

The Logic of Consistency and the Rise of Human Rights Institutions

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Thesis submitted for the degree of Doctor of Philosophy

Hilary Term 2020

Word count

99,888

(Excluding references)

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Abstract

This thesis proposes a theory to explain the conditions under which moral argument matters in world society, called the logic of consistency. The theory is the result of an examination into the rise of international scrutiny of national human rights practices, with a focus on the three United Nations monitoring institutions: the Treaty Bodies, the Special Procedures, and the Universal Periodic Review. The move to these institutions, which serve to identify, verify, and publicise the (in)ability of states to comply with their human rights obligations, represents a curious phenomenon that cannot be explained by IR middle-range or grand theories, but it can by the logic of consistency. The logic of consistency identifies and connects traces of political action in relation to international scrutiny of human rights over the last hundred years, offering a revisionist account of the rise of human rights institutions. Building exclusively on primary sources, the empirical analysis demonstrates how appeals of political actors to universal principles has generated a universal horizon that pulls them towards the spirit of the universal principles they invoke, irrespective of their intentions. This universal horizon has subverted the resistance of states to external scrutiny and has compelled them to embrace permanent scrutiny of all states, in relation to all rights at all times, with or without their consent. The logic of consistency reveals the immanent ground of universalism, beyond metaphysical principles or assumptions of cultural unity in world society. It draws on philosophy, sociology, history, legal theory, and politics and aspires to contribute to the understanding of the behaviour and significance of moral argument in all these fields. Its scope is so wide that it is hard to identify social norms and institutions not shaped by it. Indeed, the social world is unthinkable without consistency.

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Acknowledgements

I do not remember a moment when I felt that I was advancing with this research project and did not feel profoundly grateful for the privilege of being able to pursue it, and the unending love, inspiration and support I received from my family, friends, mentors, and interlocutors. I realise now that being grateful is easier than expressing it as I would wish, not least because I fear that I run the risk of underestimating even brief encounters with people who have had an impact on my thinking or embarrassing them by associating them with what I have to say in the following pages. I can say without exaggeration that this is the part of the thesis I have been most eager to write but have had most difficulty writing it.

I should begin by thanking my supervisor, Kalypso Nicolaïdis, without whom I would not have even come to Oxford. Her eagerness and openness to engage with innumerable versions of my ideas without ever imposing her view, her patience with my confusion, and sudden turns in my attempts to clarify the problem I thought I was trying to understand, are quite out of the ordinary. The ideas expressed here would be far messier and more impenetrable if it hadn't been for her insistence on simplifying and clarifying them. But above all, Kalypso is a deep, non-judgemental listener and a caring person beyond scholarly pursuits. With her unusual skill in bringing people together, she has made me feel at home at the European Studies Centre, where I met wonderful people and experienced unforgettable moments. They are too many to innumerate, but I cannot not mention Julie Adams and Othon Anastasakis, who filled the place with kindness, care, and cheerfulness.

I could not imagine a more inspiring and lively sanctuary in which to grow personally and academically than at St Antony's College. I always experienced it as an unending

conversation—one you can join or leave at any moment, which takes you to places unimagined but then impossible to forget. A conversation that transforms you as a person even if you have preciously little to contribute. I have enjoyed deeply conversations with many people, including particularly with Max Smeets, Joel Ng, Quentin Bruneau, Xiaoyu Lu, Morad Moazami, Kira Juju, Emre Caliskan, Victor Willi, Ruben Reike, Dan Cooper, Sam Ramani, Nicole Grajewski, Thais Roque, Rodrigo Moraes, Ivaylo Laydjiev, Vinicious Dordigues Vieira, Matteo Legrenzi, Kerem Öktem, Stefan Szwed, David Leon, Helena Lopes, Giulia Gonzales, and many others who are too many, or make me uncomfortable, to mention by name.

When I found myself at a cross-roads, Andrew Hurrell and Eddie Keene were critical in helping me find the North Star. A sentence they picked out from what I had written became the heart of the final project. Conversations with Faisal Devji, Paul Betts, Ramon Sarró, Michael Freeden, Rosmary Foot, Margaret MacMillan, Duncan Snidal, Onora O’Neill, Dapo Akande, Richard Falk, Nigel Rodley, Marc Bossuyt, Theo van Boven, Terry Skolnik, Medlir Mema, Pablo de Greiff, Martti Koskenniemi, David Kennedy, Sally Engle Merry, Martha Finnemore, Stephen Krasner, John W. Meyer, Alessandro Ferrara, and especially Nadia Urbinati, have helped me enormously in developing my ideas. I am particularly grateful to Andrew Clapham for sponsoring my stay at the Graduate Institute in Geneva, and for his penetrating insights on my project. Likewise, Philip Alston graciously supported my stay at NYU Law School in New York, and I knew I had a thesis when it survived a conversation with him over lunch. Having the *viva* with Chris Reus-Smit and Eddie Keene was the apex of this entire endeavour. I have never experienced a more exhilarating, profound, kind-hearted, and probing conversation than the two and a half hours I spent discussing their deep reflections on my ideas.

