vice-President were indicted for atrocities committed in the context of post-electoral violence even though the indictment against President Kenyatta was subsequently dropped. These indictments caused much uproar and contributed significantly to the AUs position in relation to the ICC. In this instance there is a clear conceptual difference in that the AU wants to protect its leaders (and argue that trials would threaten peace and reconciliation) while the ICC and its main proponents such as the EU sees accountability as the most important.

Some Member States have not towed the AU line. Thus Malawi refused to host the AU Summit in 2012 because they were not willing to invite Al-Bashir just to have him arrested and turned over to the ICC. On the contrary, countries like South Africa have failed to cooperate with the ICC by failing to execute the six year old arrest warrant for Omar Al-Bashir following his visit to South Africa for the 25th AU Summit in

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<sup>503</sup> This decision was reiterated during the 18th Ordinary Session of the Assembly of AU Heads of State and Government, insisting that failure of Member States to comply with this resolution will attract sanctions.

<sup>504</sup> Tim Murithi, 'The African Union and the International Criminal Court: An Embattled Relationship?' (2013) IJR Policy Brief 8, 3.

<sup>505</sup> Desmond Tutu, 'Will Africa Let Sudan Off the Hook?' (*New York Times*, 2 March 2009). Available at: [http://www.nytimes.com/2009/03/03/opinion/03tutu.html?\\_r=0](http://www.nytimes.com/2009/03/03/opinion/03tutu.html?_r=0). Accessed 7 November 2015.

<sup>506</sup> Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (OUP 2011) 213.

<sup>507</sup> ICC, 'Situation in the Republic of Côte d'Ivoire', available at: [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/icc0211/Pages/situation%20index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/Pages/situation%20index.aspx). Accessed 1 September 2015.

<sup>508</sup> Christopher Gevers and others, 'Ensuring Cooperation with the ICC' in Lorraine Kearney (ed), *Positive Reinforcement: Advocating for International Criminal Justice in Africa* (SALC 2013) 60.

2015. Kenya, Djibouti, Ethiopia, South Sudan and Chad are other countries that have refused to assist the ICC in its quest to arrest and prosecute Al-Bashir. Such mixed response to the AU resolution is not unexpected since States are faced with competing obligations to the Rome Statute and the AU. Although in the balancing of scales, a State's treaty obligation should ordinarily attract greater commitment than a resolution which does not carry the weight of law. Besides, Du Plessis and Gevers have pointed out that not only are African States Parties to the Rome Statute obliged to cooperate with the ICC, the obligation to cooperate with the ICC also flows from the Genocide Convention (in the case of indictments on genocide such as that against President al-Bashir).<sup>509</sup>

In what has arguably become part of a grand plan to circumvent the ICC process, which some view as an imperialist tool against Africa, the AU has gone on to create an African criminal justice system which can try international crimes such as genocide, war crimes and crimes against humanity. It is noteworthy that some provisions of the Malabo Protocol, adopted by the AU in 2014, reflect the drive to create 'African solutions to African problems' and as such affirm the argument of the drafters that it is not merely an anti-ICC project.<sup>510</sup> However, while it can be argued that the court is a relevant introduction into the ever-changing judicial landscape of the African continent, its technical feasibility and practicality are separate issues entirely.

Setting aside the challenges of the newly expanded court, the Protocol presents numerous opportunities for the AU in its campaign towards greater accountability for mass atrocities on the continent. It is very significant that an African Court with international criminal jurisdiction makes the court more physically accessible to victims in need of reparations. It therefore increases the prospects of immediate response to crisis situations around Africa and hopefully an improved implementation of international criminal justice.

Unfortunately, the chances of the Malabo Protocol becoming Africa's silver bullet for attaining accountability was knocked off with the introduction of an immunity clause. Article 46A of the Protocol grants immunity from prosecution to sitting African Heads of State and senior State officials. This is clearly a different, African conception of who should be held accountable, than the conception of Article 27 of the Rome Statute.<sup>511</sup> The introduction of the immunity clause defeats the claim by the AU regarding its commitment towards achieving accountability for international crimes on the continent. By giving a free pass to the violators of human rights, what the AU is suggesting is that power in Africa does not come with accountability but with impunity.

Despite progressive legal instruments and other initiatives as set out above, there has been limited progress in ensuring accountability for mass atrocities in Africa. The accountability process sometimes never commences or is stalled by attempts at peace deals, which are consistently broken almost as soon

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<sup>509</sup> Max du Plessis and Christopher Gevers, 'Balancing Competing Obligations - the Rome Statute and AU Decisions' (2011) ISS Paper 225, 7.

<sup>510</sup> Malabo Protocol, art 28 (expands the Court's jurisdiction to cover crimes of genocide, war crimes etcetera but goes further to include terrorism, corruption, unconstitutional change of government, trafficking, illicit exploitation of natural resources and many more, all of which are problems peculiar to Africa).

<sup>511</sup> Max du Plessis, 'Shambolic, Shameful and Symbolic - Implications of the African Union's Immunity for African Leaders' (2014) ISS Paper 278, 1.

as they are entered into.

## 2. LGBT(I) rights

### a) Introduction

A comparison of the legal framework applicable to sexual minorities in Africa and Europe can leave one feeling discouraged. While homophobic sentiments seem to have grown among the African public, homosexuality and other forms of gender identity have been gaining greater acceptance in Europe.<sup>512</sup> The difference in the level of acceptance might be explained by the divergent positions taken by European and African governments and institutions, which in turn impacts the level of acceptance by the general public. This study will assess the conception held by African institutions -in particular the AU and the African Commission on the issue of sexual minorities (LGBT(I)). This will be compared to the conception held by the EU and EU Member States.

Although not reflected in the current societal attitudes towards sexual minorities, some traditional cultures such as in coastal Kenya, ways had been found to integrate and accommodate sexual minorities into 'mainstream' society.<sup>513</sup> The current situation of sexual minorities in Africa whereby same sex behaviour is criminalised by more than two-third of African States and sexual minorities are at great risk of sexual, verbal and physical violence can be viewed as the product of colonialism and the influence of organised religion.<sup>514</sup> By criminalising same-sex relations, governments are only reinforcing this image of LGBT(I) rights as unnatural. In a recent survey in 39 countries worldwide, the African continent was found to be the least accepting of homosexuality. 98% of the respondents in Nigeria, 90% of respondents in Kenya, 96% in Senegal, Ghana and Uganda believed homosexuality should not be accepted in society.<sup>515</sup>

The current state of affairs in Africa has attracted the attention of the EU, leading to a strong push by the EU and its Member States towards the recognition of the rights of persons belonging to sexual minorities abroad.<sup>516</sup> Highlighting the EU's commitment to this area, the Working Party on Human Rights adopted in June 2010 the Toolkit to Promote and Protect the Enjoyment of all Human Rights by LGBT people and in 2013 the Council adopted the Guidelines to promote and protect the enjoyment of all human rights by LGBT(I) persons.

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<sup>512</sup> Pew Research Center, 'The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries' (4 June 2013), available: <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>. Accessed 6 August 2015.

<sup>513</sup> Chukwuemeka Anyamele and others, 'Sexual Minorities, Violence and AIDS in Africa' (2005) Africa Region Working Paper Series No 84, 1 <<http://www.worldbank.org/afr/wps/wp84.pdf>> accessed 30 March 2016.

<sup>514</sup> *ibid* 1-5.

<sup>515</sup> See Pew Research Center (n 512).

<sup>516</sup> Council of the European Union, 'Guidelines to Promote and Protect the Enjoyment of All Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons' (24 June 2013), available at: [https://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/137584.pdf](https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/137584.pdf). Accessed 30 March 2016, para 8 (states that 'building on international standards and its own legislative framework, the EU is committed to advancing the human rights of LGBTI persons').

### b) The African Commission

When considering State reports, the Commissioners have generally shown a quite high degree of openness and interest towards issues faced by sexual minorities.<sup>517</sup> During a discussion on the Cameroonian country report at the 39<sup>th</sup> session of the African Commission in 2006, three Commissioners questioned the State representative on issues of concern to LGBT(I), with regards to discrimination on the basis of sexuality being contrary to Article 2 of the Charter; the criminalisation of same-sex practice as well as the imprisonment and trial process of a group of homosexual men.<sup>518</sup>

With regards to the passing of resolutions, the African Commission in 2014 adopted Resolution 275 on the Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity. Resolution 275 is strongly focused on the violence and persecutions faced by sexual minorities such as corrective rapes,<sup>519</sup> murders, harassment, arbitrary arrests and extortions. States are called upon to create a safe environment for LGBT(I) activists, while ensuring the prosecution and punishment of alleged persecutors. This resolution not only draws Member States' attention to the plight of sexual minorities; the resolution also puts violence against sexual minorities squarely within the realm of the Commission's jurisdiction.<sup>520</sup> This represents a huge step forward for the Commission, especially when considering that the same Commission had removed a reference to lesbian and bisexual women from a resolution adopted in 2007 on the situation of women's right in the Southern Africa Development Community.<sup>521</sup>

Finally, with regard to the consideration of communications, there has been no decision rendered by the African Commission on the criminalisation of homosexual relations or of other LGBT(I)-related issues.<sup>522</sup> In *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the African Commission did mention sexual orientation as a prohibited ground of discrimination under the Charter.<sup>523</sup> However, this is *obiter dictum* at most, and cannot be considered as enshrining sexual orientation as a forbidden ground for discrimination under the African Charter.<sup>524</sup> Many advocating for the rights of LGBT(I) persons have discouraged organisations to make use of the communication procedure as a negative precedent stating that 'homosexuality is un-African' would be extremely difficult to reverse. However, Viljoen argues that

<sup>517</sup> Fergus Kerrigan, *Getting to Rights: The Human Rights of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Africa* (The Danish Institute for Human Rights 2013) 154.

<sup>518</sup> Sibongile Ndashe, 'The Battle for the Recognition of LGBTI Rights as Human Rights' (2010) 4 Perspectives 5, 18.

<sup>519</sup> A practice whereby a person is raped because of their perceived homosexuality (with the perpetrator often believing this would make the victim heterosexual).

<sup>520</sup> CAL, 'Civil Society Organisations Commend the African Commission's Resolution Condemning Violence Based on Sexual Orientation and Gender Identity' (23 May 2014) <<http://www.cal.org.za/new/?p=1822>> accessed 4 August 2015.

<sup>521</sup> Ndashe (n 518) 19.

<sup>522</sup> In the case of *Courson v Zimbabwe* before the African Commission, the complainant alleged that the laws of Zimbabwe criminalising sexual contact between consenting homosexual adults in private as well as the offensive statements by State officials were in violation of the African Charter. The communication was however withdrawn by the author before a decision was reached by the Commission, see *Courson v Zimbabwe* (2000) AHLRL 335 (ACHPR 1995).

<sup>523</sup> *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2005) AHRLR 128 (ACHPR 2005), para 169.

<sup>524</sup> Kerrigan (n 517) 154.

all depends on the selection of the right case.<sup>525</sup> While a case dealing with decriminalisation would be quite difficult, bringing in questions of morality, a case touching on civil liberties such as freedom of association and expression would currently have a reasonable chance of success.

While the African Commission has grappled with LGBT(I) rights, the promotion and protection of sexual minority rights still remain a personal stance taken by the Commissioners, rather than an institutional position. Whether a Commissioner will issue a press release regarding discrimination faced by LGBT(I) or ask questions at the examination of the State report, remain at the discretion of the Commissioner. This explains why NGOs are so keen on getting in Commissioners which are sympathetic to the cause of LGBT(I) persons. Some Commissioners have taken very negative public stance against LGBT(I) persons.<sup>526</sup> At the same time, one must also understand the political influence exerted upon the Commissioners.<sup>527</sup>

In fact, there is still a reluctance to see LGBT(I) rights, including the decriminalisation of same sex conduct as human rights and to allow the Charter to evolve to comprise LGBT(I) rights. For example, at a meeting with members of LGBT(I) organisation, Commissioner Musa Bitaye from Gambia pointed out that the African Charter does not protect sexual minorities.<sup>528</sup> Another example relates to the registration of The Coalition of African Lesbians (CAL) as an observer organisation. The reluctance of the Commission to register CAL relates in part to the thinking that the rights promoted by the organisation are not protected under the African Charter and CAL therefore has no dealings whatsoever with the Commission. In May 2010, the Commission rejected CAL's application for observer status, stating that 'the activities of the said Organisation do not promote and protect any of the rights enshrined in the African Charter'.<sup>529</sup> CAL was finally granted observer status in 2015, though it was not a unanimous decision of the Commission.<sup>530</sup>

The 2015 elections to the Commission has seen the departure of a staunch opponent to LGBT(I) rights.<sup>531</sup> Coupled with others who were recently elected and are known to be sympathetic to the plight of African LGBT(I) there is a possibility for change. However, the possibility of political backlash against any positive move by the Commission, as illustrated by the Executive Council request to the Commission in June 2015 to revoke the observer status of CAL,<sup>532</sup> remains a serious concern. While civil society activists and parts

<sup>525</sup> Interview with Prof. Frans Viljoen (Director of the Centre for Human Rights, University of Pretoria, August 2015).

<sup>526</sup> The Vice-President of the Commission Bechir Khalfallah from Tunisia has described lesbianism as 'a new virus' imported to create divisions within Africa. See Dicta Asiimwe, 'African Union Rights Agency Gives Gay Lobby Observer Status' (*The East African*, 2 May 2015) <<http://www.theeastafrican.co.ke/news/African-Union-rights-agency-gives-gay-lobby-observer-status/-/2558/2703782/-/6lvdf/-/index.html>> accessed 9 August 2015.

<sup>527</sup> Interview with Viljoen (n 525).

<sup>528</sup> Ndashe (n 518) 30.

<sup>529</sup> CAL, 'Statement on Decision of the African Commission on Human and Peoples' Rights to Grant Observer Status to the Coalition of African Lesbians [CAL]' (25 April 2015) <<http://www.cal.org.za/new/?p=1908>> accessed 8 August 2015.

<sup>530</sup> See Interview with Viljoen (n 525).

<sup>531</sup> *ibid*; Interview with Ugandan Human Rights Defender (August 2015).

<sup>532</sup> AU Decision 887(XXVII) 'Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights' EX.CL/Dec.887(XXVII), para 7 ('[requests] the ACHPR to take into account the fundamental African values, identity and good traditions, and to withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values; in this regard, [requests] the ACHPR to review its criteria for granting Observer Status to NGOs and to withdraw the observer status granted to the Organization called CAL, in line with those African Values').

of the Commission have come out strongly in support of LGBT(I) rights, States, with the notable exception of South Africa,<sup>533</sup> remain very hostile.

The Commission is very much concerned with issues of physical violence faced by sexual minorities as compared to other discriminatory practices on the basis of gender identity and sexual orientation. The Special Rapporteur on Human Rights Defenders in Africa, Mrs Reine Alapini-Gansou issued a press release in February 2014 on the promulgation by Nigeria of the Same-Sex Marriage Prohibition Act. Commissioner Alapini-Gansou focused on the shrinking space and increased incidents of violence against defenders of LGBT(I) rights.<sup>534</sup>

Resolution 275 is strongly focused on physical violence faced by sexual minorities. In so doing, and contrary to the position favoured by the EU, the Commission has avoided tackling the difficult issue of discrimination and societal prejudice faced by sexual minorities on the basis of their sexual orientation as well as from defending homosexuality as a 'normal' sexual orientation. This is also the result what Viljoen describes as 'strategic incrementalism' by NGOs in pushing the Commission towards a greater acceptance of LGBT(I) rights first through uncontroversial rights. The EU on the other hand has focused much of its attention on fighting discrimination against sexual minorities as evidenced by the inclusion of sexual orientation as a prohibited ground of discrimination in Article 19 of the TFEU and Article 21 of the Charter of Fundamental Rights of the EU.

The progress that can be seen with regard to at least a rhetorical commitment to other vulnerable groups in Africa from the side of the AU is clearly absent with regard to LGBT(I). While the Commission has taken some positive measures for the protection of LGBT(I) rights it remains a deeply divisive issue on the African continent and in many other parts of the world. Universal recognition of LGBT(I) rights, if only at a rhetorical level, is still a distant dream.

### C. Conclusions

The Africa-EU Partnership refers to '2 unions, 1 vision'.<sup>535</sup> It may be argued that the slogan rings true in that the AU's conceptualisation of human rights, rule of law and democracy on most issues on paper is not very different from the EU. There are clearly exceptions such as with regard to criminal accountability for heads of State and other senior politicians for mass atrocities and with regard to LGBT(I) rights as shown in the two case studies above. It must also be noted that there are clearly different conceptualisations of human rights, rule of law and democracy among different States (and within States) and among the institutions of an international organisation. In the case of the AU it is clear that the African Commission often takes a more progressive, universalist approach to issues than what is reflected in statements adopted by the AU political bodies. However, AU human rights treaties tend also to be universalist with for example most of the provisions of the Maputo Protocol on the Rights of Women in

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<sup>533</sup> Discrimination based on sexual orientation is prohibited under the South African constitution.

<sup>534</sup> African Commission on Human and Peoples' Rights, 'Press Release on the Implication of the Same Sex Marriage [Prohibition] Act 2013 on Human Rights Defenders in Nigeria' (6 February 2014) <http://www.achpr.org/press/2014/02/d190/>. Accessed 5 August 2015.

<sup>535</sup>The Africa-EU Partnership, available at: [http://www.africa-eu-partnership.org/sites/default/files/documents/jaes\\_en\\_brochure\\_final\\_web.pdf](http://www.africa-eu-partnership.org/sites/default/files/documents/jaes_en_brochure_final_web.pdf). Accessed 30 March 2016.

Africa being in line with CEDAW as interpreted by the CEDAW Committee. Value-driven differences are few such as with regard to polygamy not being outlawed but merely discouraged in the Maputo Protocol.

## V. The League of Arab States and the Organisation of Islamic Cooperation

### A. General Introduction

#### 1. Background Similarities

The League of Arab States (LAS or Arab League) is an intergovernmental organisation based in Cairo. It was founded in 1945 by the Pact of the League of Arab States (Arab Pact; frequently identified as the Charter of the League of Arab States) shortly before the end of World War II and now includes 22 Member States.<sup>536</sup> One of the principal goals of its early leaders was to promote the independence of Arab territories that were at the time largely under British or French colonial control. Although its original mission did not include the promotion of human rights within its Member States, the League has, from its inception, criticised human rights abuses committed by non-Member States against Arabs and Arab interests. It is a strong rhetorical advocate of non-interference in the internal affairs of its Member States, including any form of external scrutiny of the human rights practices of its members. Several LAS and OIC Member States participated in the 1955 Bandung Conference that helped launch the non-aligned movement, including most importantly Egypt, but also Afghanistan, Burma, Indonesia, Iran, Iraq, Jordan, Lebanon, Libya, Pakistan, Saudi Arabia, Syria, Sudan, Turkey, and Yemen. The LAS promotes the cultural, educational, trade, scientific, and economic interests of its members.

The Organisation of Islamic Cooperation (OIC) (formerly the Organisation of the Islamic Conference) is an intergovernmental organisation based in Jeddah, Saudi Arabia. Although it frequently is stated that it was founded in 1969 (in Rabat, Morocco), in reality it was not until 1972 that the OIC Charter was approved at the 34th Islamic Conference of Foreign Ministers held in Jeddah. It now includes 57 Member States, making it the second largest intergovernmental organisation in the world after the United Nations. The vast majority of its members are states where the Muslim population constitutes a majority, though there are some exceptions. Like the LAS, human rights practices of Member States was not a founding concern of the organisation, though the OIC has from the beginning criticised the human rights practices of non-Member States, particularly Israel.

The Arab League and the Organisation of Islamic Cooperation have their distinct characters, history, interests, and cultures. Despite such differences, there are several points of commonality between the two.

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<sup>536</sup> Syria was suspended in 2011. The Member States in alphabetical order (with their date of accession in parentheses) are as follows: Algeria (1962), Bahrain (1971), Comoros (1993), Djibouti (1977), Egypt (1945), Iraq (1945), Kuwait (1961), Lebanon (1945), Libya (1953), Mauritania (1973), Morocco (1958), Oman (1971), State of Palestine (1976), Qatar (1971), Saudi Arabia (1945), Somalia (1974), Sudan (1956), Syria (1945) (suspended on November 16, 2011), Transjordan (1945), Tunisia (1958), United Arab Emirates (1971), the Mutawakkilite Kingdom of Yemen (1946). The identification of Palestine as a 'State' is for some observers, of course, controversial. The Mutawakkilite Kingdom of Yemen became the Arab Republic of Yemen in 1962 (popularly "North Yemen"). South Yemen joined the Arab League as an independent state in 1967 before merging with North Yemen in 1990 to form what is now the Republic of Yemen.

### **a) *Overlapping Memberships***

Every member of the Arab League is also a member of the OIC, including Palestine, which both organisations have recognised as a state. The geographical focus of the Arab League is relatively concentrated and includes all North African states, from Morocco in the west to Egypt in the east, all of the states on the Arabian Peninsula, as well as Sudan, Mauritania, Somalia, Syria, and Iraq. The OIC, in addition to these LAS states, includes a dozen other African countries, Central Asian states, Iran, Pakistan, as well as the far eastern countries of Indonesia, Malaya, and Brunei. The increased geographical, cultural, and ethnic variety of the OIC gives it a much greater diversity, even though it is defined along religious lines. All Member States of the LAS have a majority Arabic and majority Muslim population.

### **b) *Colonial legacy and recent independence***

The vast majority of Member States of the Arab League and the Organisation of Islamic Cooperation were under some form of colonial rule or domination until the second half of the twentieth century. Of those under colonial rule, most fell under the dominion of either the United Kingdom or France, though some eastern members of the OIC were under Japanese rule. At the beginning of World War II only a handful of States were independent, such as Saudi Arabia, Albania, Turkey, Afghanistan, and Iraq. It was during the 1940s through the 1960s that a wave of independence movements and decolonisation acts established independence for the majority. Nevertheless, several OIC and LAS states continued under some form of foreign domination well into the 1970s and 1980s. Six OIC states that were republics within the Soviet Union obtained their independence only in 1991. Thus, both the LAS and OIC were institutions whose Member States emerged out of movements of national liberation, independence, anti-colonialism, and anti-imperialism. The organising themes of both organisations strongly and understandably reflect the importance and the salience of independence, anti-colonialism, and the rejection of foreign interference in the internal affairs of Member States. These concerns seemingly underlie the negative reaction against outside (often disparaged as being ‘western’) promotion of human rights.

### **c) *Identity-based institutions***

Both the Arab League and the OIC are by their own definitions ‘identity’ based intergovernmental organisations rather than universal, regional, or ‘interest-based’ organisations. Unlike the Organization for American States, the Association for Southeast Asian Nation Nations, the European Union, and the Council of Europe, neither the Arab League nor the OIC are defined by a region. And, unlike intergovernmental organisations such as the Organisation for Economic Cooperation and Development (OECD), Group of 7 (G7), or the World Trade Organization, neither the LAS nor OIC is organised around an economic or policy issue. Rather, both the LAS and OIC highlight the ‘identity’ themes of race/ethnicity/culture (for the League of *Arab* States) or religion (the Organisation of *Islamic* Cooperation). While both the LAS and the OIC promote economic, trade, and other relations among their Member States, their organising rationale is founded on their perceived identities and identity-interests.

### d) *Inter-organisational conflicts*

Although both the LAS and OIC Charters emphasise the goals of peaceful relations among Member States, state sovereignty, and non-interference in the internal affairs of other Member States, there have in fact been recurring conflicts among members of the two organisations. The following is a partial list that identifies some of the conflicts and interstate interference in the internal affairs with the LAS (since 1945) and the OIC (since 1969):<sup>537</sup>

- Jordanian seizure of the West Bank and Egyptian seizure of Gaza (1948);
- Jordanian and Saudi Arabian interference in the North Yemenese civil war (1962-1970);
- Dhofar Rebellion in Oman (1962-1976)
- Jordanian-Palestinian civil war (1970-1971);
- Jordanian-Syrian conflict (September 1970);
- Syrian occupation of Lebanon (1976-2005);
- Iran-Iraq War (1980-1988)
- Gulf War beginning with the Iraqi invasion of Kuwait (1990-1991)
- Houthi insurgency (2004-2015)
- Iran-PJAK conflict (Iran-Iraq) (2004-present)
- Syrian Civil War (including Turkey, Saudi Arabia, Iran, others) (2011-present)
- Syrian Civil War (overflow into Lebanon) (2011-present)
- Saudi-Iranian dispute regarding destruction of Saudi Embassy in Tehran (condemned by both the LAS and OIC (January 2016)

These conflicts, wars, and interference in the internal affairs among Member States illustrate the deep divides among Member States as well as the obvious fact that the official policy of non-interference is aspirational rather than actual. Thus despite the professed core founding values of peaceful relations among Member States of the LAS and the OIC, serious conflicts are recurring phenomena and necessarily harm the ability of the organisations to operate smoothly.

## 2. **The Underlying Economic, Developmental, and Governance Factors in LAS and OIC Member States**

Any attempt to understand how the Arab League and the OIC conceptualise human rights should take into account the important historical, social, economic, and structural dynamics of the states that constitute the members of the organisations. Because of the real *and* symbolic effects of colonialism, the economic situation, the human development situation, and other factors, the ‘conceptualisation of human rights’ should not be understood to be the result of conscious policy decisions made by the Member States of the organisations, but something that has emerged instead from a complex interaction of social and

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<sup>537</sup> This is only a partial list and does *not* include non-LAS/OIC state interference in the region (including by Israel, the United Kingdom, France, and the United States), nor does it include purely internal conflicts, civil wars, and coups within Member States, nor does it include cases of suspected (but uncertain) intrigue against Member States (such as the presumed killing of Musa al-Sadr by Muammar Qaddafi on behalf of either Arafat or Khomeini or the Damascus bombings of 1986).

economic factors that necessarily influence, if not fully shape, their conceptualisations of human rights (as discussed below).

In *Development as Freedom*,<sup>538</sup> Sen argues that a multiple developmental human factors are closely interrelated. One cannot successfully measure national economies, for example, by focusing on one or two factors such as gross national product or even income per capita. Rather, a broad range of interconnected factors must be considered: educational opportunity for children, equality for women, environmental quality, governmental transparency, availability of health care including pre-natal care, life-expectancy, and human rights. It would be highly unusual for any country to do well in most of these categories but neglect one or two. It similarly would be rare for a country to do well in one or two factors and not the others. Because *human resources are a country's most valuable resource*, the way that states approach each of these interrelated factors reveals a great deal about how the state is likely to treat the other factors and, ultimately, the value that the state attaches to the human dignity of its population. If a state were to insist that it cared a great deal about one issue (perhaps the religious practices of its population), but neglected the broad range of issues, it is likely to reveal that in reality the state ultimately has little serious concern for any of the important factors related to human development.

#### a) *Human Development Indices (HDI)*

A significant majority of members of both the LAS and OIC are developing countries, though several states are wealthy due to their petroleum resources.<sup>539</sup> Ten of the top 20 countries with proven oil reserves are members of the OIC and seven of the top 20 are LAS Member States. In addition to the oil-rich Gulf states, Indonesia, Malaysia, and Brunei also have considerable oil wealth, though due to its large population, Indonesia's oil resource is a relatively less salient factor than in other petroleum-rich states. While the presence of oil resources creates the enormous potential for national economies and human development, unfortunately in most cases oil wealth has not translated into broad gains in human development nor more open societies. (See Petroleum States and Corruption Perceptions below)

In the 2015 United Nations Development Programme report, which provides the 2014 rankings, LAS and OIC Member States do not do particularly well. When divided into five quintiles, each with 38 states, the rankings for the OIC and Arab League are as follows:<sup>540</sup>

Quintile	Ranking of states	Arab League	OIC
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<sup>538</sup> Technically, he received the 'Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel'. Amartya Sen, *Development as Freedom* (Knopf 1999).

<sup>539</sup> According to the World Bank's figures for the 2016 fiscal year, six LAS countries are classified as having Upper-Middle-Income economies (UMIC) while seven are classified as having Lower-Middle-Income economies (LMIC). For the OIC (overlapping with LAS), there are a total of 16 UMIC economies and 18 LMIC economies. World Bank, 'Country and Lending Groups' <<http://data.worldbank.org/about/country-and-lending-groups>> accessed 25 March 2016

<sup>540</sup> Since 1990, the United Nations Development Programme has issued annual reports ranking states on several factors related to human development, including education, life expectancy, and income. Note: Syria is included in the rankings for both the LAS and OIC while Somalia is excluded due to insufficient data for the UNDP.

First	1-38	1	2
Second	39-76	6	10
Third	77-114	6	14
Fourth	115-152	3	10
Fifth	153-188	5	21

Table 2: Ranking of LAS/OIC member states (UNDP report)

Thus only two OIC states are in the top quintile in the UN Human Development Index (Brunei and Qatar). There are 10 in the second quintile (Saudi Arabia, UAE, Bahrain, Kuwait, Oman, Kazakhstan, Malaysia, Lebanon, Iran, and Turkey); 14 in the third quintile (Azerbaijan, Jordan, Algeria, Albania, Libya, Tunisia, Suriname, and Maldives); 10 in the fourth quintile (Kyrgyzstan, Iraq, Guyana, Morocco, Tajikistan, Syria, Equatorial Guinea, Bangladesh, Pakistan, and Nigeria); and there are 21 in the lowest quintile (Cameroon, Mauritania, Comoros, Yemen, Togo, Uganda, Benin, Sudan, Djibouti, Senegal, Afghanistan, Ivory Coast, Gambia, Guinea-Bissau, Mali, Mozambique, Sierra Leone, Guinea, Burkina Faso, Chad, and Niger).

As will be shown below, these OIC and LAS states do not do particularly well with regard to their respect for the domestic implementation of international human rights standards. This, of course, raises the suspicion that their weaknesses with regard to human rights may not be a result of inattention to or dismissal of human rights norms, but to a much broader lack of concern about the lives of human beings within their countries. Any attempt to understand how human rights are conceptualised within the LAS or OIC perhaps should not necessarily focus exclusively on human rights failures, but should consider the much broader issue of concern for human dignity, of which human rights is but one among many interrelated concerns.

In 2002, the United Nations Development Programme (UNDP), in conjunction with the Arab Fund for Economic and Social Development, issued its first *Arab Human Development Report*.<sup>541</sup> The report found that there were pervasive problems in the Arab world with regard to human development. These included notably a lack of respect for human rights, a deficit with regard to good governance, unnecessary restrictions on trade, poor distribution of wealth, a democratic deficit, an educational deficit, and severe inequalities between men and women.<sup>542</sup> Those Arab countries that were doing relatively well financially on a national basis could attribute their economic fortune not to having removed the human development deficits that affected their less wealthy neighbours, but simply to the fortune of having petroleum-based natural resources in the ground. But they too suffered from comparable human rights deficits, lack of good governance, and gender inequality. The 2002 report, written by Arabs for Arabs, and which is now recognised as a classic in the world of development, concluded that:

Arab countries need to embark on rebuilding their societies on the basis of:

- Full respect for human rights and human freedoms as the cornerstones of good governance, leading to human development

<sup>541</sup> UNDP and AFESD, *Arab Human Development Report 2002 – Creating Opportunities for Future Generations* (UN 2002). The 2002 report was prepared by leading Arab economists, sociologists, and political scientists who examined the status of human development in the Arab world and made recommendations to improve conditions of the population. The UN Arab Human Development Report thus effectively considered all 22 members of the LAS, who concurrently are members of the OIC.

<sup>542</sup> *ibid* 27-29.

- The complete empowerment of Arab women, taking advantage of all opportunities to build their capabilities and to enable them to exercise those capabilities to the full.
- The consolidation of knowledge acquisition and its effective utilisation. As a key driver of progress, knowledge must be brought to bear efficiently and productively in all aspects of society, with the goal of enhancing human well-being across the region.<sup>543</sup>

The 2009 *Arab Human Development Report* – the most recent report – identified recurring human rights problems within the Member States of the Arab League, noting specifically that the ‘norms on human rights’ adopted in the LAS’s Arab Charter on Human Rights (ACHR) are

“Inconsistent with international standards. Indeed, the death penalty, which more than half the countries of the world have abolished and which the United Nations condemns, is applied liberally in several Arab countries, which do not limit it to the most serious crimes or exclude its imposition in cases of political crime.

State constitutions do not adhere in several key respects to the international norms implicit in the charters to which Arab countries have acceded. This gravely compromises levels of human security in the countries concerned. Many Arab countries’ constitutions adopt ideological or doctrinal formulas that empty stipulations of general rights and freedoms of any content and which allow individual rights to be violated in the name of the official ideology or faith. Others deal ambiguously with freedom of opinion and of expression, tending to restrict rather than to permit. Arab countries’ constitutions also routinely delegate the definition of rights to state regulation. In doing so, they allow freedoms and individual rights to be violated at the point when the latter are translated into ordinary law. While Arab laws and constitutions generally do not mandate discrimination between citizens on the basis of language, religion, doctrine, or confession, discrimination against women is quite evident on the law books of several states.”<sup>544</sup>

The Arab Human Development Reports suggest that while it should be recognised that the state parties to the Arab League are distinct from the Arab League as an institution, the fact that they have always prioritised state sovereignty and have rejected external interference in internal affairs, suggests that the human rights deficit in the Arab League as an institution might well be traced back to the internal human rights practices of its Member States.

### ***b) Corruption Perceptions Index (CPI) from Transparency International (TI)***

The most widely recognised and cited comparative measure of corruption has been issued annually by TI since 1993. It is, of course, impossible to have a perfect measure of the state of corruption in states due to the obvious fact that much about corruption is hidden and unknown. This is the reason why, in 1995, the first report using the CPI was published.<sup>545</sup> The index attempts to classify countries and regions according to the perceptions of its citizenry of the corruption levels suffered in their public sectors. TI uses

<sup>543</sup> *ibid.*

<sup>544</sup> UNDP and AHDR, *The Report in Brief: Arab Human Development Report 2009 – Challenges to Human Security in the Arab Countries* (UN 2009) 5.

<sup>545</sup> TI, ‘Our History’ <<http://www.transparency.org/whowere/history/>> accessed 26 January 2016.

information from independent public and private organisations to construct its indicators. When displaying the CPI, TI makes the difference between country scores, being a number from 0 to 100, where 0 relates to highly perceived corruption and a 100 to the exact opposite, and its subsequent rank. It is necessary to recall that this is not a comprehensive index to fathom the complexity of corruption, a reason why TI has developed other indicators to complement the picture.

The latest report on CPI, released on 27 January 2016 (with data from 2015), is proof of a delicate situation in terms of corruption perceptions in the LAS and OIC Member States.<sup>546</sup> The table below divides the TI ranking into five groups, with approximately 35 states in each quintile. LAS and OIC Member States are distributed according to the TI rankings. Maldives, Palestine and Brunei are not covered by the IT 2015 report.<sup>547</sup>

Quintile	State Ranking	Arab League	OIC	CPI Score
First	1-36	2	2	61-100
Second	37-71	5	8	43-60
Third	72-106	5	13	34-42
Fourth	107-141	3	20	26-33
Fifth	142-168	7	11	8-25

Table 3: Ranking of LAS/OIC member states (Corruption Perception Index by Transparency International, 2016)

Only two OIC states, the UAE and Qatar, are listed in the top quintile, having relatively high CPI scores. Kuwait, Oman, Saudi Arabia, Jordan and Bahrain from the LAS are added to Senegal, Turkey and Malaysia to compose the eight OIC members in the second group. The third quintile, in order are Tunisia, Morocco, Egypt, Algeria and Djibouti, with eight more states exclusively of the OIC (Benin, Burkina Faso, Gabon, Suriname, Albania, Mali, Niger and Indonesia). It is in the next quintile where the OIC members almost equal the preceding clusters of countries, with a total of 20 states. These are Lebanon, Comoros and Mauritania only for the LAS, plus Ivory Coast, Mozambique, Sierra Leone, Guyana, Azerbaijan, Gambia, Kazakhstan, Pakistan, Togo, Cameroon, Guinea, Bangladesh, Tajikistan, Iran, Kyrgyzstan, Nigeria and Uganda for the OIC. The bottom quintile includes Syria, Yemen, Libya, Sudan, South Sudan,<sup>548</sup> Iraq and Somalia and OIC members Chad, Uzbekistan, Turkmenistan, Afghanistan and Guinea Bissau.

The six LAS states at the bottom of the list are all to varying degrees undergoing internal conflicts, revealing a correlation between corruption and state immobility regarding these problems. At the same time, and more generally, the fact that many countries in the region are showing severe problems in regards to security, makes them concentrate their actions and resources to counter them, leaving anti-corruption, accountability and transparency policies in the background, according to TI. Many of the states similarly may similarly be classified as 'fragile states,' underscoring social problems on several levels.<sup>549</sup>

<sup>546</sup> TI, *Corruption Perception Index 2015 Report* (TI 2016).

<sup>547</sup> This is due to a methodological decision of TI not to include countries that are not included in at least three TI's data sources. This does not alter the country score, but it does certainly slightly affect the ranking. For more information, see Omar E Hawthorne, 'Transparency International's Corruption Perceptions Index: "best flawed" measure on Corruption?' (3rd Global Conference on Transparency Research, Paris, 24-26 October 2013).

<sup>548</sup> TI makes the distinction between South Sudan and Sudan whilst the new state remains outside the LAS and the OIC systems.

<sup>549</sup> See eg the Fund for Peace rankings of fragile States for the year 2015; FFP <<http://fsi.fundforpeace.org/rankings-2015>> accessed 30 March 2016.

The main problem that plagues the region today is that of political corruption. The existence of untouchable elites who have a disproportionate importance in the decision-making processes of LAS Member States combines with a stagnant judiciary branch, whose independence is not totally guaranteed in law, nor in practice. Notwithstanding these facts, the ratification of some LAS countries of the United Nations Convention against Corruption is seen by TI as a laudable step forward.<sup>550</sup> However, Egypt, Libya, Morocco, Syria and Tunisia have all worsened their CPI results. On the contrary, Kuwait, Jordan and Saudi Arabia all show better scores than in previous years, with the Saudi Kingdom fulfilling its third year on a positive trend.<sup>551</sup>

Like the scores on the HDI, it is apparent that both LAS and OIC states have particularly difficult challenges with regard to corruption. This again suggests that there are important structural issues that go beyond how human rights are conceived and respected.

### *c) Corruption and Petroleum*

Although only a small group of LAS and OIC states have significant oil resources, the states that do have such wealth typically have a disproportionate influence on the budget, direction, and implementation of policies of the two organisations. Among the Member States of the OIC and LAS that are among the top 20 oil producing states in the world are Saudi Arabia, Iran, United Arab Emirates, Iraq, Kuwait, Nigeria, Algeria, Kazakhstan, Qatar, and Libya. Unfortunately, there often is an inverse correlation between oil wealth and respect for human rights, good governance, transparency, and equality in the distribution of wealth. Rather, there is more likely to be a positive correlation between oil wealth and corruption. According to some of the world's leading economists:

“Higher levels of corruption present the most obvious political risk that can arise from large holdings of natural resources. The short run availability of large financial assets increases the opportunity for the theft of such assets by political leaders. Those who control these assets can use that wealth to maintain themselves in power, either through legal means (*e.g.* spending in political campaigns) or coercive ones (*e.g.* funding militias). By some accounts, corruption is a hallmark of the oil business itself. But oil and gas dependence can also affect corruption indirectly. As discussed later, the presence of oil and gas wealth can produce weak state structures that make corrupt practices considerably easier for government officials. These risks are also likely to be exacerbated if the growth of the oil and gas sector is associated with a concentration of bureaucratic power, which increases the difficulty of securing transparency and other constraints on those in power. Not surprisingly, statistical studies that seek to account for variation in levels of corruption across different countries find that natural resource dependence is a strong predictor.

Corruption related to natural resources takes many forms. International mining and oil companies that seek to maximise profits find that they can lower the costs of obtaining resources more easily by obtaining the resources at below market value—by bribing government officials—than by

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<sup>550</sup> Syria is only a signatory, but not a State party to it. Chad and Somalia are not party to the treaty. See <[https://www.unodc.org/documents/treaties/UNCAC/Status-Map/UNCAC\\_Status\\_Map\\_Current.pdf](https://www.unodc.org/documents/treaties/UNCAC/Status-Map/UNCAC_Status_Map_Current.pdf)> accessed 19 December 2015, for an up-to-date overview of signatories.

<sup>551</sup> See TI (n 546) 15.

figuring out how to extract the resources more efficiently. In other cases, the natural resource is sold to domestic firms at below full value, with government officials either getting a kickback or an ownership share. In practice, the risks of corruption in resource- rich environments are very large and the costs of such corruption to the national economy are enormous. By some accounts, for example, Nigeria’s president Abacha was responsible for the theft of as much as US \$3 billion.”<sup>552</sup>

Thus, the extraordinary petroleum resources of many of the OIC and LAS countries does not necessarily translate into rights for women, good governance, or even the distribution of wealth.

#### d) *Human Rights and Fundamental Freedoms*

Several international organisations provide annual evaluations of the human rights practices of countries of the world, including most famously Amnesty International, Human Rights Watch, and the International Federation for Human Rights. Other human rights organisations focus on particular regions or issues. All evaluations of human rights have inherent limitations and none should be relied on as providing necessarily accurate information, particularly in societies that are relatively less transparent. One organisation that attempts to rate countries annually has such limitations as well, and its methodology is not necessarily precise or dispositive. The Freedom House rankings, despite such limitations, provide one bellwether among others for cross-national comparisons.

Freedom House attempts to assess public liberties and civil rights with an ordinal indicator, with which democratic credentials are assessed. This index seeks to implement the seminal definition of ‘democracy’ advanced by Robert Dahl.<sup>553</sup> This indicator is also informative of the more general human rights situation, as it basically sums up the current conditions regarding first generation rights.<sup>554</sup>

The recently released report (27 January 2016) is summarised in the following table, where the freedom ratings ‘Free’, ‘Partly Free’ and ‘Not Free’ have been classified for LAS and OIC Member States.<sup>555</sup> Freedom House provides data for the Gaza Strip and the West Bank separately. In this table, Palestine has been integrated with the data from the West Bank.

Freedom House Rating	Arab League	OIC
Free (1-2.5)	1	5
Partly Free (3-5)	4	22
Not Free (5.5-7)	17	30

Table 4: Ranking of LAS/OIC countries (Freedom House, 2016).

Only one LAS member, Tunisia, ranks as free in the 2016 Freedom House report. The OIC includes five in this category (Benin, Senegal, Suriname, Tunisia, and Guyana). In the next rating of ‘Partly Free’ are the four Arab League countries of Comoros, Kuwait, Lebanon and Morocco, and 22 OIC states (the LAS states

<sup>552</sup> Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz, ‘What is the Problem with Natural Resource Wealth’ in Macartan Humphreys, Jeffrey D Sachs and Joseph E Stiglitz (eds), *Escaping the Resource Curse* (Columbia University Press 2007) 10-11.

<sup>553</sup> Robert A Dahl, *Polyarchy: Participation and Opposition* (Yale University Press 1971).

<sup>554</sup> Freedom House, ‘Methodology’ <<https://freedomhouse.org/report/freedom-world-2016/methodology>> accessed 31 January 2016.

<sup>555</sup> Freedom House, ‘Table with Country Scores 2016’ <<https://freedomhouse.org/report/freedom-world-2016/table-country-scores>> accessed 31 January 2016.

plus Albania, Bangladesh, Burkina Faso, Guinea-Bissau, Guinea, Indonesia, Ivory Coast, Kyrgyzstan, Malaysia, Maldives, Mali, Mozambique, Niger, Nigeria, Pakistan, Sierra Leone, Togo and Turkey). A plurality of Arab League and OIC states are consigned to the 'Not Free' category. At the bottom of the Not Free category are Saudi Arabia, Somalia, Sudan, Syria (although suspended from its membership to the LAS and the OIC), Turkmenistan and Uzbekistan.

In its analysis of most of the LAS countries, Freedom House consistently gives states with ongoing conflicts poor marks as well as describing states such as Saudi Arabia with terms such as engaging in total suppression. Additionally, Freedom House states that most countries are not moving in a positive direction, but towards higher ratings of repression.<sup>556</sup> In the case of the OIC Member States, the subregional statements are not any better, with 91.2% of OIC Member States residing in the 'Partly Free' or 'Not Free' category.

## B. League of Arab States

### 1. Introduction

#### a) Overview

The permanent headquarters of the League of Arab States is situated near Tahrir ('Independence') Square in Cairo, Egypt. The founding Pact of the League of Arab States (Arab Pact) emphasises the importance of independence of the 'Arab' lands that were, at the time of the League's founding, subject to European colonial control either as protectorates, colonies, or other forms of direct or indirect rule. Since 1945, all Arab lands have acquired their independence. The Pact also emphasises the cooperation among Arab states to promote their common political and economic interests, but says nothing at all about human rights or good governance. This omission should, however, be placed in context. The Arab League was created before the drafting of the first major modern human rights instrument, the Universal Declaration on Human Rights, and thus it was not at all exceptional that the Arab League did not identify human rights as a founding issue.

The Arab League, which celebrated its 70<sup>th</sup> anniversary in 2015, is often identified as the world's oldest regional intergovernmental organisation. The accuracy of this identification may, however, depend on the meanings of the terms 'regional' and 'oldest.' Strictly speaking, 'Arab' does not identify any particular region of the world, as the term is more closely tied to ethnicity, language, and culture than to any geographical space. The Pan American Union, created in 1890, was reformed into the Organization of American States (OAS) in 1948. Although the Arab League is formally older than the OAS (1948) and the Council of Europe (CoE) (1949), the Arab League has shown much less of an interest in human rights *within* its Member States than has both the CoE and the OAS.<sup>557</sup>

While human rights are absent from the 1945 Pact, the Arab League has adopted some texts related to human rights, including, most importantly, the ACHR in 2004, which came into force in 2008, although not

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<sup>556</sup> Arch Puddington and Tyler Roylance, *Freedom in the World 2016 – Anxious Dictators, Wavering Democracies: Global Freedom under Pressure* (Freedom House 2016) 10.

<sup>557</sup> Human rights came even later to the Association of Southeast Asian Nations (ASEAN).

all of the Arab League's 22 members have ratified it as of 2015. According to Rishmawi, 'there is evidence that attention to human rights and international law is slowly but increasingly featuring in LAS's decisions. There is a noticeable increase in informed and accurate reference to international law in resolutions.'<sup>558</sup> Yet, even with these modest improvements,

"There are very few major achievements of LAS bodies in relation to ensuring promotion and protection of human rights and beyond. LAS has systematically adopted the approach that it, as a body does not interfere in the internal affairs of Member States. Therefore, despite many major human rights concerns in Arab countries, LAS generally did not discuss these concerns through its various bodies. The main exception has always been violations of international human rights and humanitarian law in the context of the Arab–Israeli conflict."<sup>559</sup>

There are several significant difficulties in describing and explaining the Arab League. As Rishmawi has stated, there 'is a scarcity of literature of any kind, academic or otherwise that analyses the LAS, its standards, mechanisms, and debates relating to the promotion and protection of human rights compared to other regional intergovernmental organisations.'<sup>560</sup> Meetings are frequently held behind closed doors. NGOs and the press often are not welcome to cover proceedings. Many critical documents are not published after being adopted nor updated after being amended. Versions of documents other than in Arabic frequently are not made available. For example, a complete, English-language version of the 1945 Pact, as amended, is not available on the Arab League's website (or other typical sources) nor is the 1983 Charter on the Rights of the Arab Child easily available in any language other than Arabic. The status of ratifications and reservations is not clearly available. Full transparency of its operations and activities should normally be a priority in any regional intergovernmental organisation that takes its role seriously for its members, civil society, or the remainder of the world.

## *b) Founding of the League of Arab States*

### (1) Historical background

In order to understand the Arab League in the twenty-first century, it is very helpful to understand its origins and founding interests.

The establishment of the Arab League in 1945 was the culmination of several historical and political events that may be traced to what is often described as the Pan-Arabism movement in the second half of the 19<sup>th</sup> century Ottoman Empire. Great Britain subsequently played an important, albeit contradictory and inconsistent role, particularly with its encouragement of the 'Arab Revolt' in 1916, an action encouraged particularly by the 'Arab Bureau' of the British Foreign Office. In the notorious McMahon-Husayn correspondence of 1915-1916, the British High Commissioner for Egypt, Sir Henry McMahon, reached an agreement with Sharif Husayn bin Ali of Mecca to work for the establishment of a post-war Arab state

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<sup>558</sup> Mervat Rishmawi, 'The League of Arab States and Human Rights' in Anja Mihr and Mark Gibney (eds), *The SAGE Handbook of Human Rights* (SAGE 2014) 616. Rishmawi is, however, very much aware, and critical of, the frequent recourse to political expediency by the Arab League rather than following a conscientious and principled approach to human rights and international law.

<sup>559</sup> *ibid* 618.

<sup>560</sup> *ibid* 617.

that would unite lands in Arabia (specifically the Hejaz), greater Syria (including modern-day Palestine, Israel, Jordan, and Syria but not Lebanon), as well as portions of Iraq under the ultimate political leadership of Sharif Husayn. The idea was promoted particularly by Mark Sykes of the British Foreign Office, who concurrently and contradictorily engaged in separate and secret negotiations with French diplomat Georges Picot to divide the Middle East into post-war British and French zones of influence in what became known as the Sykes-Picot agreement of 1916. As if these contradictions were insufficient, the British cabinet and its Foreign Secretary, Arthur Balfour, issued a declaration in 1917 wherein 'His Majesty's Government' pledged its efforts to create a Jewish 'homeland' in Palestine. The simultaneous British promotion of Arab unity, British interests, and Zionism were the convoluted circumstances that stimulated the establishment of the Arab League in 1945.<sup>561</sup>

The original impetus for the creation of a specific 'Arab' organisation is generally credited to the British, who as early as 1941 modestly encouraged Arab leaders to form an organisation to protect their interests against Axis powers.<sup>562</sup> The first concrete proposal to establish an organisation came in the 'Alexandria Protocol' (7 October 1944) adopted by representatives from Egypt, Iraq, Syria, the Emirate of Transjordan, and Lebanon. Representatives from these five lands, subsequently joined by the Mutawakkilite Kingdom of Yemen (later the Yemen Arab Republic) and the Kingdom of Saudi Arabia, drafted, signed, and became the first seven states to ratify the Arab Pact.

The original signatories to the Arab Pact are frequently described as independent Arab states. It would be more accurate to assert that in 1945 the 'independent' status of the signatories was more aspirational rather than an accomplished fact. Of the seven earliest members of the Arab League, only Saudi Arabia and the Mutawakkilite Kingdom of Yemen were fully independent at the time. The remaining five were effectively under either British or French military occupation or suzerainty at the time the Pact was adopted.<sup>563</sup> Indeed it is more accurate to describe the majority of the signers of the Pact as 'struggling-to-

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<sup>561</sup> Robert W MacDonald, *The League of Arab States: A Study in the Dynamics of Regional Organization* (Princeton University Press 1965) 33-48.

<sup>562</sup> For a discussion of these diplomatic exchanges in the early 1940s, as well as the ambivalent role of Britain and its erstwhile Arab allies, see Younan Labib Rizk, *Britain and Arab Unity: A Documentary History from the Treaty of Versailles to the End of World War II* (I.B. Tauris 2009) 105-133 and 137-159. The United Kingdom was particularly interested that the new organisation would be 'loyal' to Britain. One might compare Britain's concerns regarding the establishment of the Arab League to that of worried parents' who wish to support the growing independence of their children while simultaneously cajoling and fretting that their children's decisions are not what the parents would have preferred.

<sup>563</sup> Beginning in 1920, and confirmed in subsequent treaties, the League of Nations established the United Kingdom as the Mandatory Power over what is now Iraq and Jordan (as well as Palestine). In the same year, the League of Nations placed what are now Lebanon and Syria under a French Mandate. At the time of the signing and ratification of the Charter of the Arab League in 1945, these four countries continued to be occupied by British and French soldiers respectively and their independence, although declared, was not fully accomplished.

While Egypt attained a modicum of independence with the adoption of a constitution in 1923, the British effectively ruled Egypt as a somewhat self-governing protectorate until the Free Officers Movement overthrew the British-friendly government of King Farouq in 1952. Continued British influence over the country and king was a significant impetus prompting the revolt. Even after 1952, British military bases continued to operate along the Suez Canal until they were finally vacated in 1956. (Only weeks after the British left in 1956, they returned as an invading force in a joint operation with the French and Israelis that was designed to return control of the Suez Canal to Europeans).

be-independent' rather than as 'sovereign states.' With the Arab League's admission of the 'State of Palestine' in 1976, the on-going aspiration for sovereignty continues to play an active role.