Quite literally, this marvellous journey would not have happened without the people who made it possible. From the very start, Sylvia Platt has been there for me, in good and bad times, and has provided me with a home in Oxford. Her generosity and kindness are perhaps surpassed only by her patience in applying her critical eye and sharp pen to every page in this thesis, several times over. My experience in Oxford would not be what it is without the constant support, stimulation, and friendship of Effrosyni Charitopoulou and Marc Witte. The continuous support and care of Michalis Hamdan and Blerim Gjonpalaj, Ricardo Decima, Annemie Watteuw and the Kindt family, remind me that I am nothing without the people who support me.

I cannot overestimate the influence of my family in my development as a person. I cannot imagine how my life would be without my sisters, brothers, nephews, and nieces, but I know it wouldn't be a life worth living. It is to my mother that I owe virtually everything I value. But I have not been there for them, to live life with them, and that has been painful to cope with, especially when I think about my parents, Gjetë Zef Macaj and Gjelina (Kola) Macaj, both of whom I lost prematurely in the middle of this journey, but whose unconditional love, dedication and perseverance keep me in awe. It has not been a less painful experience to be there and not be there with them, as Dion, my wonderful five-year old nephew, once reminded me when he asked with a stern look in his face, and brighter than usual black eyes: 'A xh! A ke ardhë me nejtë me mu, a veç me punu?!', which translates, roughly, to 'Uncle! Are you here to be with me, or to work only?!', or less literally: 'I am not here to watch you work!'. The love of my life, Marina Calculli, has accompanied me every step of the way, up to the very last moment of printing and submitting the thesis. She has been able to explore the ideas that have survived in this thesis with patience, care, and creativity, and she has shown me the joy of having a life companion.

Chapter I. Introduction

Man commands himself to be necessarily at fault. It is not very clever of him to tailor his obligations to the standards of a different kind of being. He expects no one to do it, so whom is he prescribing it for?

— Montaigne, *On Vanity*¹

And Vertue, who from Politicks
Had learn'd a Thousand Cunning Tricks,
Was, by their happy Influence,
Made Friends with Vice: And ever since,
The worst of all the Multitude
Did something for the Common Good'.

— Mandeville, *The Grumbling Hive*²

... But still I ask, who are you?
— A part of that force
which, always willing evil, always
produces good.

— Goethe, *Faust I*³

Why have states created institutions to hold themselves accountable for human rights obligations they can hardly comply with? This question goes to the heart of the international effort to protect human rights following the creation of the United Nations in 1945, and the recognition of the universality of human rights, contributing to the unprecedented rise and expansion of international human rights law. The leading powers, especially the United States and the Soviet Union, were divided about the extent of the recognition of human rights as an international concern but unified in their resolve to resist and derail any form of international scrutiny of national human rights practices, proposed mainly by Latin American countries such as Mexico and Cuba. But even as major states resisted external scrutiny of

¹ Michel de Montaigne, *The Complete Essays*, trans. M. A. Schreech (London: Penguin Classics, 2003).

² Bernard Mandeville, *The Fable of the Bees: Or Private Vices, Publick Benefits: Volume I*, ed. Frederick Benjamin Kaye (Oxford: Clarendon Press, 1924), 24.

³ Johann Wolfgang von Goethe, *Faust I & II, Volume 2: Goethe's Collected Works - Updated Edition*, trans. Stuart Atkins, Revised edition (Princeton: Princeton University Press, 2014), 36.

their adherence to increasingly demanding and conflicting human rights obligations, they nevertheless exploited the language of human rights to justify their political action, and pillory their adversaries. The vociferous conflict about claims and counterclaims of adequate appropriation of human rights somehow gave birth to institutions to do exactly what virtually all states feared and resented: scrutinise the degree to which all states comply with the obligations that flow from international human rights law, with or without their explicit consent. This seemingly chaotic conflict has, over the last seven decades, given rise to not one, but three institutions to scrutinise the human rights practices of all states in relation to all rights at all times: the Treaty Bodies, the Special Procedures, and the Universal Periodic Review. This development represents fundamental change in the normative and institutional structure of world society, but it is not easy to grasp what has compelled states not only to assume human rights obligations they can never fulfil and constantly violate, but also and most remarkably, to develop institutions that serve to verify, document, and publicise their inability to meet their obligations.