It may be said, with little exaggeration, that it was the British Foreign Office's conception of what is an 'Arab', going back at least to 1914, that underlay the initial calls to create an organisation of 'Arab' states. Moreover, it was necessary for the British government to give its approval for developing such an institution due to its ultimate control in 1945 over the foreign affairs of Egypt, Iraq, and Transjordan.<sup>564</sup> British interests between 1943 and 1945 appear to have been largely influenced by the simultaneous realisations that its mandates would presumably expire shortly after the war, its wish to promote positive relations with emerging independent states and to influence the emerging states to oppose Axis-power interests, and to give the appearance of playing a proactive role in encouraging what seemed destined to occur with or without British approval.

There appears to have been little thought or discussion about what should be included, and conversely excluded, when forming the new organisation. The earliest conception of who should be included appears to have been based on identifying lands with majority-Arab populations, including Greater Syria (Syria, Lebanon, Palestine, and Transjordan) and the Arabian Peninsula. In some discussions in the 1940s Egypt was considered by many not to be 'Arab' and thus not an obvious participant. It was the fact of Egypt's vital cultural, historical, and educational role that seems to have transformed the implicit organising principal from being one of ethnicity to one of language and culture. As the organisation expanded beyond the original seven members, the connection to the notion of 'Arab' became even more tenuous. Thus an organisation named after an ethnicity as originally conceived by the British was transformed into a term designating a people with a supposedly common language and culture.

At the time of the founding of the Arab League in 1945 it may be said that three of the principal interests and goals of the fledgling organisation were first, promoting independence from foreign rule in all 'Arab' lands (however defined); second, promoting cooperative relations among the emerging independent states; and third, opposing any efforts by the British or the world community to create a Jewish entity or state inside Palestine. It should be noted that efforts to promote *Arab* unity were circumscribed by the

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In 1941, some Iraqis staged a coup that overthrew the British-installed Hashimite dynasty, but it was immediately suppressed by the British. Occupation and control of Iraq continued until 1947, after which the British continued to station troops in the country until the Ba'athist revolt of 1958 finally ousted the Europeans. The Emirate of Transjordan, with its British-appointed Hashimite King Abdullah, did not obtain its final independence until 1947. Although Lebanon formally adopted a constitution in 1926 and France negotiated treaties with Syria and Lebanon in 1936, the French parliament failed to ratify the treaties and France continued to station troops in the two lands and controlled much of their political life. During World War II, Vichy France ruled in both countries. In 1943, the Lebanese unsuccessfully revolted against the occupying Vichy soldiers. The official French Mandates for Syria and Lebanon were finally and completely terminated only when the United Nations came into existence in October of 1945, several months after Lebanon and Syria ratified the Charter of the Arab League. French troops finally left Lebanon and Syria in 1946.

Thus, all of the signatories of the Alexandria Protocol and five of the seven signatories of the Charter represented lands that remained officially under French and British control. The salient importance of "Arab independence" throughout the Charter was in no small part due to the fact that the representatives sought independence for their own countries from the still-occupying French and British.

<sup>564</sup> Rizk (n 562) 125.

competing interests of local political elites to rule their respective sovereign states rather than be subsumed into some larger political entity where their influence might be diluted.

## (2) The 1945 Pact of the League of Arab States

As suggested above, the Arab League was formed largely for the purpose of promoting the independence and interests of Arab-majority lands that remained under partial or total foreign control, particularly by the United Kingdom and to a somewhat lesser extent France. It was thus founded on a combination of nationalistic, Pan-Arab, anti-colonial, and anti-foreign sentiments. According to Article 2 to of the 1945 Arab Pact,

“The purpose of the League is to draw closer the relations between Member States and co-ordinate their political activities with the aim of realising a close collaboration between them, to safeguard their independence and sovereignty, and to consider in a general way the affairs and interests of the Arab countries.”

Additional interests include cooperation among Member States for promoting economic development, trade, communications, transportation, cultural exchanges, social welfare, and health.

Having been founded in 1945, prior to the Universal Declaration of Human Rights (1948) and the Genocide Convention (1948), the Arab Pact’s lack of reference to human rights, democracy, good governance, is understandable. Its focus was not the rights of individuals or minority groups, but the importance of self-determination (for the national ethnic majority), sovereignty, and non-interference in the internal affairs of Arab states. The Pact declares that each Member State ‘shall respect the form of government obtaining in the other States of the League, and shall recognise the form of government obtaining as one of the rights of those States, and shall pledge itself not to take any action tending to change that form.’ (1945 Arab Pact, Article 8) According to Rishmawi, ‘the main aim of the organisation [at its founding] was to help newly established independent Arab states.’<sup>565</sup>

This founding doctrine of non-interference in the internal affairs of other Arab League states has subsequently constrained the Arab League as an institution, as well as its Member States, from criticising human rights practices within Arab League states. In addition, while the Pact refers to the rights of its Member States, as in Article 8, it says nothing about the rights of *people* who live inside those states. None of the subsequent amendments to the 1945 Pact included any provisions on the rights of human beings. (In 2015, amendments to the Pact were proposed to include references to human rights, but they have not been adopted.) Thus the Arab League is to a large extent preserving non-interference as a guiding principle rather than overcoming it.

Though the interest of Arabs and independence of lands where Arabs were in a majority was a founding concern, no substantial effort was made to clarify what was meant by the defining term ‘Arab.’ As stated above, it was once argued that the Egyptian people were not really ‘Arabs’ (ethnicity). Excluding Egypt would have been peculiar as it was arguably the world’s leading centre for Arabic language, culture, and entertainment. Thus the effective if unstated decision was taken to include with an Arab institution the lands where the Arabic language and culture played a dominant cultural role. Nevertheless, the original

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<sup>565</sup> Rishmawi (n 558) 615.

gap in explaining what is and is not included in the important word 'Arab' leads to the understandable concern of whether those of non-Arab nationality living in Arab League states are second-class citizens or not entitled to the same rights as Arabs. This same problem confronts the Member States of the Organisation of Islamic Cooperation: do state governments and institutions show a preference for Muslims to the exclusion of non-Muslim citizens of the same states?

Palestine was of express interest in the Arab Pact. In 1945, the world 'Palestine' would have been understood to refer to the *entire* land of 'Palestine' under the British mandate, including what is now Israel (which did not exist until 1948), the West Bank, and Gaza.<sup>566</sup> In 1945, all three were under the same British mandate and political control and were not seen as separate entities. As explained above, the Arab League was not concerned about the not-yet existent entity of Israel, but were very concerned that the British might grant some or all of Palestine to the Jews. Speaking with hope more than certainty, the Annex to the 1945 Arab Pact declares that Palestine is *de jure* an 'independent' state and that it should participate in Arab League meetings.<sup>567</sup>

The 1945 Pact has been amended twice, in 1958 and 2005. The first amendments pertained to Council meetings and in 2005 it was amended for the purposes of establishing an Arab Parliament and for establishing procedures in the event of an attack against a Member State. The 2005 amendments came into force in 2007. For a discussion of this new Arab Parliament, see Part V.B.1.c) Proposals were made in 2015 to amend the Arab Pact to include human rights protections, but no final action has been taken.<sup>568</sup>

### (3) The absence of 'Islam' during the founding years

What may be surprising to observers of the 21<sup>st</sup> century Middle East is that the founding documents of the Arab League, the Alexandria Protocol and the 1945 Arab Pact, made no reference to religion, Islam, or God, nor did the Arab League's Cultural Treaty of 1946 or the 'Casablanca Protocol' of 1965. Even though all of the original founding members and all of the current members of the Arab League have Muslim majorities, the salient issue of Islam in Arab lands goes unmentioned in these early documents.<sup>569</sup> This absence, compared with more recent Arab League documents, is a salient sign of changing priorities, whether in rhetoric or reality. Many of the most famous leaders of independence movements in the Arab world in the 1940s and 1950s, including Gamal Abdel Nasser and Muhammad Naguib of Egypt, Riad el-

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<sup>566</sup> To underscore how terminology has changed, Jews born in Palestine before 1947 referred to themselves 'Palestinians' (as did Arabs). The word referred to the land of Palestine and was not a synonym for 'Arab' nor did it designate any ethnicity or religion.

<sup>567</sup> In 1945, Palestine had effectively been under British rule since 1917, and had been declared a British mandate through the League of Nations. In 1947, Britain announced its intention to withdraw from Palestine and to turn responsibility for its future over to the new United Nations. UNGA Res 181 proposed to divide Palestine into a 'Jewish State', an 'Arab State', and an international zone for Jerusalem. Israel declared its independence in 1948 and seized part of the designated Arab State in the fighting of 1947 and 1948. The state of Transjordan seized the 'west bank' and Jerusalem, while Egypt seized Gaza, leaving the proposed Arab lands under Israeli, Transjordanian, and Egyptian control.

<sup>568</sup> Mervat Rishmawi, *The League of Arab States: Human Rights Standards and Mechanisms* (Open Society Foundation 2015) 15-17.

<sup>569</sup> Lebanon's Muslim majority is, however, split between Shia and Sunni, and neither school of Islam has a majority in that country.

Solh (Lebanon), as well as Michel Aflaq, Salah ad-Din al-Bitar, and Zaki al-Arsuzi (founders of Ba'athism), were largely 'secular' and religion played at most a secondary role in their political concerns. In this way they were more like Pakistan's Muhammad Ali Jinnah or Turkey's Mustafa Kemal rather than the Muslim Brotherhood's Hassan al-Banna or Sayyid Qutb. The original concern often was for *Arabs* rather than *Muslims*, even though the vast majority of Arabs were Muslim. The selected identity marker was ethnicity and not religion.<sup>570</sup>

The state that has had perhaps the greatest influence in the Arab League and the OIC, stemming in no small part from its extraordinary wealth and substantial financial contributions to both organisations, has been Saudi Arabia. The Saudi king is now identified in official documents of both organisations with the title of 'Custodian of the Two Holy Mosques.' The seemingly modest and unmajestic title of 'custodian' nevertheless insinuates a symbolic if not actual pre-eminence over all other heads of state in the Muslim world.

Just as the language, symbols, and references to Islam have grown in the Muslim world since the second half of the 1970s, so have such references increased in the documents and statements of the Arab League. The 2004 ACHR *does* refer to God and Islam in the preamble and 'Islamic Shariah' in Article 3.

#### (4) The 'Arab Spring' and reform efforts after 2011

Many Arab League Member States were caught up in the excitement and turmoil of the so-called Arab Spring in 2011. As the events were unfolding, the LAS appointed in July 2011 a new Secretary-General Nabil al-Arabi, a former-Egyptian diplomat, played an important role in 'pushing forward a League-wide reform process' during a tumultuous period.<sup>571</sup> The LAS uncharacteristically opened the reform process to members of civil society who took advantage of the moment.<sup>572</sup>

Ultimately, however, the reforms implemented to date have been found to be far from what would be needed for the Arab League to become a serious actor in promoting human rights, transparency, and good governance within its Member States.<sup>573</sup>

#### c) *Institutions under the Arab Pact*

The institutions of the Arab League will be divided into those that have responsibilities for a range of issues (this section) and those that have responsibilities particularly for human rights issues (Part V.B.3 below).

When discussing the various institutions that exist within regional organisations such as the Arab League, it is common to divide them into 'political' bodies and 'expert' bodies. In political bodies, such as the Council of the Arab League (see below), the members are understood to represent the political interests of the states they represent, whereas 'experts' are understood to be 'independent' and not to act as

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<sup>570</sup> See eg Adeed Dawisha, *Arab Nationalism in the Twentieth Century: From Triumph to Despair* (Princeton University Press 2003); and Patrick Seale, *The Struggle for Arab Independence: Riad el-Solh and the Makers of the Modern Middle East* (CUP 2010).

<sup>571</sup> Rishmawi, 'Standards and Mechanisms' (n 568) 14.

<sup>572</sup> *ibid.*

<sup>573</sup> *ibid* 16.

representatives of states. Below the component institutions of the Arab League will be classified as 'political' or 'expert.'

The **Council of the Arab League** is the principal decision-making body of the Arab League, with each state having one representative. It is a political body that represents the interests of the Member States. The Council meets with different levels of representatives: the first and highest consists of heads of state and is known as the 'Summit.' The second level is the Council of Foreign Ministers, and the third consists of the states' Permanent Representatives to the Arab League. Summits establish basic policies for the Arab League, including decisions regarding revisions of the Pact and the adoption of treaties to be submitted to Member States for ratification. Decisions are typically made by consensus. The second highest level, the Council of Foreign Ministers is responsible for implementing policies established at the summit level and engaging in acts such as high-level mediation among conflicting states. The Permanent Representatives of the Member States to the Arab League undertake the actual implementation and oversight of Summit and Council of Foreign Ministers meetings.

Voting procedures in Council meetings and the binding effect of decisions have caused problems from the beginning. Following reforms in 2005, the procedures have been adopted whenever decisions are not unanimous. First, the final decision is delayed until the following session. When a matter is urgent, the following session may be convened within a month. Second, if unanimity is not reached, a two-thirds vote is necessary for substantive matters (such as security, peace, sovereignty, treaty amendments, etc.), while a simple majority is needed for procedural matters (such as the budget).

The Arab League also conducts political meetings entitled 'Ministerial Councils', consisting of each state's minister for Justice, Interior, Health, Tourism, et cetera. There are total of 13 separate specialised Ministerial Councils. The Council of Ministers of Justice have adopted model laws for Arab states that contain inconsistencies with international human rights standards and in 1998 the Council for Ministers of Interior approved the Arab Convention on the Suppression of Terrorism, which similarly is inconsistent with international norms.<sup>574</sup> In 2002, Amnesty International published a report that highlighted the many conflicting provisions in the ACST. Among them stand out conceptual problems in defining terrorism, privacy issues in the monitoring of suspects, broad and permissive extradition rules, and co-opted freedom of expression in public outlets under the rubric of security.<sup>575</sup>

These important meetings at the Council level, where basic Arab League policies, laws, standards, and goals are debated and approved are not open to the public. NGOs do not have access to Council meetings and agendas for the meetings typically are not publicly released in advance. On occasion NGOs do make recommendations for Council meetings.<sup>576</sup>

Article 4 of the Arab Pact provides for the establishment of **Permanent Committees** to be responsible for issues identified in Article 2. With regard to human rights, the most important such committee is the Permanent Arab Committee on Human Rights (APCHR), discussed below. Among the other Permanent

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<sup>574</sup> *ibid* 24-26.

<sup>575</sup> Amnesty International, *The Arab Convention for the Suppression of Terrorism: A Serious Threat to Human Rights* (AI 2002) 24-25.

<sup>576</sup> Rishmawi, 'Standards and Mechanisms' (n 568) 22.

Committees are the Political Committee, Culture Committee, Social Committee, Legal committee, Information Committee, Women's Committee, and the Organisation of Youth Welfare.<sup>577</sup>

The **General Secretariat** is the office that supervises the daily operations at the Arab League headquarters in Cairo. The head of the office, the Secretary-General holds the rank of Ambassador and is appointed by the Council to a renewable five-year term. Since 2011, the Secretary-General has been Nabil Elaraby. He promoted and participated in a 2013 conference in Cairo entitled 'The Arab League and Human Rights: Challenges Ahead', sponsored by the International Federation of Human Rights (FIDH), the Cairo Institute of Human Rights Studies, the Arab Organisation for Human Rights, and the Egyptian Initiative on Personal Rights.<sup>578</sup> Within the General Secretariat are departments of, *inter alia*, Women, Family and Childhood; Palestine Affairs; and Human Rights.<sup>579</sup>

There are more than 25 **Specialised Organisations** within the Arab League, including the Arab Educational, Cultural and Scientific Organisation (ALESCO), the Arab Labour Organisation (ALO), the Arab Women Organisation (AWO), and the Arab Fund for Social Development (AFSD). The headquarters of these Specialised Organisations' are dispersed throughout Member States.<sup>580</sup>

In 2005, after discussions lasting several years, the Arab League adopted amendments to the 1945 Arab Pact, including a new Article 19 that established an **Arab Parliament**, which came into force in 2007. Each Arab League Member State is entitled to four representatives.

The principal responsibility of the Parliament is to promote economic development, Arab unity, cooperation, national security, and human rights. Although it does not have law-making powers, it makes recommendations to the Council, and officially has the very important, but limited, power of posing questions and requiring responses from the Ministerial Councils, the Secretary-General, senior staff members, and specialised organisations. If its authority is recognised and respected, this could become a valuable tool for investigating other bodies' actions with regard to promoting human rights. Unfortunately, in the words of one close observer, it is 'clear' that the 'Parliament is a relatively weak body that will not be able to ensure, by power of decisions, that Arab legislation is consistent with international human rights law.'<sup>581</sup>

Thus far the Parliament has not developed formal procedures or practices for engaging with the NGO community. However, Rishmawi has outlined a case study where there was productive engagement between the Parliament and civil society regarding women's rights during the 2013-2014 period. The lack of formal arrangements leaves open the possibility for constructive engagement following the developing

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<sup>577</sup> See MacDonald (n 561).

<sup>578</sup> FIDH, 'The Arab League and Human Rights: Challenges Ahead' (Regional Seminar, Cairo, 16-17 February 2013) <[https://www.fidh.org/IMG/pdf/rapport\\_lea\\_uk-iddouble.pdf](https://www.fidh.org/IMG/pdf/rapport_lea_uk-iddouble.pdf)> accessed 30 March 2016.

<sup>579</sup> See Cris E Toffolo, *The Arab League* (Infobase Publishing 2008) 51; Mervat Rishmawi, 'The League of Arab States: Recent Developments on Human Rights and Social Justice' in Ida Lintel, Antoine Buyse and Brianne McGonigle-Leyh (eds), *Defending Human Rights: Tools for Social Justice* (Intersentia 2012) 42. For the Department of Human Rights, see below.

<sup>580</sup> Toffolo (n 579) 52.

<sup>581</sup> Rishmawi, 'LAS and Human Rights' (n 558) 624.

model of the new treaty-body Arab Human Rights Committee (AHRC) established in 2009 rather than the relatively closed APCHR established in 1968.<sup>582</sup>

The 1945 Arab Pact contemplated the establishment of an Arab Court of Justice in its original Article 19 (now Article 20). Attempts in 1950, 1996, and 2005 to establish such a court foundered. Kuwait launched a new attempt to establish such a court in 2014, and a drafting process currently is underway to establish a statute for such a court.

## 2. Chronological Overview of the Arab League engagement with Human Rights

As mentioned above, human rights, good governance, democracy, and transparency were not founding principles of the Arab League and they played little role during its early years where the LAS focused on independence for Arab lands, the Israeli/Palestinian dispute, and state sovereignty. The Arab League has never departed from its founding principle of non-interference in the internal affairs of other Member States, a position that fundamentally precludes serious promotion of human rights. As one former Arab League expert on human rights wrote: 'The issue of human rights has only rarely influenced LAS policies. In fact, the LAS has never criticised any member for violating human rights. The only criticism and condemnation regards Israeli violations of human rights in the occupied Arab territories.'<sup>583</sup> Indeed, to the extent that the Arab League promoted human rights during its early years it pertained to Israeli suppression of Palestinian rights. The Arab League did not denounce, for example, Jordanian occupation of the West Bank or Egyptian occupation of the Gaza strip, both of which were seized by the Arab League members in 1948. One of Arab League's first acts to promote human rights was the 'Casablanca' Protocol for the Treatment of Palestinians in Arab States.<sup>584</sup>

It was only after the June 1967 war where Israeli seized the West Bank, the Gaza strip, the Sinai Peninsula, and the Golan Heights that the Arab League began to manifest an interest in the Arabs who lived inside those territories that had recently been under member-state control. The first institution created by the Arab League to focus on human rights issues, the APCHR, established in 1968 immediately after the June 1967 war, did not focus on the rights of all Arabs, but instead 'monitored and denounced human rights violations by Israel in the occupied territories, making the Palestinian (human rights) question its main concern.'<sup>585</sup> As al-Ajani observed, the Arab League was developing a 'growing awareness of the importance of human rights as a useful political weapon, particularly vis a vis Israeli human rights violations in the occupied territories.'<sup>586</sup> In comparison with other regional human rights systems, the Arab League is a 'latecomer' among intergovernmental organisations, as the American, African, and European

<sup>582</sup> Rishmawi, 'Standards and Mechanisms' (n 568) 50.

<sup>583</sup> Wael Allam, 'The Arab Charter on Human Rights' (2014) ALQ 28, 50.

<sup>584</sup> Protocol for the Treatment of Palestinians in Arab States (adopted 11 September 1965) <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=460a2b252>> accessed 30 March 2016 (Casablanca Protocol); see also Rishmawi, 'LAS and Human Rights' (n 558) 628.

<sup>585</sup> Vera van Hüllen, 'Just Leave Us Alone: The Arab League and Human Rights' in Tanja A Börzel and Vera van Hüllen (eds), *Governance Transfer by Regional Organizations: Patching Together a Global Script* (Palgrave Macmillan 2015) 128.

<sup>586</sup> Mohammed SM Al-Ajaji, 'The League of Arab States and the Promotion and Protection of Human Rights' (LLM Thesis, The University of British Columbia, 1990) 112.

systems of protection and promotion of human rights were established between the 1950s and the 1980s.<sup>587</sup>

Beginning in the second half of the 1960s, the Arab League began to take a somewhat broader approach to human rights issues. In December 1966, the year that the ICCPR and the ICESCR came into force, the United Nations designated 1968 – the 20th anniversary of the Universal Declaration of Human Rights – as the ‘International Year for Human Rights.’ In 1967, in preparation for the upcoming International Year for Human Rights, the UN’s Human Rights Council requested UN Secretary-General U Thant to engage in discussions with regional intergovernmental organisations that did not have human rights mechanisms in order to encourage the organisations to establish them. Discussions between the UN General Secretariat and the Arab League began in 1967. The LAS notably participated in the UN’s International Year for Human Rights in 1968.

Recognising the value of employing the newly recognised international human rights law from the two conventions, the Arab League began increasingly to use ‘international human rights’ as a rhetorical weapon against Israel. The increasing LAS rhetoric about international human rights standards did not extend to Arab League states’ own treatment of Palestinian refugees.<sup>588</sup> Thus during the 1966-1967 period a variety of factors came into play: international recognition of the ICCPR and ICESCR as international law, the UN’s recognition of a symbolic 20<sup>th</sup>-year anniversary of the beginning of the modern human rights system, UN engagement with the Arab League on establishing a human rights institution, and the possibility of there being a new type of human rights rhetoric that could be used to criticise Israel. With this combination of factors, the Arab League decided in 1968 to create the first LAS institution devoted to human rights, the APCHR, which came into existence in 1969. It operated under the general rules for all other functional commissions within the General Secretariat until receiving its own governing statute in 2007.

In the early 1970s, coinciding with the creation of the OIC, the Arab League increasingly referred to Islam and sharia as a means for understanding and effectively circumscribing human rights standards. The new human rights language within the LAS was crafted to create religious and cultural rationales for not applying international human rights norms internally, while at the same time using international human rights standards to denounce Israel and other non-Member States. While it was not difficult to identify the inconsistencies in such uses of ‘human rights’ by the Arab League, the positive outcome is that human rights finally were on the agenda.

During the period, most major human rights instruments coming from the Arab League spoke of the rights of *Arabs* (such as the 1983 Charter on the Rights of the *Arab* Child) and typically referred to the noble values of Islam, thereby placing many of the inhabitants of Member States in the category of people not included (or included as an afterthought) in the documents. After 2004, instruments deemphasised the

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<sup>587</sup> Van Hüllen (n 585) 125.

<sup>588</sup> The Arab League’s more recent response to other issues involving Palestine reveal a continuing inconsistency with its approach to human rights. The Arab League has been a strong supporter of Palestine’s accession to the Rome Statute so that it would be able to bring actions against Israel in the International Criminal Court (ICC). Yet when the International Criminal Court brought actions against LAS Council member President Ali Abdullah Saleh of Yemen and President Omar al-Bashir of Sudan for genocide and other crimes, the Arab League opposed the ICC because it was interfering in the internal affairs of a Member State.

identity elements of Arab ethnicity and the Islamic religion. Arab League documents and positions on human rights nevertheless carved out ‘regional’ and ‘cultural’ (*i.e.* religious) exceptions as justifications for not complying with ‘Western’ standards.

During the years 2001-2004, culminating in the Tunis Summit and the adoption of the ACHR (in force 2008), the Arab League began to take its first modest steps toward the development of a modern human rights regime.<sup>589</sup> Prior to 2004, with the adoption of the ACHR, the Arab League had done little to actually promote human rights.<sup>590</sup> Although it has not abandoned the sovereignty principle, nor established effective monitoring mechanisms, nor produced human rights treaties that adhere fully to international human rights norms, there has been an important sea change – at least rhetorically. The more recent human rights texts come much closer to accepting international norms (with some exceptions) and they explicitly reference the universality of human rights. Since 2004 they also have largely, though not entirely, abandoned the dividing of Arabs from non-Arabs and Muslims from non-Muslims. Yet, to be clear, even these steps are halting and are not consistent – suggesting that internal disputes and pressures and different coalitions prevail at different times on different issues. Thus, on the one hand, there is important and recognisable progress, though on the other their instruments fall far short of establishing an effective human rights regime.

The change is perhaps most clearly manifest in the adoption of the 2004 ACHR, which makes pronounced statements in support of universal human rights standards. It should be noted, however, that the change between 2001 and 2004 was not one of a transformational internal sea change pervading the Arab League as a whole, but it was likely the results of a strongly contested internal struggle combined with outside pressures pushing a reluctant Arab League to modernise its institutions and approaches. Thus, on the positive side, Rishmawi sees ‘evidence that attention to human rights and international law is slowly but increasingly featuring in LAS’s decisions.’<sup>591</sup> Yet, even with this circumscribed optimism, this same close observer of the Arab League finds:

“the fact remains that human rights promotion and protection remains problematic. Political considerations and the inter-state relations remain the dominant factor in decision-making, especially because the lack of a developed Parliament and expert bodies means that most of the decisions are taken at the political level. Also, in light of the absence of an advanced Secretariat with adequate human and financial resources and adequate strategies in relation to human rights, the Secretary General and the Secretariat are able in principle to play a role, but in practice this role has been, and is expected to continue to be, limited.”<sup>592</sup>

Van Hüllen offers a much harsher assessment of the meaning of the supposed advances at the 2004 Tunis Summit and what is taken as the real rationale behind it.

“This ‘surge’ towards governance transfer by the Arab League in 2004 was certainly not due to a sudden belief in the normative value of democracy, human rights, the rule of law, and good

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<sup>589</sup> For a brief chronological overview, see van Hüllen (n 585) 125-140.

<sup>590</sup> *ibid.*

<sup>591</sup> Rishmawi, ‘LAS and Human Rights’ (n 558) 616.

<sup>592</sup> *ibid* 631.

governance as universal standards for governance. Looking at the Arab League's activities more closely suggests that *its recent efforts should be understood as symbolic action rather than attempts at effectively promoting and protecting governance standards in the region*. Even though the final draft of the Arab Charter on Human Rights was brought closer to global standards, its content still falls behind internationally recognised, 'universal' norms, for example with regard to gender equality, the death penalty, and the right to derogations under emergency law."<sup>593</sup>

Van Hüllen argues that the 2004 Tunis 'reforms' came not from an internal wish to promote good governance and human rights in the Arab League, but as a way of ingratiating Member States to the international community that was increasingly demanding reforms, a lessening of authoritarianism, and responding to increasing restlessness among populations caused by corruption, lack of reform, and economic stagnation. It might almost be said that the international community was pressing for reforms as a way of proactively anticipating the 'Arab Spring' that would finally come seven years later.

The clear and significant improvements exemplified in the 2004 ACHR do not mean that the document is without important flaws. However good, improved, or flawed the 2004 ACHR is, it continues to lack any powerful enforcement mechanisms. The record since 2004 is mixed, with some positive developments and some troubling regressions.

### 3. Arab League Human Rights Institutions

In addition to the roles that the governing institutions play with regard to human rights, as explained above, there are a number of institutions whose specific mandate concerns human rights issues. The activities and functions of these institutions provide insight into the conceptualisation of human rights by the Arab League.

#### a) Arab Permanent Committee on Human Rights (APCHR) (1968)

The APCHR was first established in 1968 as a permanent technical committee pursuant to Article 4 of the 1945 Pact.<sup>594</sup> From its beginning, the headquarters of the APCHR have been at the Arab League's General Secretariat offices in Cairo. In 2007, the Council elevated the status of the APCHR from that of an Article 4 Permanent Committee governed by generic rules for other committees, by adopting a statute specifically designed for the APCHR.<sup>595</sup> According to al-Midani, the establishment of the APCHR was the beginning of the Arab League's taking 'seriously' the issue of human rights.<sup>596</sup>

The APCHR is a political body whose members are appointed by Member States. Each state is entitled to one vote. There is a quorum requirement of the presence of half of the members of the Commission. The

<sup>593</sup> van Hüllen (n 585) 135 (*Emphasis added*).

<sup>594</sup> For a brief description of the events leading to the creation of the APCHR, see Part V.B.3.a) (below). For a detailed discussion of the APCHR, see Rishmawi, "The Human Rights Commission of the Arab States." (The title of the institution varies depending on the translation).

<sup>595</sup> LAS Ministerial Council Res 6826 (5 September 2007) (in which the Council approved the statute for the APCHR); Mohammad A Al-Midani, 'Human Rights Bodies in the League of Arab States' (2012) 3 *Jinan Hum Rts J* 109, 114. The discussion below regarding APCHR procedures is based upon the 2007 Statute unless otherwise stated, although many of the rules and procedures are similar to the rules applicable prior to 2007 (Al-Midani, 115-122).

<sup>596</sup> *ibid* 110.

Commission attempts to reach consensus on issues, but adopt measures by majority vote if consensus is not reached. APCHR decisions are considered to be provisory pending a final decision by the Council.<sup>597</sup>

The APCHR's responsibilities include establishing procedures for cooperation on human rights issues among Arab League Member States; articulating an 'Arab' position on human rights issues (including draft treaties); drafting proposed human rights treaties; offering opinions on treaties' compliance with international human rights standards; and promoting human rights education. Since its inception, the APCHR has provided recommendations with regard to draft human rights documents, including the Arab Convention on Regulating the Status of Refugees in Arab Countries (1994), the ACHR (1994), and the revised ACHR (2004), and the Convention to Fight Terrorism in the Arab World. The APCHR has participated in meetings with other international human rights bodies.<sup>598</sup>

Unfortunately, despite the official and publicised actions in which it engages and international meetings that it attends, APCHR has no significant mechanisms for seriously promoting human rights, such as examination of reports, special rapporteurs, or working groups.<sup>599</sup> The lack of serious mechanisms means a lack of significant results.<sup>600</sup> Thus, according to another observer, 'the [APCHR] lacks any real power to monitor the respect of human rights by Member States of the Arab League.'<sup>601</sup> It similarly has no special procedures such as special rapporteurs or thematic working groups.

It is important for intergovernmental bodies dealing with human rights issues to have constructive engagements with civil society and human rights NGOs and to be as open to the public as possible. NGOs play an important role in shining the light in places where governments often prefer darkness. This does not mean, of course, that NGOs are without fault or that they never exaggerate or distort their findings. But just as some NGOs might overemphasise abuses, governments are just as likely to underreport them. For this reason there needs to be a healthy, open, and vigorous exchange of information in order to derive the truth. Thus the appropriate approach for bodies interested in human rights is to hear evidence from all sides, investigate, and to hold governments accountable – knowing that even the best of governments commit errors.

It also is important for intergovernmental human rights organisations to be as transparent as possible in their actions. While holding meetings in closed session may be warranted in some cases depending on the circumstances (such as hearing testimony from an eye-witness whose life is endangered), the emphasis should be on transparency and openness.

Ideally, the APCHR should thus engage constructively with the NGO community and at the same time be open to the public so that all points of view can be heard and discussed. Unfortunately, however, the APCHR largely does its work in secret and its meetings are not open to the public.<sup>602</sup>

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<sup>597</sup> *ibid* 120.

<sup>598</sup> *ibid*.

<sup>599</sup> Rishmawi, 'LAS and Human Rights' (n 558) 619.

<sup>600</sup> *ibid* 620.

<sup>601</sup> Leila Zerrougui, 'The Arab Charter on Human Rights' (High-Level Panel on the UDHR, Alumni Conference on the 25th Anniversary of the Human Rights Centre, University of Essex, 4-6 July 2008) 8 [4].

<sup>602</sup> Al-Midani (n 595) 120.

With regard to the NGO community, APCHR took a modestly positive step in 2003 and granted limited observer status to some NGOs, but the total number recognised is approximately 18.<sup>603</sup> Moreover, even those that are admitted ‘have only limited access to Commission documentation and deliberations, and are not allowed to address the Commission in its sessions.’<sup>604</sup>

However, one of the requirements for an NGO to obtain authorisation to participate in some of the APCHR events is that it must be a registered NGO in one of the Arab League states. This of course presents a situation where a Member State that wishes to avoid scrutiny of its human rights record may simply refuse to register the critical NGO. ‘In fact, a large number of active human rights NGOs in Arab countries have either been denied registration by their national governments, or have not been able to register due to restrictive laws.’<sup>605</sup> Rather than encouraging Member States to comply with human rights standards, the policy effectively encourages states not to recognise NGO groups that are likely to be critical of them while to recognising ‘human rights’ groups that support governmental policies instead.<sup>606</sup> Wiktorowicz identifies the state dynamics behind such incentives with regard to Jordan: ‘Moderate groups, which do not threaten state control, are encouraged to organise while more critical groups find organisation space limited or closed. Authoritarian practices are thus projected through the manipulation of the bureaucracy to support state interests and priorities [...]’.<sup>607</sup> He provides as an illustrative case the problem of registration in Jordan, one of the relatively more open countries in the Middle East:

“Discretionary state power is used to control the leadership and general membership of NGOs. Although it is not explicitly stated in [Jordanian] Law 33, all volunteers as well as administrative board members must first be approved by the ‘security department,’ a euphemism for the *mukhabarat* and public security at the Ministry of the Interior. These agencies are charged with the responsibility of preventing collective action that threatens the security of the state, national unity, or the Hashemite regime. This input in registration decisions represent the veto power of the security apparatus. Through this power, the state enjoys absolute control over the composition of volunteers in NGO activities and is able to shape and mode the makeup of participants in the voluntary sector. The state uses this power to exclude particular individuals, deemed threatening to the regime.”<sup>608</sup>

The state recognition of NGOs is not a routine formality adhering to transparent criteria. Rather, registration is a political decision about which groups the state favours and which it opposes. It may well

<sup>603</sup> Rishmawi, ‘LAS and Human Rights’ (n 558) 619.

<sup>604</sup> *ibid*; see also Rishmawi, ‘Standards and Mechanisms’ (n 568) 30.

<sup>605</sup> Rishmawi, ‘LAS and Human Rights’ (n 558) 619.

<sup>606</sup> Some such groups are actually financed by States that wish to hide their actual practices and are designated as GONGOs (Government Organised Non-Governmental Organisation). For a description of the problems with GONGOs in the Middle East, see Shadi Hamid, ‘Civil Society in the Arab World and the Dilemma of Funding’ (*Brookings*, October 2010) <<http://www.brookings.edu/research/articles/2010/10/middle-east-hamid>> accessed 30 March 2016 (noting that ‘many NGOs are not actually NGOs. They are what observers are now calling GONGOs – government organized non-governmental organisations. They are funded, staffed, and otherwise supported by governments. The idea is not to instigate or inspire change, but rather to control and manage it.’).

<sup>607</sup> Quintan Wiktorowicz, *Management of Islamic Activism: Salafis, the Muslim Brotherhood, and State Power in Jordan* (SUNY Press 2000) 3.

<sup>608</sup> *ibid* 32.

be the case that honest and conscientious human rights organisations are exactly the groups that states will refuse to recognise and thus be excluded, while GONGOs may be allowed to participate. To this extent APCHR is reinforcing human rights abuses rather than preventing them.

Rather than focusing its energies on improving the human rights record of its own Member States, as is the case with the European Court of Human Rights, the principal focus of the APCHR is on the violations of human rights committed by Israel against the Palestinians. 'The main concern for this Arab Permanent Commission [APCHR] remains the Israeli violations of human rights in the occupied Arab territories and the need to alert international public opinion and the various media to the dangers these violations create to international peace and security.'<sup>609</sup> However appropriate it may be to draw needed attention to the human rights record of Israel, it cannot help but be noticed that the APCHR is largely ignoring the countries over which it has oversight responsibility and focuses its attention instead on a country over which it exercises no supervisory function. Those critical of the APCHR have some basis for noting that the firm denunciation of Israel may actually serve as a means of distracting attention from the human rights records of Arab League states. It is almost as if the real concern of the APCHR is not on protecting the human rights of Arabs, the vast majority of whom live inside the Member States, but denouncing the State of Israel.

The APCHR can best be understood as institution that uses the term 'human rights' not to promote human rights, but how the Member States wish to have their human rights records be seen.

#### *b) Expert Advisors to the APCHR (2006-2010 and 2010-2012)*

In response to the criticisms regarding the overtly political nature of the APCHR and to address the lack of expertise of many of its members, the Council adopted a resolution creating a Specialised Subcommittee of Experts of the APCHR in 2006.<sup>610</sup> In 2007, the Council adopted a statute to govern the activities of the Subcommittee of Experts.<sup>611</sup> Resolution 6831 mentions the names of members that made up the Specialised Subcommittee of Experts and a requirement that a chairperson be chosen from these seven members.

In 2010 the body was revised and the name was changed to Committee of Experts of the APCHR. The Experts Committee was, in turn, disbanded in 2012. While in operation, this body consisted of seven human rights experts who were to act in their individual capacity.

Among the tasks originally assigned to these expert panels included studying questions presented by the APCHR and the Secretariat, conducting research regarding the promotion of human rights in the Arab world, and preparing draft human rights conventions and acts for the consideration of APCHR. Although it worked on a project to update the convention on the Rights of the Arab Child, its work was terminated before completion under a different name and different responsibilities. It did, however, develop a Human Rights Education Plan (2009-2014) and then a Plan for its implementation.

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<sup>609</sup> Al-Midani (n 595) 120.

<sup>610</sup> *ibid* 122; see also LAS Ministerial Council Res 6705 (6 September 2006).

<sup>611</sup> LAS Ministerial Council Res 6831 (5 September 2007). See Al-Midani (n 595) 123.

**c) *Department of Human Rights (within the General Secretariat) (1992)***

The Human Rights Department is located within the General Secretariat. It provides logistical and administrative support to the APCHR. It also engages in relations with comparable entities in other institutions, though it is not a policy-making body. According to Rishmawi, it is 'is very small, under-resourced, and does not have a coherent human rights strategy.'<sup>612</sup> Although other offices within the General Secretariat have some responsibilities for human rights issues, such as refugees and women, the Department of Human Rights has little authority and influence and does not play the role of coordinating human rights policies even within the General Secretariat.

**d) *Arab Human Rights Committee (AHRC) (2009) (treaty body)***

The Arab League's first and only independent expert committee on human rights is the AHRC. It is a seven-member treaty body authorised by Article 45 and 46 of the ACHR (2004). It was established in 2009 following the entry into force of the ACHR in 2008. It generally meets at the Arab League headquarters in Cairo.

ACHR Article 45 provides that committee members should be 'highly experienced and competent' and that they 'shall serve in their personal capacity and shall be fully independent and impartial.' Nevertheless, it is the states that nominate the candidates and there is no independent review process to determine whether the Article 45 criteria were met by the nominees. Moreover, it is the assembled states that elect the members by secret ballot from among those who nominated. Thus, the entire nomination and selection process is under complete political control, and there are no established guidelines or oversight to ensure that the candidates are indeed independent. There is nothing to prevent a state from nominating a state employee from serving on the AHRC, and nothing that prevents states from voting for nominees who are expected to be compliant with state political interests.

In a very positive move, the 2014 Rules of Procedure recognised the authority of the AHRC to interpret the 2008 Arab Human Rights Charter, just as the UN's Human Rights Committee has the recognised authority to interpret the International Covenant on Civil and Political Rights.

A very important contribution of the AHRC has been its relative openness to NGOs. It meets with the NGO community and it accepts 'shadow reports' when conducting its reviews of state practices. It also encourages states to consult with civil society representatives.

**4. *Human Rights Instruments and Issues***

**a) *Arab Charter on Human Rights and the Arab Human Rights Committee***

The 2004 ACHR is the Arab League's single most important instrument explaining its official conception of human rights. It was completed in 2004 and entered into force in 2008. As of February 2016, 14 Member

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<sup>612</sup> Rishmawi, 'LAS and Human Rights' (n 558) 620.

States have ratified it.<sup>613</sup> Although most human rights scholars find it to be an important improvement over the 1994 Arab Human Rights Charter (which was never ratified and never went into force), and although there are some provisions that equal international standards, there are many provisions that continue to fall short.

### (1) Background

As early as 1969, the year following the creation of the APCHR, initial discussions began on what would ultimately lead to the adoption of the ACHR in 2004. The early steps, however, produced little results because of the lack of interest of Member States.<sup>614</sup>

In 1982, the APCHR began work on drafting what twelve years later would become the 1994 ACHR. Its work was interrupted, in part, by the OIC's decision to promulgate the Cairo Declaration on Human Rights and the APCHR's decision to await the outcome of the OIC's work before completing the task. Saudi Arabia and the Emirates insisted that the new draft charter be consistent with the Cairo declaration.<sup>615</sup> The 1994 Charter was never ratified and never entered into force.<sup>616</sup> It was widely criticised for failing to comply with international human rights standards.<sup>617</sup>

In January of 2001, the LAS's APCHR proposed that the 1994 ACHR should be revised. In March of 2003, the Arab League's Council accepted the APCHR's proposal and instructed it to undertake the task. During this period the Middle East was in turmoil, particularly following the September 11 attacks on New York and Washington.<sup>618</sup> The United States had invaded Afghanistan (2001) and was preparing for an invasion on Arab League Member State Iraq (2003). There were on-going economic sanctions on Syria and Iraq, and in Palestine the Second Intifada was underway (2000-2005). By 2003, the 'Quartet' (United States, European Union, United Nations, and Russia) were promoting a 'roadmap' for peace in the Middle East and there were international pressures to respond to the terrorism and chaos through, in part, governmental reforms.

It is in this context of Middle Eastern turmoil, wars, efforts to reform authoritarian governments, and attempts to find peaceful solutions to conflict that the APCHR initial draft was presented in October 2003. The APCHR, however, continued to conceive of issues largely along the same lines that it had during 1970s through 1990s rather than in accordance with the new pressures for reform and international human rights. Thus the APCHR's 2003 draft was widely criticised by human rights experts, the International Commission of Jurists, NGOs, and the UN's OHCHR. The distinguished jurist Leila Zerrougui explained that the APCHR draft contained provisions that 'were in fact regressions' from the 1994 Arab Human Rights

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<sup>613</sup> There are several discrepancies on the Internet regarding how many States have ratified. The correct list of States that have ratified is: Algeria, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Saudi Arabia, Sudan, Syria, United Arab Emirates, and Yemen. States that have signed but not ratified include: Egypt, Morocco, and Tunisia.

<sup>614</sup> See Allam (n 583) 41. Allam was a legal expert for the APCHR.

<sup>615</sup> *ibid* 42.

<sup>616</sup> Arab Charter on Human Rights (adopted 15 September 1994, not in force)

<<https://www1.umn.edu/humanrts/instreet/arabhrcharter.html>> accessed 30 March 2016

<sup>617</sup> Al-Midani (n 595) 119.

<sup>618</sup> Allam (n 583) 42-43.

Charter rather than improvements as had been anticipated.<sup>619</sup> The draft by the Arab Standing Committee on Human Rights provided in many clawback clauses, and in the specific issue of gender equality (Article 2 of the Charter) presented additional limitations that subjected equality to 'Shari'a and other revealed laws.'<sup>620</sup>

In order to respond to the widespread criticism of the October 2003 draft, the Arab League and the UN's OHCHR, relying on a previously signed 'Memorandum of Intent' between the two institutions (wherein the OHCHR committed itself to provide expert assistance), agreed to establish a six-person committee of Arab experts to assist in preparing a new draft, although ultimately only five agreed to participate. The five were Arabs human rights experts in various parts of the United Nations.<sup>621</sup>

Arab/OHCHR experts made two important decisions guiding their preparation of the new draft. First, the revised document would 'have at its heart non-derogable rights' in accordance with the UN Human Rights Committee's General Comment No. 29, and second, the text should not articulate the 'lowest common denominator' among Arab League state practices, but should be a document consistent with human rights standards that states could ratify or not as they chose. The experts also made the conscious decision not to include language equating Zionism with racism.

The experts acted quickly and presented their draft only weeks later to the APCHR in January 2004. The UN experts initially met with APCHR to discuss the draft. Some state representatives on the APCHR, however, objected to the presence of non-members during the discussions and other states sought to reconsider the October 2003 APCHR draft and set aside the expert draft. Ultimately, however, the APCHR decided to use the expert draft as a basis for its discussions and two of the experts were consulted as the APCHR proceeded through an article-by-article analysis. There were sharp disagreements among APCHR members and the first set of meetings was described as 'stormy.'<sup>622</sup> The APCHR completed its revisions of the experts' draft on January 14, 2004. The same human rights observers that had criticised the first APCHR draft, although noting the improvements over the October 2003 draft, nevertheless were disappointed with many of the revised provisions adopted by APCHR. Although the January 14 draft diluted many human rights provisions, it nevertheless remained an improvement over both the 1994 ACHR and the APCHR's first draft. The 'Commission kept some very important provisions from the Experts' draft, which makes the 2004 version of the Charter a leap forwards in terms of LAS's recognition of human rights, despite its many shortcomings.'<sup>623</sup>

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<sup>619</sup> Zerrougui (n 601) 9.

<sup>620</sup> *ibid.*

<sup>621</sup> They were from Egypt, Saudi Arabia, Qatar, Tunisia, and Algeria, see Allam (n 583) 43. Although as a practical matter it is understandable why only Arabs were selected by the United Nations to provide expert advice (presumably to avoid the accusation of 'outside' or 'Western' interference with Arab matters), it is also deeply troubling that both the United Nations and the Arab League jointly accepted the experts' ethnicity as an appropriate and necessary qualification for providing advice to the Arab League on international human rights standards that affect all human beings regardless of their race or religion. It was not the finest hour for the Arab League, which apparently insisted on the requirement, nor the United Nations, which agreed to it.

<sup>622</sup> Zerrougui (n 601) 11.

<sup>623</sup> Rishmawi, 'Standards and Mechanisms' (n 568) 68.

The APCHR's January 14, 2004 draft was forwarded to the Arab League Summit meeting in Tunis in May 2004. Many scholars and human rights advocates had hoped that the Summit would make positive improvements to the APCHR draft. The Tunis Summit, however, simply adopted the January 14 draft without amendment. This then became the 2004 ACHR, which was sent out for ratification by Arab League states, and came into effect in 2008 after having been ratified by seven states. As of 2015, a total of 14 states have ratified it, leaving eight Arab League Member States that have not ratified it.

## (2) The Charter

Although the 2004 ACHR is a 'leap forwards in terms of the League's recognition of human rights,'<sup>624</sup> it nevertheless includes many provisions that fall short of international standards. Shortly after it came into effect in January 2008, Louise Arbour, the UN's High Commissioner for Human Rights, who had provided experts to the Arab League to assist in drafting the charter, released a statement declaring:

"Throughout the development of the Arab Charter, my office shared concerns with the drafters about the incompatibility of some of its provisions with international norms and standards. These concerns included the approach to death penalty for children and the rights of women and non-citizens. Moreover, to the extent that it equates Zionism with racism, we reiterated that the Arab Charter is not in conformity with General Assembly Resolution 46/86, which rejects that Zionism is a form of racism and racial discrimination. OHCHR does not endorse these inconsistencies. We continue to work with all stakeholders in the region to ensure the implementation of universal human rights norms."<sup>625</sup>

It is indeed possible to suggest that the 2004 ACHR is even more problematic than diplomatically stated by Arbour. Rishmawi has suggested that the standards articulated in the 2004 ACHR may more closely reflect the attitudes of Arab League Member States than the international standards adopted in numerous human rights instruments. The 'Charter mirrors to a large extent the degree of acceptance of international human rights treaties by Member States and the reservations that have been entered by these states to international instruments.'<sup>626</sup> Nevertheless, as Rishmawi herself emphasises, there are some positive aspects of the 2004 ACHR that should be fully appreciated.

### (a) *Formal acceptance of universal and international human rights standards*

The 2004 Arab Charter of Human Rights, unlike predecessor declarations from the Arab League, officially accepts and approves of international human rights standards. The preamble affirms:

"The principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and having regard to the Cairo Declaration on

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<sup>624</sup> *ibid.*

<sup>625</sup> Louise Arbour, 'Arab Rights Charter Deviates from International Standards' (Statement by the UN High Commissioner, 30 January 2008) <<http://www.un.org/apps/news/story.asp?NewsID=25447#.VwdjzPI96Uk>> accessed 30 March 2016.

<sup>626</sup> Rishmawi, 'LAS and Human Rights' (n 558) 622.

Human Rights in Islam.”

Article 1 accepts the universality and indivisibility of rights by noting the following goals:

1. *To place human rights at the centre of the key national concerns of Arab States*
2. *To teach the human person in the Arab States in accordance with universal principles and values and with those proclaimed in international human rights instruments*
3. *To entrench the principle that all human rights are universal, indivisible, interdependent and interrelated.*

Prior to 2004, the Arab League had not made such clear statements in support of the international human rights agenda. It also should be noted that 17 of the 22 Arab League states have ratified both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, though often with reservations.

The ACHR also contains an important Article 43 that would seem to suggest that rights previously established in domestic law or international law cannot be reduced or eliminated by the Charter.

“Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international and regional human rights instruments which the States parties have adopted or ratified, including the rights of women, the rights of the child and the rights of persons belonging to minorities.”(Article 43)

As will be seen below, however, this article that appears to support rights recognised domestically and internationally may be contradicted by other articles of the ACHR.

#### *(b) Equality, non-discrimination, and discrimination*

The ACHR contains important clauses that prohibit discrimination on a variety of grounds including race, gender and religion, including the Preamble and Articles, 1, 3, 4, 11, 12, 24, 34, and 39. The principal non-discrimination/equality provision of the ACHR states:

1. Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability.
2. The States parties to the present Charter shall take the requisite measures to guarantee effective equality in the enjoyment of all the rights and freedoms enshrined in the present Charter in order to ensure protection against all forms of discrimination based on any of the grounds mentioned in the preceding paragraph. (Article 34)<sup>627</sup>

Despite its formal adoption of the principles of universality and indivisibility of human rights in the Preamble and Article 1 of the ACHR, it nevertheless demonstrates, at a minimum, a *rhetorical* bias in favour of Arabs and, to a lesser extent, toward Islam. The same Article 1 that speaks of universality

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<sup>627</sup> ACHR, art 34.3 on ‘positive discrimination’ toward women is discussed separately below.

simultaneous demonstrates a particular interest in Arabs and in Islam, only two of the numerous ethnic and religious groups found in the Member States of the Arab league. The ACHR repeatedly refers to the *Arab nation* and *Arab states* without recognising that there are many ethnicities (and nations) that live inside their borders who are not Arab. Similarly, the AHRC (unlike the Arab Pact) references and privileges 'Islam' and the 'noble values of Islam,' though it also makes a general reference to 'other divine' religions (ACHR, preamble; Article 3.3). Although the ACHR references Islam twice (the Preamble and Article 3), it does not – unlike the OIC Charter and the Cairo Declaration of Human Rights in Islam – presume that it should be interpreted consistently with Islamic sharia. Indeed the ACHR is notably much more inclusive than was the 1983 Convention on the Rights of the Arab Child.

Among the numerous non-Arab or non-Muslim peoples who reside in Arab League states but who are not included in the categories of 'Muslim' and 'Arab' are Egyptian Copts, Druze, Jews, Syrian Orthodox Christians, Armenians, Berbers, Azeris, Circassians, Kurds, Tatars, Maronite Christians, Pashtu, Persians, Somalis, Turks, and many others. The problem with the ACHR's explicit inclusion of Arabs and Muslims can perhaps be understood by imagining that the European Convention on Human Rights, rather than referring to all human beings, explicitly praised 'the noble Catholic religion,' the 'venerable Canon law,' 'Christian states,' and the 'White' peoples of Europe.