Why states have made the move to human rights institutions remains an open question. They could reflect imposition from powerful states to transmit their values and conceal their imperial interests. They could also reflect an aspiration by all states to safeguard basic principles that underpin their shared moral knowledge. Another possibility is that states have been persuaded of the value of having institutions that foster the appearance of conformity with the obligations they have assumed, without needing to change their behaviour. But it could also be that these institutions represent an accumulation of miscalculations and accidents, over a long period of time, wherein states will have lost control over the process but now must live with a new institutional reality even as they resist it. This is the gist of the prevalent explanations that could be applied to understand why states have created

institutions to reveal their own imperfections, but none of them offers a satisfactory explanation, this thesis will argue.

The thesis advances an alternative explanation, anchored in the arguments that states deploy to exploit the possibilities available in world society, or more specifically, in the universal principles they invoke to justify their relative positions. In appealing to the universal, political actors engender a universal horizon that compels them to act in ways that reflect more closely the spirit of the universal principles they invoke, rather than their particularist intentions for invoking them. The logic underpinning this process obliges states to show consistency between their particular practices and the universal they invoke to justify them, giving rise, amongst others, to institutions that scrutinise universal adherence to universal norms.

This chapter outlines the elements and assumptions underpinning this answer, as well as the nature and relevance of the problem in question, developed in five parts. It begins with a consideration of the phenomenon of human rights institutions, to shed light on the circumstances leading to their creation and their significance for human rights and world society more broadly. The next section presents prevailing explanations mentioned above to consider their assumptions and explanatory power, before formulating the central argument of the thesis, expressed in the form of a theory: the logic of consistency. Subsequently, the chapter considers the overall approach of the study, the rationale behind the selection of cases as well as the strategy for collecting and analysing the data required for the empirical analysis, which represents more than two thirds of the manuscript.

1. The human rights institutions problématique

Whether and to what extent human rights could or should be universally enforced remains a central and unresolved question. Responses to this question have shaped all the activities of the United Nations in the field of human rights, in a negative direction. Not only have virtually all states rejected even the theoretical possibility of universal enforcement, but they have also persistently and systematically sought to prevent and undermine international measures that interfere in their internal affairs. The UN Charter itself crystallises the tension between recognising human rights as one of the overarching goals of the UN at the same time as it recognises the principle of non-interference in what states come to view as essentially their internal affairs. Denying the power of the Human Rights Commission to take any action on human rights complaints immediately after it came into being in 1947, offers just one illustration of the determination of major powers to eliminate external interference. Yet, curiously, widespread resistance did not prevent the UN from acquiring a capacity to assess national practices of human rights through *ad hoc* interventions and fact-finding missions, but also and most notably, through purposefully designed institutions, ultimately amounting to permanent interference in the domestic affairs of all sovereign states at all times.

1.1. Curious change

This shift could not be inferred from the drafting process of Universal Declaration which became the priority of the newly established Commission. Whilst the question of implementation was repeatedly raised, it was ultimately postponed and the Universal Declaration that the General Assembly adopted in 1948 did not contain any provision for its implementation. Yet it was a question that could not be negated: even those who sought to avoid the question had to accept that some kind of resolution was in order, if not inevitable. By 1954 sufficient support could be found for the acceptance of mechanisms to monitor

compliance with obligations that states could join voluntarily, creating a necessary opening for the rise and expansion of what came to be known as the Treaty Bodies. Each human rights treaty came with a group of experts attached to it, gradually giving rise to a monitoring system consisting of ten Treaty Bodies. But this was a system that was weak and slow, too slow for newly decolonised countries that demanded urgent UN action in the fight against racism and colonialism, resulting in the reinstatement, in 1967, of the powers of the Commission to address grave and systematic violations. This unexpected change enabled the Commission to create a new kind of institution to address the question of apartheid in South Africa and subsequently the Israeli occupation of Palestine and other Arab lands – the so-called Special Procedures.

The proponents of this new institution sought to limit its application to what they framed as *sui generis* cases, but they could not prevent one special case after another mounting into an intrusive and expansive system of Special Procedures. Their ever-expanding purview provoked dissatisfaction amongst their erstwhile creators that was so deep that it brought down the Commission in 2006, giving birth to the Human Rights Council. They now disavowed the Special Procedures they had brought to life because they had become confrontational in character and selective in application, a weapon in the hands of Western countries. A group of countries from the Global South, spearheaded by China, Cuba, Pakistan, Iran, and India, managed to engineer a demand for yet another institution, to rid the new Council from politicization and selectivity – the Universal Periodic Review. Every four and half years, the Periodic Review assesses the human rights practices of all states in relation to all rights, irrespective of whether they have signed up to them or not, mounting to universal scrutiny of universal rights.