The ethnic and religious references identified in the ACHR should be seen in context of the same document that *condemns* 'all forms of racism and Zionism, which constitute a violation of human rights' (ACHR, preamble) and that declares that all 'forms of racism, Zionism and foreign occupation and domination constitute an impediment to human dignity and a major barrier to the exercise of the fundamental rights of peoples; all such practices must be condemned and efforts must be deployed for their elimination.' (ACHR, Article 2.3)

While the ACHR, consistently with international law, recognises some rights of political activity to *citizens* of the respective states (Article 24.1-4), it nevertheless includes some 'citizenship' requirements for other rights that are not consistent with international law. For example, under international law, all children have the right to basic education when they live in a country regardless of their citizenship. Unfortunately, the ACHR allows for a citizenship test before receiving the right for this issue among others: Articles: 24.5-6, 36, 37, 39, and 42.

### (c) *Recognised rights*

The ACHR identifies the basic second- and third-generation rights to food, housing, healthcare, water, development, and education (Articles 38-42), as well as rights for people with disabilities (Articles 3.1, 33.2, and 34.1). Minorities may enjoy their culture, language, and religion (Article 25).

The ACHR includes the core rights to engage in politics (Article 24.1-4), form associations and to have freedom of assembly (Article 24.5-6), and freedom of movement, (Articles 26-27). There is a recognised right to freedom of thought, conscience, and religion.

While the articulation of the rights contain positive elements, the ACHR also provides for limitations of these rights in such a way as to potentially undermine them, as discussed below, including limitations clauses ('clawbacks') and derogations.

Human rights instruments typically contain ‘granting clauses’ that identify the rights guaranteed under the instrument, but also contain ‘limitations clauses’ that identify the circumstances under which those rights might be limited, restricted, or curtailed. One of the fundamental problems of the ACHR is the breadth of its limitations clauses that have the capacity to effectively eliminate the rights supposedly guaranteed by the Charter.

The broadest and most damaging type of limitation is when an article provides that the right can be limited ‘according to law’ (or some similar formulation). This may mean that the legislature, or perhaps even the executive, may limit or restrict the right simply by having a countervailing law or regulation. The ACHR repeatedly raises this broad limitation. In a telling example, Article 30 contains the broad clauses:

1. Everyone has the right to freedom of thought, conscience and religion and no restrictions may be imposed on the exercise of such freedoms *except as provided for by law*.
2. The freedom to manifest one’s religion or beliefs or to perform religious observances, either alone or in community with others, *shall be subject only to such limitations as are prescribed by law* and are necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others.

Under international law, including ICCPR Article 18, freedom of thought, conscience, religion and belief is part of the so-called *forum internum* and may *never* be restricted in any way and may never be derogated in times of emergency. Such rights protect one’s innermost beliefs, opinions, and values. The UN Human Rights Committee’s General Comment 22, for example, has prohibited any restriction whatsoever. But under the ACHR, a simple statute may overcome the protection and criminalise, for example, the holding of unorthodox religious beliefs regardless of whether one ever utters such beliefs publicly. This infringement on perhaps the most sensitive part of human identity, a person’s internal beliefs, is a flagrant violation of international law. Article 30.2 permits restrictions only to the extent that such restrictions are ‘*necessary*’ in a tolerant society.

There are other examples where the simple adoption of a law also may be used to negate a right otherwise provided in the granting clause. Each of the following articles allows the right to be limited if there is either a ‘law in force,’ ‘limitations prescribed by law,’ ‘governed by law,’ or ‘determined by law’: Articles 6, 7, 9 (perhaps), 14, 21, 25, 33, 34, and 35.2. These limitations, which are at best deeply problematic, essentially give the right to the legislature or executive to undermine the rights. These too are deeply problematic under international law.

Thus there appears to be a stark discrepancy between ACHR Article 43 (which appears to restrict the possibility of local law trumping international law) with the express language of almost 10 specific clauses.

Article 4.2 identifies the rights that are non-derogable in times of emergency, including the rights of freedom of thought and religion, nationality, as well as to be free from torture, inhuman treatment, slavery, and trafficking in human organs.

The sections below explore the rights of women, children, refugees and migrants under the 2004 ACHR.

### (3) Arab Human Rights Committee (treaty body) (2009)

The most important work of the AHRC is to review the Article 48 reports submitted by states. The Article 48 mechanism requires states to submit their initial report within one year after ratifying the ACHR and once every three years thereafter. As of the end of 2015, eight initial reports had been submitted (Jordan, Algeria, Bahrain, Qatar, UAE, Iraq, Lebanon, and Sudan). Only one state, Jordan, had submitted its first triennial review. State reports ranged in length from 60 pages (Sudan) to 119 (Bahrain). The state reports typically identified laws, constitutional provisions, and international treaties ratified by the state. They identified on-going human rights proposals or initiatives. States identified no consultations with civil society in terms of preparing the reports.

All reports by the states and the AHRC reviews were written in Arabic and are posted on the LAS website. No translation is provided into any other language. The AHRC requests that state reports follow a particular order (which basically corresponds to the order of the articles in the Charter).<sup>628</sup>

A very important contribution of the AHRC has been its relative openness to NGOs. The AHRC, unlike the APCHR, accepts 'shadow' or 'parallel' reports by NGOs that are not state-registered and that do not have observer status with the Arab League, and thus is more broadly open to the viewpoints of civil society. The AHRC has even provided guidelines for NGOs to prepare their reports.<sup>629</sup>

After receiving state reports and the NGO parallel reports, the AHRC typically conducts a two-day meeting with state representatives and meets separately with representatives of civil society that have submitted reports, in closed sessions, to discuss state practices.

Once the meetings are complete, the committee prepares its own report reviewing the state's submissions. The ACHR's observation reports range in length from 5 to 11 pages. They do not refer to any evidence supplied by NGOs or other outside sources. They typically include two sections. The first expresses appreciation to the state and offers some general comments. The second sections make brief observations about whether the reports were complete and whether they provided proper and complete citations to the laws and noted such omissions as the absence of definitions of terms. Although the ACHR reports are very brief, they demonstrate some seriousness of purpose and they do make reference to international standards. Examples of their findings include observations about deficiencies in the state reports and shortcomings in state practices.

The following are representative criticisms regarding the shortcomings in the state reports:

- Not seeking contributions from NGOs and National Centers/Committees for Human Rights;
- Failure to identify the institutions and individuals who prepared the reports;
- Absence of meaningful detailed information on the background circumstances of the country, including social, political, judicial, and economic environments;
- Lack of information on the general political structure of the country;
- Absence of information on parity between men and women in constitutions;
- Shortcoming of laws on nationality for children;

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<sup>628</sup> See Rishmawi, 'Standards and Mechanisms' (n 568) 42.

<sup>629</sup> *ibid* 44-46.

- Lack of equality among citizens in health, education, and business sectors;
- No mention of number of cases where death sentence was eliminated or alleviated;

The following are representative criticisms by the AHRC of state practices:

- Disproportionate and inappropriate punishment (and torture);
- Contradictions in some laws;
- Absence of procedures for rape cases;
- Lack of equal opportunity in schools and the disparity between private and public schools, crowded classes;
- Absence of legislation for labour unions;
- No protection of victims of trafficking in persons;
- Lack of independence of the judiciary;
- Refusal to allow surprise visits to prisons;
- Ineffective responses to violence directed at women and children;
- Absence of programs against pollution; and
- Absence of charter principles in the country's legislative process.<sup>630</sup>

Although the observations were brief and without compelling detail, it can be seen that there was some seriousness in the reviews. Accordingly this would appear to be fertile ground for further improvements and advances.

## *b) Case Studies:*

### *(1) Women's rights*

Of all human rights concerns in the Arab world, the issues surrounding the rights and status of women are perhaps the most important, salient, controversial, and complex. Women have been subjected to sexist discriminatory practices in education, employment, and bodily security.<sup>631</sup>

The role of women in Arab society is a salient aspect of life in the Arab world as well as in how the outside world perceives (or imagines) it. Women are often portrayed both inside the Arab world and outside as submissive, veiled, less educated, and confined to the domestic sphere. There are many within the Arab world who believe that this is the natural (or divine) order and many outside who use it to stereotype and ridicule Arabic culture and beliefs. Women's minds and bodies are part of a vast cultural war both within and among civilisations.

The Arab League has not adopted a dedicated convention on the rights of women. Nevertheless, all but two states (Somalia and Sudan) have ratified CEDAW, albeit with reservations. Only two states (Tunisia

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<sup>630</sup> Arab Human Rights Committee (AHRC), *Examination of Reports Submitted by State parties under Article 48 of the ACHR. Observations and final recommendations of the AHRC*, including *Jordan* (2012); *Algeria* (2012); *Bahrain* (2013); *Qatar* (2013); *UAE* (2013); *Iraq* (2014); *Lebanon* (2015); *Sudan* (2015). English-language translations of these reports are available from [Jeremy.Gunn@uir.ac.edu](mailto:Jeremy.Gunn@uir.ac.edu) except for Lebanon and Sudan.

<sup>631</sup> Female genital mutilation is largely not officially sanctioned by Muslim or Arab countries, which generally condemn the practice, but often take insufficient steps to eliminate it.

and Libya) ratified CEDAW's optional protocol accepting the jurisdiction of the Committee on the Elimination of Discrimination against Women and the additional obligations that it brings.<sup>632</sup>

The 2004 ACHR includes several anti-discrimination provisions regarding women. Perhaps the clearest is with regard to employment opportunities: there 'shall be no discrimination between men and women in their enjoyment of the right to effectively benefit from training, employment and job protection and the right to receive equal remuneration for equal work.' (ACHR, Article 34.4) Any rights that women have under international law, including CEDAW, also are guaranteed.

"Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international and regional human rights instruments which the States parties have adopted or ratified, including the rights of women." (Article 43)

Nevertheless, one of the most important provisions related to women contains a significant caveat.

"Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter." (Article 3.3)

Article 3.3's statement favouring *positive* discrimination towards women consistent with the Islamic sharia is controversial for well-understood reasons. Sharia is not, of course, a published written text similar to law that can be consulted and examined by scholars, judges, and individuals. Rather, it is a *process* of interpreting and reasoning engaged in by qualified scholars using authoritative sources. Although in principle there is only one sharia, in reality many scholars interpret divine law differently and have sometimes sharply differing opinions. While it would be true to say that most devout Muslims fully accept the proposition that *sharia should be the governing law*, it is also true to say that there is no universally accepted understanding of exactly what sharia allows and prohibits. Thus the caveat in Article 3.3 can be understood to be a religiously compelling requirement at the same time that it leaves in doubt exactly what are the rights of women. In practical effect, the sharia provision gives significant latitude to state officials to announce that something is required by 'sharia' without needing to explain or justify it. 'Sharia' can thus be used to support or deny the right of a woman to choose whether to wear the veil, just as the term *laïcité* in France can be used to support or deny right of a woman to choose whether to wear

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<sup>632</sup> Comoros, Djibouti, and Tunisia either did not present any RUDs or subsequently withdrew them. Most of the LAS members present reservations (particular or general) with regard to Articles 2, 9(2), 16(1)(2), 29(1)(2), and 15(4). They principally involve the following issues: condemnation of discrimination and enhancement of total equality; equal rights of women and men in terms of the nationality of their children; family law (marriage, divorce, custody, adoption, heritage); settlement of disputes and arbitration; and equality regarding freedom of movement and freedom to choose residence. Saudi Arabia and Oman entered general reservations on the basis of Shari'a and their Constitutions. See <<http://indicators.ohchr.org/>> and <<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm#N21>> accessed 30 March 2016. Tunisia withdrew all its reservations in 2014, see CEDAW Depository Notification 'Tunisia: Withdrawal of the Declaration with Regard to Article 15(4) and of the Reservations to Articles 9(2), 16(C), (D), (F), (G), (H) and 29(1) Made upon Ratification' (23 April 2014) UN Doc C.N.220.2014.TREATIES-IV.8.

the veil. While the terms ‘sharia’ and ‘*laïcité*’ have profound resonance in Arabo-Muslim and French society respectively, neither term provides a precise meaning that can serve as the basis for letting people know what is permitted and what is prohibited.

‘Sharia’ has, of course, been interpreted (correctly or incorrectly) to deny women the independent right to travel, wear the clothing they choose, work, leave the home, receive an education equivalent to men, or to associate with men. To call such restrictions on a person’s activities ‘positive discrimination’ that ‘favours women’ when it in fact may deny to women opportunities and choices that men have in abundance is, in a word, patriarchal. Men would easily understand that it would not be considered ‘positive discrimination’ if *they* were required to veil and remain at home unless their wives or mothers gave them permission to leave. Moreover, when ‘sharia’ is used in states it is selectively employed in a way that often applies different standards of behaviour to men and women. A firm requirement of sharia, based upon the Quran, is that *both* men and women must ‘lower their gaze’ in the presence of the members of the opposite sex. Yet there are no sharia-enforced laws punishing men for looking at women and verbally harassing them. One may have the highest regard for sharia while at the same time fully recognising that the rights of human beings should not be based on varying and inconsistent interpretations of what is good and what is evil.<sup>633</sup>

One final troubling aspect of Article 3.3 is its *implication* that the *divine* law of sharia in fact provides the rule for determining what is permissible and what is prohibited, whereas in reality *all* of the Arab states, including Saudi Arabia, operate legal systems that ultimately are under the control of *political* authorities and *not religious scholars*.<sup>634</sup> Thus it is not God’s understanding of sharia that plays a role in Article 3.3, but the state’s understanding.

## (2) Children’s rights

The principal Arab League instrument focusing on children is the 1983 Charter of the Rights of the Arab Child.<sup>635</sup> Its legal status is somewhat dubious, as the instrument appears to be more than a simple declaration but less than a binding treaty. It contains no ratification provisions and appears to establish no legal obligations. It is said that it was ratified by seven Member States but never went into force.<sup>636</sup> The Charter provides for no enforcement or supervisory mechanism. It merely states that states should

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<sup>633</sup> See eg Javaid Rehman and Susan C Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martinus Nijhoff Publishers 2007); Ekaterina Y Krivenko, *Women, Islam and International Law: Within the Context of the Convention on the Elimination of All Forms of Discrimination against Women* (Martinus Nijhoff Publishers 2009); Christina Jones-Pauly and Abir D Tuqan (eds), *Women under Islam: Gender, Justice and the Politics of Islamic Law* (I.B. Tauris 2011).

<sup>634</sup> The arguable exception to this statement would be that there are judges (qadis) who apply sharia when making decisions on inheritance, divorce, marriage, and other issues. But it should also be noted that such judges receive their authorisation to make such judgments from the State and the State retains the power to terminate or replace them. In Saudi Arabia, the king, who has never been a trained religious scholar, has ultimate authority to educate, hire, and fire all imams and ulema.

<sup>635</sup> The only English language translation of which we are aware is contained in Philip E Veerman, *The Rights of the Child and Changing Image of Childhood* (Martinus Nijhoff Publishers 1992). A French translation is available at <[http://www.acihl.org/article.htm?article\\_id=7&lang=fr-FR#sdfootnote2anc](http://www.acihl.org/article.htm?article_id=7&lang=fr-FR#sdfootnote2anc)> accessed 30 March 2016.

<sup>636</sup> Rishmawi, ‘Standards and Mechanisms’ (n 568) 99.

regularly present to the General Secretariat reports on their actions and measures that they have undertaken to implement the treaty. (Article 50)

Of more importance is the fact that all Arab League states, including most recently Somalia in 2015, have ratified the 1989 UN Convention on the Rights of the Child (CRC). There was discussion among Arab League members in 2009 regarding the advisability of revising the 1983 Charter, but the decision was made to promote instead state compliance with the UN's CRC.<sup>637</sup> Thus the provisions and elements of the Arab League's 1983 Charter arguably are relatively unimportant due to their being out-of-date, not being part of a binding treaty, and being superseded by subsequent acts. It nevertheless should be noted, from a historical perspective, that the most salient issue immediately challenged by experts regarding the original Charter was that it pertained not to the rights of children in general nor children living in Member States, but specifically to the rights of the *Arab* child. As such it stands out as an example of the earlier focus of the Arab League on Arab identity rather than universal human rights.

There are several provisions within the 2004 ACHR that pertain to the rights of the Child.<sup>638</sup> The principal Articles are 10.2 (prohibiting trafficking in children), 17 (standards for criminal trials of juveniles), 29.2 (acknowledging the right to nationality), 30.3 (granting to parents the right to provide religious education to their children), 33 (affirming families and the well-being of the child), and 34 (restricting child labour and protecting migrant children).

The most criticised portion of the ACHR with regard to children is the possibility of the invocation of the death penalty for youth offenders. ACHR Article 7 provides that a 'Sentence of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime.' As with other limitations clauses, as described above, a simple law adopted by a state legislature authorising the death penalty for children under the age of 16 would overcome this treaty provision.

Importantly, Article 43 of the ACHR provides that 'Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international and regional human rights instruments which the States parties have adopted or ratified, including the rights of [...] the child [...]'. Thus the ACHR affirms that international standards and not any local or regional standards should apply.

Thus, at least in principle, Arab League Member States, not the Arab League as a whole, have accepted international human rights law regarding children except to the extent that they added reservations to their ratifications.

During the first decade of the 21<sup>st</sup> century the Arab League undertook a few initiatives targeting at children. The most ambitious was a 10-year Second Arab Action Plan on Childhood (2003) that contained an extensive list of practical actions that could be taken during the period 2004-2014.<sup>639</sup> The vast majority of recommendations focused on issues such as education, healthcare for children and mothers, poverty,

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<sup>637</sup> *ibid* 84.

<sup>638</sup> For an overview discussion of the 2004 ACHR, see Part V.B.4.a)(2) (above).

<sup>639</sup> LAS Secretariat-General Administration of Family, Women & Childhood Division, 'Draft Action Plan on Childhood' <<http://www.crin.org/en/library/publications/draft-arab-action-plan-childhood>> accessed 25 March 2016.

needs of disabled children, and related issues. Most recommendations seem uncontroversial, though perhaps more ambitious than circumstances would warrant. It largely avoids issues of religion and gender stereotyping and calls for equality of educational opportunity. There are some startling though infrequent exceptions. It calls, for example, for increasing the percentage of female elementary education teachers ‘in view of the children’s needs at this age to motherly attention’ and seeks programmes that comply with ‘divine laws.’

In December 2010, the Arab League issued the A new Arab Plan on Childhood is scheduled to be launched shortly. The ‘Marrakech Declaration’ was issued in December 2010 by the Fourth Arab High Level Conference on the Rights of the Child.<sup>640</sup>

### (3) Refugees and Migrants’ rights

Some of the most serious current refugee and migrant problems in the world today come out of Member States of the Arab League, including particularly Syria and Iraq. No Member State of the Arab League ratified the 1951 UN Convention on the Status of Refugees.<sup>641</sup> No state ratified the 1994 Arab Convention on Regulating Status of Refugees in Arab Countries. In 2010, work began on drafting a new refugee convention, but the text and the process have not been open to the public.<sup>642</sup>

The 1994 Arab Convention on Regulating the Status of Refugees in Arab Countries was never ratified and never entered into force. The text of the 1994 Convention falls somewhat short of the standards of the 1951 UN Convention Relating to the Status of Refugees, particularly by omitting some rights contained in the UN convention, including guaranteeing right of education for refugee children. None of the Arab League states ratified UN convention, meaning that neither the Arab League nor its Member States has taken effective action to deal with the world’s increasingly serious refugee problem, much of which comes out of Arab League states. The framing of the 1994 Convention reflects the priority status for Muslims and Arabs: ‘Invoking their religious beliefs and principles deeply rooted in the Arab and Islamic history, which make man such a great value and a noble target that various systems and legislation cooperate to ensure his happiness, freedom and rights.’ (Preamble) The unratified treaty included no enforcement mechanism, but was to be ‘monitored’ by the Secretary-General, whose authority was limited to making ‘requests’ for information from states.

## C. Organisation of Islamic Cooperation

### 1. Introduction

#### a) Overview

The OIC (the ‘Organisation of the Islamic Conference’ prior to 2011), with its 57 Member States, is the second largest intergovernmental organisation in the world after the United Nations. As stated in the

<sup>640</sup> Marrakech Declaration (Fourth Arab High Level Conference on the Rights of the Child, Marrakech, 19-21 December 2010).

<sup>641</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150. For the failure of any Member State to have ratified it, see Rishmawi, ‘Standards and Mechanisms’ (n 568) 101.

<sup>642</sup> *ibid* 83.

currently governing Charter of the Organisation of the Islamic Conference of 2008 (2008 OIC Charter), it is guided by the 'noble Islamic values' of peace, tolerance, and moderation, and promotes, among other values, human rights, the rights of women and children, democracy, self-determination, and good governance.<sup>643</sup> The OIC also pledges to 'respect, safeguard and defend the national sovereignty, independence and territorial integrity of all Member States.' All states with majority-Muslim populations are members of the OIC, as well as 11 states with Muslim minorities. With its self-proclaimed religious identity, it is unique among the world's intergovernmental organisations.

Although the OIC perceives itself as explaining Islamic values and speaking for the worldwide Muslim community (*ummah*), almost none of the members of the governing Islamic Summit or Council of Ministers are religious scholars. Virtually all official members of the Islamic Summit are political leaders who obtained their positions through hereditary monarchies (as in the case of Morocco and Jordan), or some combination of heredity and family decision (as in the case of Saudi Arabia), through military coups (as in the case of Egypt under Abdel Fattah el-Sisi or Syria under Hafez al-Assad), or other varieties of political machinations. Democratically elected leaders are rare exceptions. Iran is unique in having a religious-education requirement for its head of state. Thus, it is peculiar that an organisation comprised of politicians whose power largely derives from position rather than popular elections or Islamic scholarship, purports to speak on behalf of the Islamic religion and Islamic values of the entire world. The OIC itself does not address, explain, or justify why it is that politicians – many of whom have had particularly unsavoury reputations – are qualified to act as legitimate spokesmen (all *are* men) for one of the world's great religions.

The criteria for membership in the OIC have not been entirely clear. All states with a Muslim-majority population belong to the OIC, while 11 Member States have only Muslim minority populations. The 1972 OIC Charter provides that 'Every Muslim state is eligible to join' the OIC.<sup>644</sup> It does not explain what is meant by 'Muslim state,' though it seems to have been intended to mean states with a Muslim-majority population. The standard that was articulated in Article 3.2 of the 2008 OIC Charter provides that 'Any State, member of the United Nations, having Muslim majority and abiding by the Charter, which submits an application for membership may join the Organisation if approved by consensus only by the Council of Foreign Ministers on the basis of the agreed criteria adopted by the Council of Foreign Ministers.' This would appear to preclude states where Muslims constitute less than 50% of the population from being ineligible to join.

Despite the apparent Muslim-majority requirement, 11 of the OIC's 57 Member States have less than a 50% Muslim population (Benin, Cameroon, Gabon, Guinea-Bissau, Guyana, Ivory Coast, Mozambique, Nigeria, Suriname, Togo, and Uganda). The 'OIC accepted the membership of Uganda in 1974, although the majority of its population is not Muslims. Apparently, that was because Uganda at that time had a

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<sup>643</sup> Charter of the Organisation of the Islamic Conference (adopted 14 March 2008, entered into force 3 September 2009) OIC Doc OIC-CHARTER-FINAL-miscdoc-ah-08 (2008 OIC Charter). The name change came in 2011, after the 2008 Charter was adopted.

<sup>644</sup> Charter of the Organisation of the Islamic Conference (adopted 4 March 1972, entered into force 28 February 1973, replaced 14 March 2008) 914 UNTS 103, art VIII (1972 OIC Charter).

Muslim president.<sup>645</sup> Curiously, the state with the third largest Muslim population in the world, India, is not a member, even though India had frequently expressed a wish to join. (Representatives from India attended the Rabat Summit in 1969, but ultimately were discouraged from participating, accounting for the sometimes conflicting counts of 24 or 25 states being represented.) The awkwardness of the membership standards for the OIC became apparent when the head of state of member-state Lebanon, who himself was a Christian, was prevented from attending the Summit meeting in Mecca in 1981 because he was not a Muslim.<sup>646</sup> It is a curious matter that the 57-member Islamic Summit, which claims to speak for Islam, includes non-Muslims who may not have the right to attend meetings, depending on where they are held.

There are no clear rules for expelling members. Egypt was nevertheless expelled in 1979, not for doing something judged to be un-Islamic, but for signing a peace treaty with Israel.

### *b) Founding of the OIC*

It is frequently, but inaccurately, stated that the Organisation of the Islamic Conference (renamed the Organisation of Islamic Cooperation in 2011) was founded in 1969 at the 'First Islamic Summit' held in Rabat, Morocco. The Rabat Islamic Summit included representatives from 24 Muslim-majority countries, as well as delegates from India and the Palestinian Liberation Organisation (PLO) (represented by Yasser Arafat) as an observer. The official Declaration of the Rabat Summit in fact made no reference to an OIC, but did adopt a resolution calling for a follow-up meeting that would '[d]iscuss the subject of establishing a permanent Secretariat' for the heads of the Islamic Summit.<sup>647</sup> In reality, the OIC was established formally as an institution only in 1972 with the adoption of the Charter of the Islamic Conference (in force 1974).<sup>648</sup> Thus the Rabat summit was simply the first of a series of recurring meetings of what evolved into the ultimate decision-making body of the OIC: the so-called 'Islamic Summit.'

The immediate trigger for the calling of the First Islamic Summit in Rabat in September 1969 was as a response to an arsonist's attack on the al-Aqsa Mosque in Jerusalem, a building that is generally regarded as the third holiest site in the Muslim world. On August 21, 1969, a deranged Christian zealot entered Al-Aqsa Mosque and started a fire that caused serious but limited damage to some of the interior and roof of the building. The attack came two years after the June 1967 (Six-Day) War. During the 1967 war, Israel captured the old city of Jerusalem and East Jerusalem, including the prominent religious and symbolic Al-Aqsa Mosque and the Dome of the Rock. The ease with which Israel seized these two sacred buildings as well as the Haram al-Sharif (Temple Mount) on which they are erected, underscored the weakness of the

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<sup>645</sup> Gokhan Bacik, 'The Genesis, History, and Functioning of the Organization of Islamic Cooperation (OIC): A Formal-Institutional Analysis' (2011) 31 J Muslim Minority Aff 594, 604.

<sup>646</sup> *ibid* 598.

<sup>647</sup> OIC, 'Declaration of the Rabat Summit Conference' (First Islamic Summit Conference, Rabat 25 September 1969) <<http://www.oic-oci.org/english/conf/is/1/DecReport-1st%20IS.htm#resolution>> accessed 30 March 2016.

<sup>648</sup> 1972 OIC Charter (n 644). For the declarations issued during the 1972 Summit, see OIC, 'Final Declarations' (Third Islamic Conference of Foreign Ministers, Moharram, March 1972) <<http://www.oic-oci.org/english/conf/fm/All%20Download/Frm.03.htm>> accessed 3 December 2015 (1972 Summit Declarations).

surrounding Arab/Muslim states that had thrice been soundly defeated by the Israeli Defence Forces during a 20-year period (1948, 1956, and 1967).<sup>649</sup>

During the weeks immediately following the arson attack, King Feisal of Saudi Arabia with the assistance of King Hassan II of Morocco, convinced the political leaders of Muslim states to attend a conference in Morocco designed to respond to the recent events. From 22-25 September 1969, representatives of two dozen countries with majority-Muslim populations (as well as the Palestinian Liberation Organisation as an observer) met in the ballroom of the Hilton Hotel in Rabat to discuss specifically the appropriate Muslim response to the Al-Aqsa fire, the Israeli-Palestinian conflict more generally, as well as the potential value of establishing a permanent 'secretariat' of Muslim countries to act as a liaison to promote the interests and values of the assembled states.<sup>650</sup>

The calling for a religious-political institution to bring together the Muslim community (*ummah*) had been a recurring wish of many in the Sunni Muslim world emerging from the abolition of the Ottoman Caliphate (1517-1924). After Turkey abolished the Caliphate in 1924, several attempts to re-establish a Caliphate took place, including by Sharif Husayn ibn Ali al-Hashimi of Mecca, who proclaimed himself Caliph in 1926. His self-advancement provoked the ire of Abdul Aziz ibn Saud, who thereupon invaded the Hijaz, overthrew Sharif Husayn, and in the following decade proclaimed the new state of Saudi Arabia. Other efforts were promoted from the 1920s to 1940s. There was a call for an international conference of 'Muslim religious, intellectual, diplomatic and political leaders,' including that of Hajj Amin al-Hussaini, the long-term leader of the Palestinian Arab community.<sup>651</sup> Such meetings became institutionalised in 1949, establishing the Mutamara al-Alam al-Islami (Muslim World Congress). In 1962, Saudi Arabia, the opponent of Sharif Husayn, attempted unsuccessfully to establish a Muslim World League. During the 1960s, in its attempt to raise the profile and influence of Saudi Arabia in the Muslim world, King Faisal undertook diplomatic efforts to bring together Muslim religious and political leaders.

It should perhaps be noted, as but one example of what would become a recurring pattern within the OIC, the Rabat meeting issued a vociferous denunciation of Israel even though no lives had been lost and the damage from the fire ultimately repaired. And yet when Muslim extremists seized the Holy Mosque in Mecca ten years later in 1979, killing several hundred Muslim pilgrims and worshippers and destroying many portions of the mosque, the OIC issued no public statement denouncing the attack or holding Saudi Arabia responsible. Secretary-General Ihsanoglu, in his book on the OIC, similarly denounced the arson attack on the al-Aqsa mosque, the third holiest site in Islam, incorrectly stating that it was perpetrated by a 'fanatical Australian Jew' (rather than a mentally disturbed Christian).<sup>652</sup> Ihsanoglu's book is, however,

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<sup>649</sup> (For a brief discussion of the Rabat Declaration, see Part V.C.2.a)(1) below).

<sup>650</sup> Shameem Akhtar, 'The Jeddah Conference' (1970) 23 *Pakistan Horizon* 179 (Among the controversial issues discussed in Rabat were the merits of a boycott of the state of Israel and whether India, a Hindu-majority country with the world's third largest Muslim population, should be allowed to participate. The divisions within the group fell along Cold War lines between more conservative States that were more closely allied with the United States and the more leftist States that were aligned with the Soviet Union. Syria and Iraq boycotted the meeting.)

<sup>651</sup> Turan Kayaoglu, *The Organization of Islamic Cooperation: Politics, Problems, and Potential* (Routledge 2015) 12.

<sup>652</sup> Ekmeleddin Ihsanoglu, *The Islamic World in the New Century: The Organisation of the Islamic Conference, 1969-2009* (OUP 2010) 22. Nor does Ihsanoglu mention that the arson attack against al-Aqsa was widely covered and denounced in the Israeli press and by Israeli religious and political leaders.

completely silent on the bloody massacre of hundreds of Muslims in 1979 inside the Grand Mosque in Mecca, *the holiest* site in Islam, that was perpetrated by fanatical Saudi Muslims.<sup>653</sup>

### *c) OIC Institutions under the 2008 Charter*

The OIC has had two ‘constitutional’ documents: the 1972 OIC Charter and the 2008 OIC Charter. In their basic form, the two documents are reasonably similar. The discussion below identifies the major institutions of the OIC as they exist currently under the 2008 Charter. (For further discussion of the substantive content of the 2008 Charter, see below).

#### (1) Islamic Summit

The Islamic Summit consists of the ‘Kings and Heads of State and Government’ and is the ‘supreme authority’ of the OIC. (2008 OIC Charter, Article 6) The first Islamic Summit met in Rabat in 1969, as described above, prior to the formal creation of the OIC. It is both a deliberative and decision-making body, with actions being taken pursuant to its authority under the Charter. (Article 7) It is slated to meet at least once every three years in a Member State. (Article 8) Although it officially remains the supreme power, some experts have concluded that the Islamic Summit is playing a gradually reduced role with the rise of the organisational roles played by the Council of Foreign Ministers (CFM) and the General Secretariat.<sup>654</sup> (See below)

#### (2) Council of Foreign Ministers (CFM)

The *de facto* governing body of the OIC is the Council of Ministers, which regularly meets once a year as well as in extraordinary sessions. It therefore is also the most important decision-making body on human rights. As has been argued previously, its power has increased with the years, though it always remains under the ultimate authority of the Islamic Summit.

Article 10 of the 2008 OIC Charter assumes, but does not explicitly state, that the CFM consists of the foreign ministers of each of the 57 Member States or their designated representatives. It is scheduled to meet at least once each year in one of the Member States, but also may meet in Extraordinary Session when circumstances warrant. It effectively acts as the on-going governing board of the OIC with regard to debates, resolutions, decisions, and creation of new bodies within the OIC, though of course it does so only with the consent – implicit or explicit – of the Islamic Summit. The CFM additionally is charged with the important responsibility of appointing the Secretary General and Assistant Secretaries. (Article 10.4.a) Since 2002, the CFM has been convened in New York City to coincide with sessions of the United Nations.<sup>655</sup> Fifteen Extraordinary Meetings have been held, including an October 2015 meeting focusing

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<sup>653</sup> Yaroslav Trofimov, *The Siege of Mecca: The Forgotten Uprising in Islam's Holiest Shrine and the Birth of Al Qaeda* (Doubleday 2007).

<sup>654</sup> Bacik (n 645) 595; Kayaoglu (n 651) 29.

<sup>655</sup> OIC, ‘Annual Coordination Meetings in NY’ <[http://www.oic-oci.org/oicv2/page/?p\\_id=68&p\\_ref=37&lan=en#annual](http://www.oic-oci.org/oicv2/page/?p_id=68&p_ref=37&lan=en#annual)> accessed 15 December 2015.

on 'Israeli attacks against the Blessed Al-Aqsa Mosque'.<sup>656</sup> The Chairman's Summary of the meeting provides an example of the continuing but not obviously fruitful results of CFM meetings.<sup>657</sup>

Although the CFM is the de facto governing board of the OIC, its resolutions are, for practical purposes, made by consensus and it does not have the power to enforce or impose its decisions on Member States. *A fortiori*, the CFM has no power to require Member States to adhere to foreign policy decisions, with the inability to impose an embargo on Israel being perhaps the most notable example.

### (3) General Secretariat and the Secretary-General

The General Secretariat is the institution responsible for on-going operations and implementation of decisions of the Islamic Summit and CFM. (Articles 16-22) According to the Charter, it is temporarily based in Jeddah, Saudi Arabia, until its permanent headquarters is established in the 'liberated' city of Jerusalem (al-Quds). (Article 21) It is required to follow-up on activities and working papers presented to the Islamic Summit and the CFM, together with harmonising the OIC activities and organs and managing internal communication.<sup>658</sup>

The institution is headed by the Secretary-General, who has effectively become the recognisable face of the OIC. There have been 10 secretaries-general of the OIC between 1970 and 2016. The modest recognition that the OIC has obtained through the years comes in response to the charismatic and visible features of some secretaries-general, most notably Ekmeleddin Ihsanoglu, who served from 2005 to 2014.<sup>659</sup> (see below) In the case of Ihsanoglu, the CFM appointed him following a vote, whereas consensus had been normally employed previously.<sup>660</sup>

The General Secretariat contains departments having responsibilities for matters including human rights, the rule of law, and democracy, all of which report to the Secretary-General. For example, under the Political Affairs section, there are departments of Muslim minorities in non-Member States and on legal affairs. The Cultural, Social, and Information section includes the Department of Social and Cultural Affairs. The staff of the different sections are protected from outside interference. The fact that OIC officials are not state-nominated appointees was designed to 'ensure that staff members are actually working for the organisation, rather than advancing the Member States' own interests'<sup>661</sup>

### (4) OIC Standing Committees and Subsidiary Organs

Article 11 of the Charter provides for the establishment of Standing Committees of the OIC to deal with issues of particular importance. Four are established under the Charter, including the al-Quds (Jerusalem)

<sup>656</sup> Resolution of the Extraordinary CFM Meeting of the OIC 'Israeli Attacks against the Blessed Al-Aqsa Mosque' (1 October 2015) OIC Doc OIC/PAL-02/NY/2015/EX.RES.

<sup>657</sup> OIC, 'Chair's Summary' (Annual Coordination Meeting of the Foreign Ministers of the OIC, New York, 1 October 2015) <[http://www.oic-oci.org/oicv2/upload/conferences/acm/2015/en/Chairs\\_summary-final-OIC-ACM-2-October-2015-eng.pdf](http://www.oic-oci.org/oicv2/upload/conferences/acm/2015/en/Chairs_summary-final-OIC-ACM-2-October-2015-eng.pdf)> accessed 10 December 2015.

<sup>658</sup> 2008 OIC Charter 2008, art 17.

<sup>659</sup> Kayaoglu (n 651) 34-35.

<sup>660</sup> *ibid* 35.

<sup>661</sup> *ibid* 36.

Committee headed by the King of Morocco.

There are other institutions established under the Charter, including the Executive Committee (Article 12), the Committee of Permanent Representatives (Article 13), the International Islamic Court (by treaty that has not entered into force due to insufficient ratifications), an Independent Permanent Commission on Human Rights (Article 15) (See Part V.C.2.b)(6) below).

The Executive Committee (Article 12) is a decision-making mechanism that meets in the case of special circumstance of international emergency and crises. Until now, these meetings have always taken place in Jeddah, composed of ‘the Chairmen of the current, preceding and succeeding Islamic Summits and Councils of Foreign Ministers, the host country of the Headquarters of the General Secretariat as well as the Secretary-General as an *ex officio* member.’ For example, an Executive Committee convened in February 2015, which focused on combatting terrorism and violent extremism.

The OIC also includes ‘Subsidiary Organs’ (Article 23) and ‘Specialised Institutions’ (Article 24). The Subsidiary Organs include such entities as the Statistical, Economic, Social Research and Training Center for Islamic Countries, Research Center for Islamic History, Art and Culture, the Islamic University of Technology, the Islamic Center for the Development of Trade, the International Islamic Fiqh Academy, and the Islamic Solidarity Fund and its Waqf (ISF).<sup>662</sup> The Specialised Institutions include the Islamic Development Bank (IDB), the Islamic Educational, Scientific and Cultural Organisation (ISESCO), the Islamic Broadcasting Union (IBU), the International Islamic News Agency (IINA), the Islamic Committee of the International Crescent (ICIC), and the Science, Technology and Innovation Organisation (STIO).

#### (5) Independent Permanent Human Rights Commission (2008, 2011)

The Independent Permanent Human Rights Commission (Commission or IPHRC) is the principal institution within the OIC system that focuses specifically on human rights.

It was first proposed as a part of the Ten-Year Programme of Action (TYPOA) in 2005, codified in the 2008 OIC Charter, and formally launched in 2011 with the adoption of the Statute of the OIC Independent Permanent Human Rights Commission (Commission Statute) by the CFM.<sup>663</sup> The 2008 OIC Charter identifies the Commission as an ‘organ’ of the OIC (Article 5) and it was given the mandate to ‘promote the civil, political, social and economic rights enshrined in the organisation’s covenants and declarations and in universally agreed human rights instruments, in conformity with Islamic values.’ (Article 15) The ambiguous drafting of OIC Article 15 allows it alternatively to be interpreted to state that Islamic values *are consistent* with Islamic values and should be promoted by the Commission, or, alternatively, that the Commission may promote international human rights *to the extent that* such rights are consistent with Islam. The Commission is specifically established ‘to advance human rights and serve the interests of the Islamic Ummah’ (Commission Statute Article 8) and to ‘support the OIC’s position on human rights’ (Commission Statute Article 13). The implication of Article 13 appears to be that if the OIC’s position on

<sup>662</sup> OIC, ‘Subsidiary Organs’ <[http://www.oic-oci.org/oicv2/page/?p\\_id=64&p\\_ref=33&lan=en](http://www.oic-oci.org/oicv2/page/?p_id=64&p_ref=33&lan=en)> accessed 7 February 2016.

<sup>663</sup> Statute of the OIC Independent Permanent Human Rights Commission (adopted 30 June 2011) OIC Doc OIC/IPCHR/2010/STATUTE.

human rights differs from that of international standards, the OIC position should prevail. Thus, at the heart of the documents establishing the Commission, there is at best ambiguity regarding whether the Commission should apply international human rights standards, and more likely the actual standard is that perceived Islamic values may trump or replace international norms.

Its name suggests that the Commission is, officially, 'independent' and its founding documents provide that it is an expert body (rather than political body) comprised of 18 recognised authorities on human rights. Members hold office for three years and may be re-elected one time. The internal Commission Rules of Procedure, in support of this independent status, provide that:

1. Commissioners shall act in their personal capacity and shall express their own convictions and views.
2. In exercising their function, commissioners shall at all times uphold utmost professionalism, truthfulness, independence, impartiality and integrity whilst enhancing their moral authority and credibility, free from any kind of extraneous influence.
3. Commissioners shall not receive instructions from any state, including their own, or any other third party. (Rule 6)<sup>664</sup>

However, despite the term 'independent' in its name and the provisions of Rule 6, Commission members nevertheless are nominated by governments and are officially elected by the CFM. It has been noted by one close observer that there is nothing that actually prohibits Member States from nominating paid state officials as 'experts.'<sup>665</sup> Nor is there any provision of the Statute (rather than internal regulations) that explicitly provides that experts should insist on their intellectual and moral independence from the states that nominate them. Ultimately, there is state political control over the nomination process and OIC political control over the election process of Commission members. And, apparently, some members of the Commission are indeed closely connected with their governments.

With regard to its tasks, the Statute provides that the Commission 'shall cooperate with the Member States to ensure consolidation of civil, political, economic, social and cultural rights in the Member States in accordance with the OIC Charter, and to monitor observance of the human rights of Muslim communities and minorities.' (Commission Statute Article 10) Thus the Commission is given no role to criticise, challenge, or sanction state practices that may be in violation of human rights, but, at best, to 'monitor' the situation. The Commission further may 'provide technical cooperation' (Article 14) and 'support' organisations that promote human rights. (Article 15). For practical purposes, the institution's role is largely advisory and it has no enforcement, sanctioning, or even criticising powers. These limited powers were subsequently advanced by Secretary-General Ihsanoglu at the first session of the Commission in Jakarta<sup>666</sup>, in which a remedial approach to human rights, using thematic reports and resolutions instead of state-by-state reviews was adopted. In this sense, the tactic of 'naming and

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<sup>664</sup> *ibid.*

<sup>665</sup> Kayaoglu (n 651) 103.

<sup>666</sup> OIC, 'Statement by H.E. the Secretary-General' (First IPHRC Session, Jakarta, 20 February 2012) <<http://www.oic-iphrc.org/en/data/docs/Sessions/1/EV/SG%20Statement%20-%20IPHRC%20-%201st%20Session%20-%20Jakarta%20-%20EV.pdf>> accessed 11 December 2015.

shaming' was rejected along with serious reviews and criticisms of member country human rights practices.<sup>667</sup>

While the IPHCR Charter and 2008 OIC Statute raise the salience of human rights in the OIC system, the mechanisms provided are far from robust.

The substantive positions taken by the Commission with regard to human rights on a variety of human rights issues are discussed below.

#### *d) Proposed International Islamic Court of Justice and Statute*

One of the most important proposed institutions of the OIC is the International Islamic Court of Justice (IICJ). Although the treaty has been negotiated and signed, an insufficient number of states has ratified it. Its Statute was approved in 1987 at the fifth Islamic Summit. To date, an insufficient number of states has ratified the IICJ Statute and it has not come into force. The reasons why this may be so are several. If the post-Cold War situation may be accountable for a lack of ratifications in the 1990s, the lack of ratifications during the 2000s and until today may be a sign of disaffection from Member States to this particular project. Although the Commission could boost the public image of the OIC internationally, this would not be enough for ratifying the IICJ, as the current situation shows.<sup>668</sup>

Moreover, the IICJ Statute does not include in any case references to human rights, the rule of law, or democracy. However, if it were to be ratified and come into force, it could become an institution that would help bring the OIC into full compliance with international law and international standards.

## **2. OIC's Conceptualisation of Human Rights over Time**

The following are among the principal *articulated* positions and principles of the Islamic Summit and the OIC between 1969 and the present:

Placing a high priority on state sovereignty and the non-interference with the internal affairs – including human rights violations – of OIC states;

- Condemning the state of Israel, particularly with regard to Palestinians;
- Formally recognising human rights while doing little to actually promote them;
- Criticising non-Member States for human rights violations against Muslims (and Palestinians); and
- Promoting better relations among OIC Member States and establishing a range of institutions to encourage cooperation on issues including economics, trade, culture, technology, and education.

Among the widely stated criticisms of the OIC have been:

- Failing to provide institutions and initiatives with sufficient funding and support;
- Acting more as a debating and discussion society rather than an effective organisation;

<sup>667</sup> Kayaoglu (n 651) 104.

<sup>668</sup> See <[http://www.acihl.org/articles.htm?article\\_id=8](http://www.acihl.org/articles.htm?article_id=8)> accessed 30 March 2016.

- Formally acknowledging human rights while doing little to actually promote them and engaging in actions to undermine them;
- Using ‘Islamic values’ as a shield to prevent scrutiny of itself and Member States; and
- Not preventing conflicts among Member States.<sup>669</sup>

In order to understand the OIC’s conceptualisation of human rights, it may be helpful to divide the subject into three chronological periods: the founding years of 1969-2004, the years that Ekmeleddin Ihsanoglu served as Secretary-General (2005-2014), and the regime that emerged after Ihsanoglu’s departure. In brief, during the early years there was virtually no serious recognition of international human rights standards apart from pro forma acknowledgements of ‘human rights.’ During the Ihsanoglu years, however, modest but measurable progress was made in the path of bringing the OIC closer in line with international standards. Some observers believed that the OIC had finally begun a slow but serious path in the right direction, though even this was debatable. Since 2014, however, there has been no serious progress and all visible signs are that the OIC is returning to its pre-2005 attitudes.

### a) *The OIC’s Conceptualisation of Human Rights (1969-2004)*

#### (1) Declaration of the Rabat Islamic Summit Conference (1969)

As mentioned above, the 1969 Rabat Islamic Summit, which predated the formal establishment of the OIC in 1972, focused generally on the Israeli-Palestinian dispute and specifically on the arson attack on the al-Aqsa mosque. The two-page final Declaration officially acknowledged that the participating states affirmed ‘their adherence to the Charter of the United Nations and fundamental Human Rights.’<sup>670</sup> The Declaration more particularly noted the ‘principles of justice, tolerance and non-discrimination.’ The Declaration did not, however, go beyond these reasonable if unremarkable *pro forma* acknowledgements. The 1969 Declaration makes reference to the ‘common creed’ (Islam) of the participating states and praises the ‘immortal teachings of Islam.’

#### (2) OIC Charter and ‘Islamic Values’ (1972)

The Charter of the Islamic Conference, which came into force in 1973,<sup>671</sup> and which formally created the Organisation of the Islamic Conference, provides a more fully formed explanation of the purpose of the Islamic Summit than did the 1969 Rabat Declaration.

Like the Rabat Declaration, the 1972 Charter made a *pro forma* commitment to ‘the U.N. Charter and fundamental Human Rights.’ There was no significant elaboration on this basic statement, though slightly more specific references were added with reference to the OIC’s opposing racial segregation and colonialism. (Article II.A. 3)

<sup>669</sup> Turan Kayaoglu, ‘A Rights Agenda for the Muslim World? The Organization of Islamic Cooperation’s Evolving Human Rights Framework’ (2013) Brookings Doha Center Analysis Paper 6, 19-23 <<http://www.brookings.edu/research/papers/2013/01/08-oic-human-rights-kayaoglu>> accessed 30 March 2016; Kayaoglu (n 651) 105-107; Ioana Cismas, *Religious Actors and International Law* (OUP 2014) 304-305. For a partial list of violent conflicts, see above.

<sup>670</sup> OIC, ‘Declaration of the Rabat Islamic Summit’ (n 647).

<sup>671</sup> 1972 OIC Charter (n 644); 1972 Summit Declarations (n 648).

The formal, rhetorical support for human rights in the Charter is somewhat undermined by its more vigorous emphasis on the principles of state sovereignty and non-interference in the internal affairs of other Member States. (Article II.B.2-3, 4) By including such language, the OIC has effectively removed itself as an institution that could monitor human rights compliance by its Member States or pressure them to comply with human rights standards. While this support for non-interference does not preclude states from taking the initiative to promote human rights within their own borders, and while it does promote the OIC's pressuring non-Member States to comply with human rights standards, it effectively acknowledges that as an organisation it will not take serious steps to pressure Member States to comply with the standards it officially supports. Because the most typical forms of violation of human rights are committed by states and within states against their own citizens, the approach taken by the OIC unfortunately *shields* states from scrutiny rather than encourage it.

From the perspective of other intergovernmental agreements, the salient feature of the 1972 Charter is its language about Islam. The Charter resolves to 'preserve Islamic spiritual, ethical, social and economic values, which will remain one of the important factors of achieving progress for mankind.' (Preface) Its objectives include promoting 'Islamic solidarity among Member States' (Article II.A.1) and preserving 'Islamic spiritual, ethical, social and economic values, which will remain one of the important factors of achieving progress for mankind.' (Preface)

It is not obviously clear, and it certainly is not explained in the 1972 Charter, why it should be assumed that the political leaders of the OIC states that signed the Charter –including such people as the Shah of Iran, Muammar Qaddafi, Hafez al-Assad, and several heads of state who came to power through military coups – should be taken seriously as authorities qualified to interpret for the world 'noble Islamic values,' religious truth, or divine law. None of them was a religious scholar and they were frequently known more for their ruthlessness than for their understanding of Islam. The OIC was not founded by recognised religious figures known for their scholarship and piety, but often by brutal political and military leaders who frequently used the language of Islam to justify their rule domestically and internationally. And thus the obvious question, never squarely addressed by the OIC itself, is whether the organisation might better be understood to be an *Islamic* organisation – as its name declares – or actually a political organisation that uses the rhetoric of 'Islam' to justify political ambitions and interests of individual heads of state and the countries they lead.

Although there are non-Muslim minorities living in all of the OIC states, the 1972 Charter says nothing about them. Rather, it focuses its interest on only one religious tradition by pledging 'to strengthen the struggle of all Moslem peoples with a view to safeguarding their dignity, independence and national rights.' (Article II.A.6) Implicitly, the political leaders of the OIC show a concern for Muslims living outside their region (where their influence is very limited) than they do for any religious minority living within their borders where they have enormous influence. While 'fundamental Human Rights' are rhetorically supported in the 1972 Charter, it does not call for safeguarding people of all religions, but only those who are Muslim. It should further be noted that while the Charter itself refers only to Islam and Muslims, Muslim *minorities* within the Member States – whether Shia in Saudi Arabia or Sunnis in Iran – often suffer the same types of persecution from 'Islamic' states that Muslim minorities experience in non-OIC states, but the Charter ignores them.

## (3) Cairo Declaration on Human Rights in Islam (CDHRI) (1990)

The OIC's first and most comprehensive human rights document was the Cairo Declaration of Human Rights in Islam (CDHRI), a non-legally binding document that was issued by the CFM in 1990.<sup>672</sup> From an international law and intergovernmental-organisation perspective, the most striking feature of the CDHRI is its repeated references to 'Sharia' (15 references), 'Allah' (9), and 'Islam' (10 not including additional references to the 'Islamic Summit'). The document goes beyond simple references. Islam praised for having an 'unspoiled nature' and for having made Muslims the 'best community' of people. (Preamble) Such self-flattery may be typical for religious leaders talking about their own religion, but it is unusual for states to make such statements about the religions of their inhabitants.

Sharia is declared to be the 'only source of reference' for clarifying the document (Article 25) and that indeed all rights identified in the CDHRI are 'subject to Sharia.' (Article 24) There are both legal and practical difficulties with such a formulation. Unlike international human rights standards that have no comparable limitations, *all* rights under the CDHRI must be identified within Sharia and may be limited by it. This creates obstacles that are not recognised under any major international human rights convention. Importantly, there is no practical explanation of exactly what *is* Sharia or how it can be known exactly what Sharia allows and what it prohibits. Within Islam, of course, what is included within Sharia is typically a question for religious scholars to decide. Under modern standards, however, laws should be written, published, and be accessible – which may not be the case with Sharia. Thus not only is Sharia a factor not identified in international human rights instruments, it is something that, by its very nature, is elusive and cannot be stated or necessarily even known.

The CDHRI does identify several particular rights, albeit all are limited under the Sharia constraint. Specifically identified are rights of:

- Equality and non-discrimination, whether on the basis of race, colour, language, sex, religious belief, political affiliation, or social status (Article 1), as well as the right against discrimination based on race or nationality with regard to getting married (Article 5);
- Equality before the law and a presumption of innocence (Article 19);
- Life, which includes bodily safety and prohibition of genocide or being killed (Article 2) and the right not to be tortured (Article 20);
- Non-combatants and property in time of war and conflict (Article 3);
- One's good name (Article 4);
- Children to have nursing, education, and health care (Article 7)

One of the more progressive aspects of the CDHRI is the imposition of *duties on states* to:

- Guarantee the right to life and prevent bodily harm (Article 2);
- Protect places of burial (Article 4);
- Provide clean environment, health care and education (Articles 7, 9, 17);
- Provide education (Article 9); and
- Guarantee employment for those who are able-bodied and willing to do so (Article 13)

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<sup>672</sup> OIC Res 49/19-P 'The Cairo Declaration on Human Rights in Islam' (5 August 1990).

Of course one of the most salient issues with regard to rights in the Muslim world pertains to religion. While the Declaration importantly acknowledges that there should be no discrimination against people based upon their religious beliefs (Article 1), and also acknowledges that there should be ‘no compulsion on man [...] to convert him to another religion or to atheism,’ (Article 10), the characterisation of rights implicitly prefers Islam over other religions. Thus it does not declare that there should be no compulsion in matters of religion generally, but only that compulsion should not be used to weaken people’s attachment to Islam.

Women are specifically held to be ‘equal to man in dignity.’ (Article 6) Whereas such a declaration, as far as it goes, is entirely consistent with international human rights law, it implicitly ignores numerous rights of equality of women that should be protected, including the equal right to education, employment, travel, marriage, inheritance, and other areas. To say that a ‘slave is equal to his master in dignity’ would be a very meagre declaration and far from what would be required under international standards. Whereas the woman is entitled to this unclear ‘dignity,’ the husband has a ‘duty’ of supporting his wife. Even though many married couples might be perfectly pleased by such an arrangement, it nevertheless unduly reinforces a difference in capacities and responsibilities, thereby *undermining* women rather than guaranteeing their full rights as human beings.

Finally, and importantly, the Declaration, as a non-binding document, does not establish any human rights mechanisms to promote state compliance. Although this absence does not distinguish the CDHRI from many other human rights declarations, many declarations are understood to be steps toward the establishment of legally binding treaties with enforcement mechanisms. There have, however, been no concrete developments within the OIC with regard to preparing a treaty on general human rights in the more than quarter century since the CDHRI was adopted.

#### (4) Defamation of Religion, Blasphemy, and Islamophobia (1999-2010)

Beginning in 1988, a wave of attention came to the issue of blasphemy with the publication of Salman Rushdie’s novel *Satanic Verses*. A group of British Muslims requested British officials to charge Rushdie with blasphemy under the British law for insults against the Prophet Muhammad, but were refused because the law was deemed to protect only Christianity, and perhaps only the Church of England. In 1989, the Ayatollah Khomeini, before his own death later that year, issued a fatwa calling upon Muslims to kill Rushdie because of his blasphemy. In the mid-1990s, two decisions of the European Court of Human Rights upheld the right of states to restrict or prohibit the showing of films that were deemed to offend the religious sensibilities of their (Christian) audiences. *Case of Otto-Preminger-Institut v. Austria* (App. 13470/87), 20 September 1994, Series A vol. 295-A and *Case of Wingrove v. The United Kingdom* (App. 17419/90), 25 November 1996. In the *Wingrove* case, the European Court of Human Rights found that the British Board of Film Classification had acted within its ‘margin of error’ in refusing to license the film for distribution a 19-minute film on the grounds of blasphemy. The film, *Visions of Ecstasy* was a fantasy film about St. Theresa of Avila that combined self-mutilation, female nudity, homoerotic caresses, and the sexual stroking and kissing of the body of the dead Christ. The inconsistency of the United Kingdom’s

prohibiting release of the film about St. Theresa on the grounds of blasphemy while refusing even to consider the case of *Satanic Verses* was not lost on Britain's Muslims nor on human rights scholars.<sup>673</sup>

A decade after the Ayatollah's *fatwa* and three years after the *Wingrove* decision, Pakistan, on behalf of the OIC, introduced a resolution on the 'Defamation of Islam' in the UN Commission on Human Rights in 1999. Although 'Islam' was used in the original title and although the only religion mentioned by name in the draft was Islam, the resolution itself focused on defamation against religion generally and not solely Islam as is sometimes assumed. The UN Commission on Human Rights, without a vote, largely accepted Pakistan's draft, albeit with some short but important amendments.<sup>674</sup> The title was broadened to be 'Defamation of Religions' rather than single-out Islam, and the references to affronting Islam in the text were either eliminated or broadened to include Islam among other religions. Both versions began with recognition of the need 'to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion' (first clause) and to recognise the importance of human dignity. With both versions affirming the universality of human rights and the UN Charter, they turn to the operative provision of the resolution, where the Pakistan original and the final version were identical except for the substitution of only one word. The final version provided that the UN Commission on Human Rights:

"Urges all States, within their national legal framework, in conformity with international human rights instruments, to take all appropriate ["necessary" in the Pakistani original] measures to combat hatred, discrimination, intolerance and acts of violence, intimidation and coercion motivated by religious intolerance, including attacks on religious places, and to encourage understanding, tolerance and respect in matters relating to freedom of religion or belief." (¶ 3)

Importantly, the adopted resolution *did* recognise the universality of human rights and it also provided that any state restrictions of expression on the grounds of defamation should be made 'in conformity with international human rights instruments.' Because international instruments have been interpreted as establishing a high threshold for the restriction of speech, the 1999 resolution initially provoked only modest controversy and it was adopted without a vote.

Between 1999 and 2010, numerous similar resolutions were submitted to UN bodies and were typically adopted without vote or were overwhelmingly supported despite an increasing split between the 'Western' WEOG countries that generally were opposed, and the OIC, developing countries, African countries, and some Orthodox-Christian countries that often supported the resolutions. Most international human rights scholars and UN experts were opposed to the defamation resolutions, and immediately recognised that they were being used to justify state laws that criminalised blasphemy.

Critics of the defamation resolutions feared that, despite their *pro forma* acceptance of prevailing international standards, they were in fact being promoted as a backdoor channel to justify domestic laws against blasphemy by suggesting that they were consistent with what was hoped to be a new *international human rights standard* that would prohibit criticism of religion. The erstwhile reformer within the OIC, Ekmeleddin Ihsanoglu made it quite clear that the OIC's goal was to bring about a change in human rights

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<sup>673</sup> Great Britain finally did repeal the law against blasphemy in 2008.

<sup>674</sup> E/CN.4/1999/L.40 (1999).

law. In a speech that he gave on behalf of the OIC to the UN Human Rights Council in 2007, he criticised blasphemy and Islamophobia, he praised the resolutions on defamation of religion, and said that insults against religion ‘could only be addressed through taking effective and legally binding measures for combating defamation of all religions.’<sup>675</sup> Thus he sought not to underscore international standards but to change them. If such were to become an international standard, it presumably would become possible to incarcerate and punish human beings for making statements that religious believers, subjectively, found to be ‘insulting.’ Thus international law could support the prohibition of statements such as ‘I do not believe that Jesus was the Christ’ or ‘Martin Luther was a sinner.’ Religious beliefs, and non-beliefs, could be criminalised in states where the majority favoured one belief over another. Currently, with the notorious exceptions of the *Otto-Preminger* and *Wingrove* cases, people do not have a right to prohibit expression that they find to be offensive. International human rights law does, however, allow the prohibition of hate speech *that incites violence* against others based upon grounds such as religion, race, gender, or nationality. But the key to the international law on freedom of expression not protecting the feelings of people, but protecting people from physical assault. All too often blasphemy laws do not protect people from physical assault; they actually *encourage* religious people to assault others whose expressions are deemed blasphemous.

The OIC was largely successful in having its defamation of religion resolutions adopted between 1999 and 2010. The UNGA saw similar efforts and resolutions from 2005 to 2010.<sup>676</sup> The resolutions, however, generated increasing opposition from some countries and were opposed inside the UN by important officials. In 2011, a new approach was decided. For the continuation of the issue of defamation of religions and the ‘Danish Cartoon’ controversy of 2005, see Part V.C.2.b)(4) below.

#### **b) *The Conceptualisation of Human Rights during the Ihsanoglu Era (2005-2014)***

##### **(1) Secretary-General Ihsanoglu (2005-2014)**

In late 2004, Turkish diplomat and scholar Ekmeleddin Ihsanoglu became the first democratically elected Secretary-General of the OIC, assuming his responsibilities early in 2005. He immediately acquired the reputation of being a reformer who wanted to bring to the OIC important and lasting changes both with regard to human rights and other areas involving good governance. In the middle of his term, in 2009, he published *The Islamic World in the New Century*, which provided an optimistic and forward-looking view of the changes that were taking place inside the OIC. During his tenure the OIC made important revisions to its founding charter, created the innovative TYPOA established the Independent Permanent Human Rights Commission (Commission), revised its approach to defamation of religion, and reorganised and streamlined many of its operations.

<sup>675</sup> OHCHR, ‘Statement by H.E. Prof. Ekmeleddin Ihsanoglu, Secretary-General of the OIC’ (High Level Segment of the 4th Session of the HRC, Geneva, 12 March 2007) <<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session4/HLS/OIC.pdf>> accessed 7 February 2015.

<sup>676</sup> Peter S Henne, ‘The Domestic Politics of International Religious Defamation’ (2013) 6 Pol & Rel 512.

For some observers who genuinely would like the OIC to act as a positive force for human rights, the relatively hopeful momentum created by Ihsanoglu seems not to have lasted beyond his tenure. It is, however, too early to decide with certainty whether this is the case. Moreover, it should be noted, that even to the extent that Ihsanoglu nudged the OIC in a positive direction, he remained very much a conservative force compared to other high officials in intergovernmental organisations. In 2013, Ihsanoglu participated in an interesting interview with Al Jazeera that revealed both Ihsanoglu's rhetoric of reform and his penchant for defending perceived Muslim interests over a more balanced or objective approach. When questioned about the fact that 'sometimes Muslims are the aggressors' in committing violence (we need think only of the Madrid, London, and Paris bombings), Ihsanoglu denied the obvious. Referring to the right-wing Norwegian nationalist, Anders Breivik, Ihsanoglu said: 'it is not the Muslims who are killing the Europeans or the Norwegians; it is not the Muslims who are attacking Western countries.'<sup>677</sup> While it is perfectly fair to reference the Breivik case and to note that Europeans also are responsible for unspeakable violence, the defensive and false insistence that Muslims do not commit violence in Europe and that it is only Europeans who do so underscores the concern that the OIC acts less as an institution that consistently promotes the value of tolerance and justice for all human beings, as it insists, but selectively supports or criticises events based not on the action itself, but on the identities of the perpetrators and victims.

## (2) Ten-Year Program of Action (TYPOA) (2005-2015)

During Ihsanoglu's first year in office, the OIC adopted TYPOA in response to ongoing calls for reform within the organisation.<sup>678</sup> Although TYPOA's objectives are broader than simple reform, and in fact encompass all aspects in which the OIC has a stake, human rights, rule of law and democracy occupy a special place. TYPOA's content should be understood as having provided a roadmap for OIC intentions and strategies in the field of human rights up to the year 2015. An Intergovernmental Experts Group is preparing a new TYPOA (presumably for 2016-2025) is working on the evaluation of the 2005-2015 TYPOA and the drafting of a new programme where it is promised that human rights will play an important role.<sup>679</sup>

The TYPOA begins with praise for Islam and the 'Ummah's pioneering role as a fine example of tolerance and enlightened moderation, and a force for international peace and harmony' and it notes the 'noble principles and values of Islam.' The document nevertheless recognises that the OIC region is facing serious problems that must be addressed. The places where challenges confront the OIC are in:

"The intellectual and political fields, there are major issues, such as establishing the values of moderation and tolerance, combating extremism, violence and terrorism, countering Islamophobia,

<sup>677</sup> Jane Dutton, Interview with Ekmeleddin Ihsanoglum, Secretary-General of the OIC (1 June 2013) <[https://www.youtube.com/watch?v=-aJnI\\_X87D0](https://www.youtube.com/watch?v=-aJnI_X87D0)> accessed 30 March 2016.

<sup>678</sup> OIC, 'Ten-Year Programme of Action to Meet the Challenges facing the Muslim Ummah in the 21st Century' (Third Extraordinary Session of the Islamic Summit Conference, Makkah al Mukarramah, 7-8 December 2005) <[http://www.oic-iphrc.org/en/data/docs/legal\\_instruments/OIC%20Instruments/TYPOA-%20AEFV/TYPOA-EV.pdf](http://www.oic-iphrc.org/en/data/docs/legal_instruments/OIC%20Instruments/TYPOA-%20AEFV/TYPOA-EV.pdf)> accessed 1 February 2016.

<sup>679</sup> OIC Res 1/41-TYPOA 'The Status of Implementation of the OIC Ten Year Programme of Action' (18-19 June 2014); OIC 'Report of the 42nd Session of the Council of Foreign Ministers' (27-28 My 2015) OIC Doc OIC/CFM-42/2015/REPORT/FINAL.

achieving solidarity and cooperation among Member States, conflict prevention, the question of Palestine, the rights of Muslim minorities and communities, and rejecting unilateral sanctions.”

Article VIII of TYPOA, ‘Human Rights and Good Governance,’ treats the issues of human rights, rule of law, and democracy. It begins by seeking a firm commitment to ‘enlarge the scope of political participation,’ to guaranteeing equality, civil liberties and social justice, as well as to promote accountability, transparency and corruption-free strategies. Yet Article VIII once again focuses not on all *people*, or even *all Muslims living in OIC Member States*, but only ‘the rights of Muslim Minorities and Communities *in non-OIC Member States*’.<sup>680</sup> The OIC, once again, does not seek to hold its own members accountable for treating all citizens or even all Muslims within its member-states justly, but emphasises only the responsibility of non-Member States’ treatment of Muslims. Israel’s treatment of Palestinians was a particular focus. Thus, once again, in its Member States where the OIC could have done something, it abjured; it limited its focus only to places where it could offer only rhetoric and condemnation.

The TYPOA calls for the establishment of an ‘independent permanent body to promote human rights’ (which ultimately would become the Independent Permanent Commission on Human Rights; see below) and for the establishment of an OIC Human Rights Charter. It sought to ‘introduce changes to national laws and regulations in order to guarantee the respect of human rights in Member States’, which presents a change in the dialectic of the OIC with regards to national sovereignty. Nevertheless, as with other OIC initiatives, there is no proposal to create any enforcement mechanisms, meaning that it relies solely on the good will of OIC members to implement TYPOA’s commitments.

### (3) Covenant on the Rights of the Child in Islam (CRCI) (2005)

The Covenant on the Rights of the Child in Islam is the only *potentially* legally binding human rights instrument that has thus far been produced by the OIC to date. It was signed in 2005, during the 32nd CFM in Sana’a, but has not received the requisite 20 ratifications.<sup>681</sup> The CRCI calls for the establishment of a monitoring mechanism to be entitled the ‘Islamic Committee on the Rights of the Child.’ (CRCI, Article 24) The monitoring body was not designed to have any real powers and, in any case, it does not exist because the CRCI has not yet come into force.<sup>682</sup>

In a general way, prior to examining the serious limitations (or ‘clawbacks’) on rights in the CRCI (for which see the following paragraphs), it is a progressive document that broadly and rhetorically goes far beyond the highly circumscribed Cairo Declaration on Rights in Islam. From an international human rights perspective, there are several positive aspects of the CRCI. It does mention the international standard of ‘the best interests of the child,’ though it is not universally and consistently applied, inasmuch as it is applied only when consistent with sharia. (CRCI, Article 8.3) Among the rights and interests of the child are:

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<sup>680</sup> *Emphasis added.*

<sup>681</sup> Covenant on the Rights of the Child in Islam (adopted 30 June 2005) OIC Doc IC/9-IGGE/HRI/2004/Rep.Final, annexed to the OIC Res 1/32-LEG ‘Legal Affairs’ (30 June 2005).

<sup>682</sup> Although the monitoring body is, on its face, an improvement with regard to overseeing implementation of human rights, it would appear to be quite weak as described in Article 24 CRCI. Members of the would-be Committee are designated ‘representatives of all the States parties’ and are not identified as being independent in any way. Moreover, the Committee is slated to meet only once every two years with a goal simply of ‘examin[ing] the progress made in implementation’. It has no additional powers.

equality (including non-discrimination against girls), life, identity, family cohesion, rights of education, assembly, to be raised in a healthy environment, rest and leisure activities, benefits for those with special needs, protection against abuse, protection from child labour, justice, and children who are refugees. One provision of the CRCI that, if enforced, has the potential for a great positive good is in Article 4.3, which provides that states should prohibit ‘customs, traditions, or practices’ (Article 4.3) taking place in society that are inconsistent with the provisions of the CRCI. This prohibition would presumably outlaw the cultural practice of female genital mutilation that has no basis in Islamic law. It similarly could be banned by Article 20.2 as an act ‘harmful to the health’ of the female child. (Note, however, that these progressive provisions are also subject to the limitations and clawback clauses, which are discussed below.)

One provision that is controversial within human rights is the CRCI’s recognition of the right of the foetus to life and the prohibition of abortion, except when warranted by the (undefined) ‘interests of the mother.’ (CRCI, Article 6.1)

Human rights instruments include not only the provisions that identify rights; they also include provisions that explain the circumstances during which the rights might be limited or derogated. There are at least three significant limitations (or clawbacks<sup>683</sup>) that appear within the CRCI that go beyond international norms and thus undermine the universality of the document.

First, sharia and Islam appear as limiting factors. Although there are fewer direct references to the role of sharia in the CRCI than there are in the CDHRI, there are several references to the underlying authority of sharia and other Islamic norms:

- (a) “it is incumbent to [...] respect the provisions of Islamic Shari’a (CRCI Article 3.1);
- (b) children have the right to be raised in a Muslim environment (Article 2.2);
- (c) children have the right to expression on matters that do not contradict Islam (Article 9.1);
- (d) children have the right to access to information that does not contradict Islam (Article 17.4);
- (e) children have the right to wear clothing that does not contradict Islam (Article 12.2.iv);
- (f) children have the right to support from parents or guardians consistent with sharia. (Article 14.5)
- (g) it is important to observe the “cultural and civilizational constants of the Islamic Ummah.”

As in other human rights statements by the OIC, there is no explanation of exactly what constitutes ‘sharia,’ what is included and not included, how it will be interpreted, or who will have the authority to decide what Sharia is – thus apparently leaving all such decisions directly or indirectly to political authorities. Thus it cannot be known with any precision how any of the rights might be limited nor when those limits will be known.

Second, deference to state laws and the prohibition of intervention in the internal affairs of Member States. As with the CDHRI, the other pervasive standard that limits rights under the CRCI are the laws of Member States and the general prohibition against intervening in the internal affairs of other Member States. The CRCI provides that it is ‘incumbent’ both to ‘observe the domestic legislation of the Member

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<sup>683</sup> See Cismas (n 669) 289 (in which clawbacks are defined as provisions ‘that allow a State to restrict a right stipulated in an international instrument by appeal to domestic legislation’).

States' (Article 3.2) and to 'observe non-interference in the internal affairs of any State.' To the extent that state laws 'trump' provisions of the CRCI, then there is no guarantee of a right for the child. Such state law provisions are found throughout, including Articles 1, 4.1, 4.3 (implicitly), and 5.

The reason why the OIC has engaged in promoting and protecting children's human rights throughout a Covenant has, according to Kayaoglu, a clear strategic component. Indeed, 'an effort to restrict rights in other areas'<sup>684</sup> guides the OIC in its children human rights actions, as the OIC centres itself on collectivities - such as the family or the state - in order to empower them throughout a common task in the realm of children's rights. In turn, 'liberal argument(s) about women's rights, gender equality, and sexual orientation',<sup>685</sup> framed as individual freedoms, become less able of protection in a human rights system in which the collective - enshrined through children's rights shared protection - is paramount. Other explanations would point out to the desire of the OIC to increase its profile in the international arena, for which credibility raising actions such as showing a strong commitment to children's rights could affect very positively. Thirdly, on a more internal but related vein, the reformist movement epitomised by TYPOA is thematically and temporarily connected to the CRCI.

What seems to be a pattern within OIC human rights instruments is their extended compliance with state legal orders. Through clawback clauses<sup>686</sup>, another way to limit the universality of OIC human rights instruments is set. This restriction structure is not uncommon in other international human rights mechanisms. However, it is particularly in the context of the OIC that these clauses become relative, singular, as they are a pathway for Shari'a<sup>687</sup> inspired domestic laws to curtail the universality of the instrument, as well as it raises differences among OIC Member States in their potential - the CRCI has not entered into force yet - implementation in domestic legal systems. Table 4 summarises these clauses, of which the most important is article 1 that subjects the legal definition of 'child' to domestic law. Such definition is directly linked to criminal and family law, which grants a wide margin of appreciation to Member States in critical aspects, that have to do with child marriage and crime children law and its related legal punishments<sup>688</sup>.

Third, there is a tendency to ignoring non-Muslim children. From the beginning to the end of the CRCI, the presumption is that it pertains solely to Muslim children, even though there are children of many different religions who live within OIC Member States. Even when there are positive assurances in the CRCI that sharia supports rights for children (rather than limits them), there is an important unstated element: ***the CRCI says little regarding the rights of children living in OIC states who are not Muslim.*** Implicitly, in spite of the supposed concern for children, the CRCI's expressed concern is only for Muslim children and not Christians, Jews, Zoroastrians, Druze, or other religions. Whether this was an intentional

<sup>684</sup> Kayaoglu, 'Politics, Problems, and Potential' (n 651) 100.

<sup>685</sup> *ibid.*

<sup>686</sup> See Cismas (n 669) 289 (provisions 'that allow a State to restrict a right stipulated in an international instrument by appeal to domestic legislation').

<sup>687</sup> On this discussion, it is important to recall that not all domestic legal arrangements are faithfully Shari'a-inspired. For instance, although marriage at early stages of life may be protected by national laws on the basis of Shari'a, prominent voices on the matter (such as Al-Azhar University) declare that this practice is not in tune with Shari'a whatsoever. For an Islamic discussion on the rights of the child, see UNICEF and Al-Azhar University, *Children in Islam: Their Care, Development and Protection* (UNICEF 2005).

<sup>688</sup> Cismas (n 669).

and conscious decision to exclude non-Muslim children from human rights protections, or a careless oversight, the CRCI effectively establishes a two-tier citizenship that is repugnant to all international human rights norms. While the OIC repeatedly declares its interest in the rights of Muslim minorities in non-OIC states, here it declined to take the obvious step of assuring the rights of non-Muslim **children** within its Member States. It would not be difficult to predict the response of the OIC if Israel instituted a law that established human rights only for Jews and excluded Muslims and Arabs. This core contradiction in the OIC's conceptualisation of human rights is difficult to comprehend.

(4) Danish Cartoons (2005), Defamation, and Resolution 16/18  
Istanbul Process (2011)

In September 2005, the same year that Ihsanoglu became Secretary-General of the OIC, the newspaper *Jyllands-Posten*, the largest in Denmark, published 12 editorial cartoons mocking Islam, Islamists, and the Prophet Muhammad. The decision to publish the cartoons was made in the context of the murder of the Dutch filmmaker Theo van Gogh by an Islamist a year earlier following release of the short film *Submission* (written with Ayaan Hirsi Ali), which criticises Muslim practices regarding women. The editorial board believed that threats of violence by Islamists was causing self-censorship by writers and artists who were frightened to criticise Islam. The decision to publish the cartoons was thus both an intentional provocation as well as an effort to promote freedom of expression. Muslim leaders within Denmark protested the publication and ambassadors from several OIC and Arab League countries unsuccessfully sought a meeting with the Prime Minister and the Arab League and OIC wrote a joint letter of protest. Later in the year a delegation of Danish imams travelled to Cairo where they met with the General-Secretary of the Arab League. The Arab League later issued a statement criticising the Danish government's handling of the matter. The OIC's Islamic Summit in Mecca similarly criticised Denmark late in 2005. During the next few months pressure continued to mount. OIC and Arab League states took actions against Denmark, including the closing of embassies. Radical groups began to issue warnings and death threats. Other publishers, in solidarity with *Jyllands-Posten* republished the cartoons, further heightening tensions. Riots broke out in several cities leading to the deaths of more than 100 people. The Danish cartoon controversy, as with the *Charlie Hebdo* publications and murders in 2015, constituted high-profile examples of the much broader disputes over gratuitous insult, blasphemy, freedom of expression, intentional provocation, inconsistent governmental responses, and murderous responses to expression and violent Islamophobic counter-responses.

The Danish Cartoon controversy prompted the OIC to create in 2008 the Islamophobia Observatory, which has to date submitted 8 reports that monitor verbal and physical aggressions, media and institutional hate speech or attacks on mosques.<sup>689</sup> Integrated in the efforts of the OIC (and indirectly LAS), Islamophobia is a permanent and non-negotiable aspect of the political work of the OIC. Apart from the already observed content within the CDHRI that backs the 'defamation of religions' concept, both the TYPOA and the OIC 2008 Charter endorse similar phrasing in regards with the importance of preserving Islam from external

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<sup>689</sup> OIC, 'Eight OIC Observatory Report on Islamophobia' (2015) OIC Doc OIC-CS-8thOBS-REP-Final-May-2015, <[http://www.oic-oci.org/oicv2/upload/islamophobia/2015/en/reports/8th\\_Ob\\_Rep\\_Islamophobia\\_Final.pdf](http://www.oic-oci.org/oicv2/upload/islamophobia/2015/en/reports/8th_Ob_Rep_Islamophobia_Final.pdf)> accessed 12 January 2016.

attacks, combating misconceptions regarding Islam and Muslims and preserving the rights of Muslims in non-Member States.<sup>690</sup>

With regard to the OIC's continuing resolutions on defamation, UN institutions, including the Special Rapporteur on Freedom of Religion or Belief and the Special Rapporteur on Freedom of Expression called for approaches that did not restrict freedom of expression. The UN Human Rights Committee's General Comment 34 (2011) was understood to express its opposition both to the criminalisation of blasphemy and the defamation resolutions.

“Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26.” (¶ 48)

There seemed little change that the binding legal norms favoured by the OIC and Ihsanoglu would be forthcoming. Accordingly, in 2011 the defamation approach was dropped in favour of a new Human Rights Council consensus Resolution 16/18 'Combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence and violence against, persons based on religion or belief.' Resolution 16/18 established what has since been called the 'Istanbul Process' to promote dialogue among states and religious groups and to denounce intolerance, stereotyping, and religious hatred. This new approach 'expresses deep concern at the continued serious instances of derogatory stereotyping, negative profiling and stigmatisation of persons based on their religion or belief, as well as programmes and agendas pursued by extremist organisations and groups aimed at creating and perpetuating negative stereotypes about religious groups, in particular when condoned by Governments. (Res. 16/18, ¶ 1)'

This Istanbul Process focuses on seeking ways to implement resolution 16/18.<sup>691</sup> Other UN organs testify for the OIC change. Indeed, a recent brief note from the Advisory Committee (AC)<sup>692</sup> further explains how the OIC has reduced rhetoric about the 'defamation of religions' and embraced the more international 'hate-speech' approach to the question. The last Session of the IPHRC 8th Session was, in turn, was dedicated to the theme of hate speech and freedom of expression, what reinforces the AC pronouncements.<sup>693</sup>

There have, however, been some signs since 2011 that the OIC and some of its Member States have not thoroughly renounced the 'defamation of religion' approach. The Arab League and its Member States, for example, appear not to have abandoned the 'defamation of religion' approach.

<sup>690</sup> OIC, 'TYPOA 2005' (n 678) s VII.

<sup>691</sup> Turan Kayaoglu, 'Dialogue 2.0: A Call for Interfaith Service and Action' (2014) 2 J Dialogue Stud 127-136.

<sup>692</sup> Advisory Committee, 'Article 19 Briefing Note: Advisory Committee Should Oppose Study to Examine the Creation of a "Global Grievance Forum for Perceived Defamation of Religion"' (August 2015) <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/211/04/PDF/G1521104.pdf?OpenElement>> accessed 31 December 2015.

<sup>693</sup> OIC, 'Independent Permanent Human Rights Commission Concludes its 8th Regular Session' <[http://www.oic-iphrc.org/en/data/docs/Media/Press%20Statements/EV/IPHRC\\_8th\\_Session\\_Concluding\\_EV.pdf](http://www.oic-iphrc.org/en/data/docs/Media/Press%20Statements/EV/IPHRC_8th_Session_Concluding_EV.pdf)> accessed 31 December 2015.

### (5) OIC Charter (2008)

In 2008, the OIC revised and amended its original 1972 Charter. The OIC institutions under the 2008 Charter have been identified above.

The 2008 Charter officially declares that it is subject to the United Nations Charter and to international law (Preamble). Member States shall uphold and promote, at the national and international levels, good governance, democracy, human rights and fundamental freedoms, and the rule of law. (Article 2.7) Articles 3, 9, 17 and 20, together with different sections in articles 1, 2, 3, and 4 revolve around the observance of and compliance with the Charter of the United Nations, International Law, and the promotion of human rights, fundamental freedoms, good governance - at the Member State and international levels - democracy and accountability. It similarly announces that it seeks 'to promote human rights and fundamental freedoms, good governance, rule of law, democracy and accountability in Member States,' *but then adds the significant caveat:* 'in accordance with their constitutional and legal systems.' (Preamble) Such a caveat may, of course, be interpreted in at least two very different ways. The first would be to say that Member States will adhere to international law *unless it conflicts with domestic law*, or, it could read that *each state will implement international law* according to its own domestic laws. Thus, as we have seen before, there is a fundamental ambiguity in the document with respect to whether international norms of universality do or do not apply.

As with other OIC documents, it appears to limit otherwise applicable international law in accordance with sharia, Islamic law, the principle of non-intervention in the internal affairs of OIC states, and the priority of state law provisions, as provided in Articles 1(3) and 2(2), (4), (6). Thus the same concern that has been addressed above continues to trouble the 2008 Charter.

### (6) Independent Permanent Human Rights Commission (2011-2014)

The Independent Permanent Human Rights Commission was another innovation of the Ihsanoglu era and was, as described above, first identified in the Ten-Year Programme of Action.

### c) *Current Trends under al-Midani (2014-present)*

In late 2013, the CFM elected Ayad Madani to the post of OIC Secretary-General, the first Saudi to hold the position. Madani had been a high political official in Saudi Arabia, holding various posts including a member of the Majlis as-Shura (Shura Council, the king-appointed legislative body), the Minister of the Hajj, Minister of Culture and Information, and various posts related to the media. The effect of Madani's tenure is not yet known, though observers already have differing reactions. The less optimistic suggest that the relative openness of the Ihsanoglu era and the numerous reforms that he promulgated are not likely to be continued and already show signs of waning. It is not seen as a good sign that the OIC now appears to be in the hands of a former Saudi state minister who was nominated by Saudi Arabia. The more optimistic observers note that Madani is a relative moderate within the Saudi context and that he may thus have the combined credibility of relative openness and Saudi influence. Both observations are based on relatively little information and either might ultimately prove correct.

#### d) OIC Criticisms of Non-OIC States

Although the OIC has consistently adhered to the policy of non-intervention in the internal affairs of other OIC Member States and its human rights instruments typically allowed for state laws to take priority over human rights norms, the OIC has repeatedly criticised the human rights practices of *non-Member States*. The country that it has, of course, criticised more than any other state is Israel, particularly with regard to its treatment of Palestinian Arabs, but also its actions in Lebanon, Syria, the Sinai (following the June 1967 war), and Jordan. The OIC has spoken for the right of return of Palestinians both to Palestine and Israel. The OIC has worked actively in the United Nations and other international organisations to promote its concerns. A recent official statement by the Islamic Summit on the matter took place in 2013, and revises the situation from a political point of view.<sup>694</sup> It condemns the state of affairs in Palestine, asks Member States for funds, supports the UN and Member States actions that shun Israel or alleviate the Palestinian situation, and makes a special mention to the observance and appeal of the UN resolutions on the rights of Palestinians to return to their land and properties. More recently, the Council of Foreign Ministers passed a resolution on Palestine<sup>695</sup> with a similar phrasing and content to the IS 2013 communiqué, but in broader detail. What this document reveals is that the OIC continuously ‘monitors and enforces pro-Palestinian norms in the Muslim world and (to) responds to Israel’s actions’<sup>696</sup> and that it does so in close observance and even partnership with UN work in this very field. A closer look reveals that both externally and internally, the OIC has been able to create a Muslim position regarding the Palestinian cause.

The OIC has shown considerable interest – and appropriately so – in speaking out for the rights of Muslim minorities in non-OIC states. Among the places that have repeatedly been subject to criticism involve Xinjiang, Jammu and Kashmir, Burma, and the Philippines. The OIC also criticised the Soviet Union for its invasion of Afghanistan in 1979 and the United States with regard to its invasion of Iraq and 2003 – as well as the human rights abuses that occurred thereafter.

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<sup>694</sup> OIC, ‘Cairo Final Communiqué: “The Muslim World: New Challenges & Expanding Opportunities”’ (12th Islamic Summit Conference, Cairo, 6-7 February 2013) OIC Doc OIC/SUM-12/F.C./FINAL.

<sup>695</sup> OIC Res 1/42-PAL ‘The Cause of Palestine’ (28 May 2015); OIC Res 2/42-PAL ‘The City of Al-Quds Al-Sharif’ (28 May 2015); OIC Res 5/42-PAL ‘The Current Situation of the Peace Process in the Middle East’ (28 May 2015); OIC Res 6/42-PAL ‘Financial Support Mechanisms for the Palestinian People’ (28 May 2015).

<sup>696</sup> Kayaoglu, ‘Politics, Problems, and Potential’ (n 651) 66.

## VI. Conclusion

### A. Summary of main findings

This report has explored the conceptualisations of human rights, democracy and the rule of law in four organisations: the United Nations, the African Union, the League of Arab States and the Organisation of Islamic Cooperation. Each organisation has its own particularities.

At the United Nations, we focused our attention on the Security Council, the General Assembly and the Human Rights Council. In relation to the latter, in addition to the working of the Council, we have also analysed the special mechanisms, particularly the Special Rapporteurs.

In line with existing literature, the report confirms that the emergence of human rights, democracy and the rule of law as issues of attention within **the United Nations Security Council** have been inconsistent, and that these concepts are used in practice rather than delineated in theoretical terms. The Security Council delegates the theoretical elaboration of concepts and the assessment of the state of affairs in their regard to other auxiliary bodies. The Security Council's main concern is to fulfil its purpose set forth in the Charter. In this regard, we see that the Council's engagement with human rights has shifted from the idea of the inviolability of Article 2(7) to one of binding obligations on states in relation to the protection of civilian populations during conflicts. This interconnection becomes inherent in the understanding of the concepts of human rights, democracy and rule of law.

While country-based resolutions have a clear focus on protection of the international peace and security, thematic resolutions of recent years have contributed to the development of conceptions in some respects. For instance, they have incorporated attention to specific vulnerable groups, namely women and children, and also to some professionals particularly affected during conflict, such as humanitarian personnel and journalists and media professionals. Their position, however, is not only one in need of protection, but also one inherently connected to the maintenance and promotion of peace and security. In this context, the right to education is emphasised in connection to children and illegal attacks against schools, and the political and public participation of women is explicitly linked to sustainable peace and security.

References to democracy are normally indirect ones, and always made in connection to the prevention of conflict. This is illustrated by the thematic resolutions focusing on women, in which participation in the peacebuilding process aims at sustainable peace and security, taking prevalence over notions of democratic governance.

Finally, the rule of law is explicitly and also indirectly addressed in thematic resolutions, highlighting specific elements. At times, it appears as a thin conception, calling for ratification of humanitarian law, human rights law and refugee law, and the need for a strong judiciary and a security reform, and at times, a thicker conception of rule of law is perceived, promoting judicial procedures for the fight against impunity.

Historically speaking, the **UNGA** had a major impact on the development of human rights concepts. This report focused on the Third Committee of the UNGA, the Social, Humanitarian & Cultural Committee. It analyzed three topical areas: sexual orientation and gender identity (SOGI), what the SOCHUM terms ‘the Promotion of a Democratic and Equitable International Order’, and the rights of migrants.

In terms of political process they led to three different results: in the case of SOGI rights no resolutions have been adopted yet, the Promotion of a Democratic and Equitable International Order has led to divided votes, and the resolutions on the protection of migrants have been adopted without vote. Different as these processes have been, this is not enough basis to conclude that the level of conceptual contestation differs greatly among these areas. It is tempting to assume that, conceptually speaking, SOGI rights are more contested than the rights of migrants. The apparent consensus on the protection of migrants in the UNGA, however, masks extreme difficulties in putting these rights into practice, as the current asylum seeker’s crisis glaringly shows.

In relation to the Committee’s work on SOGI rights, it is clear that these rights are deeply contested. A consensus appears to have formed however that bodily harm against LGBT people should be condemned. In relation to the resolutions on the protection of migrants, conceptually speaking what is of interest is that there is no indivisibility approach. Social, economic and cultural rights of migrants are hardly mentioned, apart from migrant children’s access to education, and several references to labor rights. Also, the vulnerability of migrants is emphasized strongly. And finally, in relation to the resolutions on the Promotion of a Democratic and Equitable International Order, the report has found that, conceptually speaking, they prioritize elements of democracy and human rights that are social, economic, and collective in outlook.

The **Human Rights Council** (HRC) is the largest body within the UN focusing on human rights. The position on human rights of the body is certainly full of contestations. One important aspect underlying the functioning of the HRC is the idea of respect for State sovereignty, expressed as the ‘respect for the principle of equal rights and self-determination of peoples.’ Nevertheless, the importance of the UPR makes it clear that the states are not completely exempt from international human rights monitoring mechanisms. Indeed, the power of the HRC lies in the fact that here national governments express their views directly on human rights issues, countries are the main actors and their overall human rights performance is the main target of scrutiny.

Having said that, political interests, more than theoretical contestations, appear to guide the selection of and the assessment of human rights issues. Decisions depend more on coalition-building than the doctrinal persuasiveness of proposals. An often cited example is the focus on human rights abuses by Israel.<sup>697</sup> Coordinated actions of regional organisations like the EU or the OIC might also challenge the

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<sup>697</sup> Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar 2010).

universality of human rights, influencing the agenda of the HRC,<sup>698</sup> although it may also counterbalance coordinated voting practices.<sup>699</sup> This results in a considerable degree of inconsistency within the body.

Nevertheless, the HRC founding resolution formally declares that ‘human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing’. However, in relation to universality, the HRC holds that national and regional particularities ‘must be borne in mind’.<sup>700</sup> This tension is explored in the case studies on LGBT(I) rights, a field where reconciling universal enforcement and cultural differences has not been easy.

Three main activities of the HRC support the principle of indivisibility of human rights. Firstly, the HRC has drafted international human rights documents such as the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights (ICESR), which introduced the possibility to adopt individual complaints in a similar manner to the monitoring mechanisms of civic and political rights (e.g. to the first Optional Protocol of the International Covenant on Civil and Political Rights). Secondly, the HRC has established the special procedures on a broad range of thematic issues. Thirdly, the HRC has adopted the UPR mechanism, which potentially encompasses all human rights without any differentiation among human rights. The case study on LGBTI has also suggested the support for the principle of indivisibility of human rights.

However, indivisibility doesn’t function properly in the practice of the HRC. There is a sharp difference between recommendations on civil and political rights and those concerning economic, social and cultural rights.<sup>701</sup>

Equality suffers from the institutional features of the HRC. Where countries have conflicting views on what equality requires in concrete cases, they can voice and gather support from like-minded states. This should primarily be seen as a challenge for a coherent and universal application of equality. The case study on LGBT(I) rights has shown that applying equality in contested areas remains a challenge. Any evaluation should nevertheless take into account that even in many countries now supporting equality for sexual minorities the success of the fight for equal rights is a recent phenomenon.

Showing a considerable contrast to the HRC, **Special Rapporteurs (SR)** have a very rich and multi-faceted understanding of human rights, democracy and the rule of law. However, they seem to adopt a context-driven’ approach to these concepts. Their understanding is very much linked to specific contexts, as they pay little attention to conceptual clarifications or definitions in their reports. This lack of conceptual discussions might be explained by their mandates, which are practically-orientated and focused on very specific topics. Similarly to the Security Council, Special Rapporteurs seem to assume common basic

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<sup>698</sup> That is why it is important that in general, EU countries do not seem to be acting as one unitary block. See FRAME Deliverable 5.1, Ch V.B.

<sup>699</sup> Interview with international expert with experience in diplomatic service (national and international level, including the HRC), (electronic interview, October 2015).

<sup>700</sup> UNGA Res 60/251 (n X).

<sup>701</sup> FRAME Deliverable 5.1, p. 160.

understandings of certain elements of human rights, democracy and the rule of law within the UN system, on which they build their specific analyses.

Nevertheless, Special Rapporteurs use most of the elements of human rights, democracy and rule of law identified by academic literature. In most cases it is difficult to clearly differentiate the various elements however, as there are many overlapping aspects. This shows that the elements depend on each other to form, as a whole, a meaningful understanding of the concepts. Conceptions of democracy and the rule of law always remain linked to the international human rights framework. However, the analysis of the reports of the selected Special Rapporteurs showed aspects relating to democracy as less important. Regardless of the specific focus of the chosen SRs, democratic governance issues are intrinsically political and thus sensitive topics to address within the UN context.

As a general trend, it can be observed that the SR tend to understand rights and principles in broad terms, trying to highlight all facets that the interpretation of a specific right might involve – as ‘human rights-friendly’ or ‘human rights-enabling’ as possible. Additionally, SR attach high importance to the effective implementation of rights in practice. The SR adopt a practically-oriented and thematically-focused approach within the UN human rights system.

In sum, the UN bodies examined in this report showed a certain tendency to assume conceptualisations or delegate the task to ‘specialised’ bodies. This is particularly the case of the Security Council, but also to some extent, the HRC. Interestingly, Special Rapporteurs, given their thematic focus and practical approach, also seem to operate on basis of an assumed understanding of human rights, democracy and rule of law. This dynamic suggests that coordination among the different bodies engaged in conceptualisation is key. Lack of conceptual clarity might hinder the comprehensive understanding of certain elements and their implementation in practice.

The **African Union (AU)** formally recognizes the universality and indivisibility of human rights. The two case studies, however, showed that there are clear exceptions such as with regard to criminal accountability for heads of state and other senior politicians for mass atrocities and with regard to the recognition of LGBTI rights. Different conceptualisations of human rights, rule of law and democracy are also found among and within Member States.

Different conceptualisations also seem to be adopted by different bodies within the AU. For instance, the African Commission often takes a more progressive, universalist, approach to issues than what is reflected in statements adopted by the AU political bodies. However, AU human rights treaties tend to support an universal approach to human rights. Value-driven or theoretical differences are few. Disparate views seem rather to emerge from opposing political interests.

This formal acceptance of the universality of rights is less apparent in relation to the **League of Arab States (LAS)** and the **Organisation of Islamic Cooperation (OIC)**. During its early years, the Arab League promoted human rights only in relation to the Israeli suppression of Palestinian rights. This was later combined with an increase in references to Islam and Sharia as a means for understanding and effectively circumscribing human rights standards. As a result, a new human rights language was crafted to create religious and

cultural rationales for not applying international human rights norms internally, while at the same time using international human rights standards to denounce Israel and other non-member states.

Regarding equality and the protection of minorities, both the LAS and the OIC are by their own definitions “identity” based intergovernmental organisations rather than universal, regional, or “interest-based” organisations. The focus of the Arab Pact was not the rights of individuals or minority groups, but the importance of self-determination (for the national ethnic majority), sovereignty, and non-interference in the internal affairs of Arab states. Moreover, several major human rights instruments spoke of the rights of *Arabs* (such as the 1983 Charter on the Rights of the *Arab* Child) and typically referred to the noble values of Islam, thereby excluding minorities (or included as an afterthought) in the documents.

A change is perceived after 2004, when instruments deemphasized the identity elements of Arab ethnicity and the Islamic religion. The more recent human rights texts come much closer to accepting international norms and they explicitly reference the universality of human rights. The dividing of Arabs from non-Arabs and Muslims from non-Muslims is almost entirely abandoned.

Regarding first generation rights, the 2004 Charter on Human Rights includes the core rights to engage in politics, freedom of association and assembly, and freedom of movement. There is a recognized right to freedom of thought, conscience, and religion. Basic second- and third-generation rights are incorporated, as well as rights for people with disabilities. Minorities may enjoy their culture, language, and religion. This formal recognition of rights, however, is contested in the case study on children, which showed that although it formally claims for be in accordance with international law, it still contemplates the possibility of death penalty for children.

The ACHR contains important clauses that prohibit discrimination. The scope of the understanding of discrimination is to some extent illustrated by the case study on women’s rights, which contemplates the ‘positive discrimination in favour of women by Sharia law.’ The practical translation of this recognition, however, emphasises protective measures, limiting women’s freedom and equality. The understanding of ‘positive discrimination’, thus, does not necessarily mean measures supporting equal opportunities. Similarly, the case study on refugees and migrants also suggest the unequal position of minorities.

Arguably, the ACHR ‘should be understood as symbolic action rather than attempts at effectively promoting and protecting governance standards in the region.’ Nevertheless, it still demonstrates, at a minimum, a rhetorical bias in favour of Arabs and, to a lesser extent, toward Islam. One example is the reference to ‘forms of racism, Zionism and foreign occupation and domination’, which hinder human dignity and the fundamental rights of peoples

Similarly to the LAS, the **OIC** also pledges to ‘respect, safeguard and defend the national sovereignty, independence and territorial integrity of all Member States.’ With its self-proclaimed religious identity, it is unique among the world’s intergovernmental organisations. The focus on Islam has consequences in terms of conceptualisation of human rights, particularly in relation to fundamental freedoms, equality and the protection of minorities.

The OIC embraces Islam in connection to human rights, democracy and rule of law more clearly than the LAS, at least formally. The 1972 Charter uses clear language about Islam, and resolves to ‘preserve Islamic spiritual, ethical, social and economic values, which will remain one of the important factors of achieving progress for mankind.’ It promotes the ‘noble Islamic values’ of peace, tolerance, and moderation, and promotes, among other values, human rights, the rights of women and children, democracy, self-determination, and good governance.

The strict protection of “Islamic values” appear to lead to considerable tension between the prohibition of insult and blasphemy, and the protection of freedom of expression, often resulting in murderous responses to freedom of expression and also, violent Islamophobic counter-responses.

The OIC focus on Islam also bears significant importance in relation to equality. Human rights, rule of law and democracy occupy a special place in the Ten-Year Programme of Action (TYPOA). The TYPOA also praise the ‘noble principles and values of Islam’ and seeks a firm commitment to ‘enlarge the scope of political participation,’ to guaranteeing equality, civil liberties and social justice, as well as to promote accountability, transparency and corruption-free strategies. Yet Article VIII once again focuses not on all people, or even all Muslims living in OIC member states, but only ‘the rights of Muslim Minorities and Communities in non-OIC Member States.’

The Covenant on the Rights of the Child in Islam (CRCI) is the only potentially legally binding human rights instrument that has thus far been produced by the OIC to date. This document too is infused in Islamic values, recognising ‘the best interests of the child,’ but in line with sharia law. Moreover, it excludes non-Muslim children.

Though the aim of this report is not primarily comparative (in contrast to Deliverable 3.3), the findings in this report do suggest that the OIC and LAS differ more in terms of human rights conceptions from the UN, than the AU differs from the UN.

## **B. Conclusions regarding the conceptual analysis**

In Deliverable 3.3 we found that different conceptions of human rights, rule of law and democracy exist at the national level. Similarly, we find in this report that conceptualisations also vary within the different organisations under review (and sometimes also within different sub-bodies of these organisations).

Several themes emerge from this conceptual analysis. First, there is much more conceptual elaboration within the institutions under review on human rights, than there is on rule of law and democracy. This is in line with what we concluded in Deliverable 3.3, namely that ‘Human rights occupy a privileged position in international relations. The degree of standard setting on human rights – by means of binding

international treaties and authoritative soft law instruments – is not matched for democracy and rule of law.<sup>702</sup>

Secondly, conceptions are often not very explicitly elaborated. We have to deduce them from practice. Throughout the report we have therefore emphasized historical and institutional context, otherwise these organizations' conceptions of human rights, democracy and rule of law cannot be deduced at all.

Third, it is difficult to say to what extent conceptual divergences are responsible for contestations within these organisations. Differences of opinion can also be due to political or economic considerations. Topics that apparently hold no conceptual contestations, for instance those which are adopted without vote, can still be deeply politically contested.

Finally, in this conceptual analysis we were confronted by the fact that silences are often as telling as words. What does not appear in a text (statements, resolutions, founding documents etc.) is sometimes as revealing of underlying concepts as what is there.

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<sup>702</sup> FRAME, Deliverable 3.3, p. 85, available at: <http://www.fp7-frame.eu/wp-content/materiale/reports/20-Deliverable-3.3.pdf>.

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## 2. Statements, newspaper articles and press releases

### Statements

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### *Newspaper Articles*

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### *Press Release*

## **3. FRAME**

- FRAME Deliverable 12.2.
- FRAME Deliverable 3.1.
- FRAME Deliverable 3.2.
- FRAME Deliverable 3.3.
- FRAME Deliverable 4.2.
- FRAME Deliverable 5.1.
- FRAME Deliverable 7.2.
- FRAME Deliverable 7.4.

## ANNEXES

### 1. Guidelines

#### a. General approach of the organisation

##### i. Organisation's position toward individual human rights, democracy and rule of law concepts

One part of the report will be dedicated to describe the organisation's conceptualisations on human rights, democracy and rule of law by exploring the approach taken towards a set of concrete concepts found in previous Deliverables, enumerated below. These concepts are listed purposely disconnected from the overarching notions of human rights, democracy and rule of law, in order to allow the researcher to question such connection in light of the approach taken within the organisation, and potentially uncover a regional perspective, free from any external bias. Also, although these elements are suggested as "disconnected" from each other, they may overlap and interconnect in many ways.

After a first exploratory research of literature and primary sources, please **briefly describe** the organisation's position and approach towards the concepts included in the list below, grouping them as needed, and indicating their connection to human rights, democracy and/or rule of law.

A **detailed elaboration** is expected only in relation to those conceptual elements with particular relevance within the organisation (for instance, foundational concepts, notions that are particularly contended or controversial in the relation with other organisations or member states). After identifying the most relevant elements for elaboration within the organisation, the partners will communicate these to the other partners and the work package leader, in order to coordinate the analysis. The analysis of such conceptual elements can take the form of a case study, if appropriate.

List of concepts highlighted in previous Deliverables:

1. Conceptions of civil and political rights and social, cultural and economic rights, with special attention to the following rights:
  - a) The right to dignity
  - b) Prohibition of Death Penalty
  - c) Prohibition of Torture and other cruel, inhumane or degrading treatment
  - d) Freedom of religion
  - e) Freedom of expression
  - f) Freedom of association and assembly
  - g) Effective judicial review
  - h) Equality before the law
  - i) Free legal assistance
  - j) Fair trial
  - k) Political Participation (direct and indirect)
  - l) The right to development
  - m) The right to safe drinking water, to sanitation and to food

- n) The right to physical and mental health
  - o) The right to education
  - p) The right to adequate standard of living
  - q) Environmental rights
2. Collective rights
  3. Human rights defenders
  4. Situation of 'vulnerable' groups. In particular:
    - a) Migrants
    - b) Older people
    - c) Children
    - d) Women
    - e) LGBTI
    - f) Persons with disabilities
    - g) Persons belonging to minorities
  5. Representation and participation of vulnerable groups.
  6. Access to justice or effective remedies
  7. Legality (in the sense that government and individuals are bound by law)
  8. Democratic process of enacting laws
  9. Legal certainty
  10. Prohibition of arbitrariness of the executive powers
  11. Independent judiciary
  12. Representation
  13. Participation of civil society
  14. Deliberation
  15. Good governance
  16. Transparency
  17. Consistency with international law
  18. Impunity of serious crimes
  19. Commitment to the International Criminal Court.

Length: approx. 20 pages/10000 words

## **b. Organisation understanding and perspectives in detail**

One part of the report will be dedicated to the detailed theoretical discussion of the understanding or approach towards human rights, democracy and rule of law within the organisation. You can choose your thematic focus based on the analysis of the official documents, and may relate to contested aspects or particularly relevant to the organisation. In doing so, please consider the following aspects:

- i. Organisation's position regarding universality and indivisibility of human rights.**
- ii. Organisation's position about diversity, equality, and discrimination.**