How states came to establish one institution after another to scrutinise the human rights practices of all states is not self-evident. It is a shift that confronts states with the irresolvable tension between national sovereignty and supranational order, between the principle of non-interference implied in the principle of national self-determination, and the necessary violation of both these principles implied in the universality of human rights and international organization. These institutions only exacerbate the ‘tension between sovereignty and internationalism’, which Paul Kennedy views as ‘inherent, persistent, and unavoidable’, an unescapable paradox underpinning the UN from its inception.⁴ ‘If some kind of ordered and law-based international society has emerged,’ Adam Roberts observes, ‘it has done so on a *curious basis*: it is founded on two logically incompatible sets of ideas, each of which needs the other in order to remedy its own inherent limitations’.⁵ Some of ‘the most significant developments in international norms’, Wayne Sandholtz and Kendall Stiles maintain, cannot be understood without reference to ‘the tension between sovereignty norms and liberal norms’.⁶ Consideration of the sources and implications of these interlocking tensions emerges as a necessity in order to understand the significance of human rights institutions, which has proven to be elusive.

Aspirations about what these institutions ought to be, have coloured interpretations of what they actually are. An overarching concern with enforcing human rights, as Bernard Williams indicates when he declares that ‘[w]e have a good idea of what human rights are. The most

⁴ Paul Kennedy, *The Parliament of Man: The Past, Present, and Future of the United Nations*, Reprint edition (New York: Vintage Books, 2006), xiv.

⁵ Adam Roberts, ‘Towards a World Community? The United Nations and International Law’, in *The Oxford History of Twentieth Century*, ed. Michael Howard and Wm Roger Louis (Oxford: Oxford University Press, 1998), 318 [Emphasis added].

⁶ Wayne Sandholtz and Kendall Stiles, *International Norms and Cycles of Change* (Oxford: Oxford University Press, 2008), 336.

important problem is not that of identifying them but that of getting them enforced',⁷ has shaped the way in which these institutions have been conceptualised. What is in question, Stefan-Ludwig Hoffman asserts, is 'how human rights might be implemented on a global scale and how to reconcile, for example, sovereignty and human rights'.⁸ This seemingly natural inclination towards enforcement has informed an understanding of these institutions as means of implementing human rights or their *mettre en oeuvre* as John Humphrey put it.⁹ They amount to a 'soft system of implementation' that relies primarily on 'inquiry and exposure', Andrew Hurrell observes.¹⁰ Charles Beitz follows the same reasoning as he constructs a 'paradigm of implementation' to capture the manifold functions of the different parts of the UN's human rights monitoring system.¹¹

Yet these institutions do not necessarily exhibit the attributes they are supposed to possess, that is, they do not necessarily represent implementation measures to achieve compliance with human rights obligations, as Andrew Clapham warns.¹² In considering the selective deployment and inadequacy of adjudication and the enforcement capacity of these 'implementation' institutions, Beitz admits that it would be 'deceptive to describe these processes as establishing accountability'.¹³ The typical conceptualisation of these institutions

⁷ Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton: Princeton University Press, 2005), 62.

⁸ Stefan-Ludwig Hoffmann, 'Introduction: Genealogies of Human Rights', in *Human Rights In The Twentieth Century*, ed. Stefan-Ludwig Hoffman (Cambridge: Cambridge University Press, 2011), 1.

⁹ Ton J. M. Zuijdewijk, *Petitioning the United Nations: A Study in Human Rights* (New York: St. Martin's Press, 1982), ix preface by John Humphrey.

¹⁰ Andrew Hurrell, 'Power, Principles and Prudence: Protecting Human Rights in a Deeply Divided World', in *Human Rights in Global Politics*, ed. Tim Dunne and Nicholas J. Wheeler (Cambridge: Cambridge University Press, 2009), 282.

¹¹ Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009).

¹² Andrew Clapham, 'Overseeing Human Rights Compliance', in *Realizing Utopia. The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press, 2012), 321.

¹³ Beitz, *The Idea of Human Rights*, 43.

might say something about how states or the UN would like to present them as part of implementation measures to achieve compliance with human rights obligations, and not necessarily what they actually represent.

1.2. Rights and responsibilities

Consideration of the basic tensions from which these institutions arise, rather than how they are presented, might offer a better vantage point from which to approximate their meaning. In a fundamental sense, as alluded to by Paul Kennedy and Adam Roberts, these tensions reveal the dialectical relation of sovereign rights and duties, the logic of which appear with clarity in Jeremy Waldron's conceptualisation of rights as responsibilities, wherein responsibilities are seen as correlative to rights. Or as Waldron formulates it: '[m]y rights correlate with your responsibilities, and if we all have rights against one another, then it follows that we all have responsibilities as well'.¹⁴ That responsibilities are constitutive of rights goes back to practices of sovereignty beyond the Peace of Westphalia, emanating from the unending strife between rulers and the ruled.¹⁵ If agents that shape world affairs 'agree in thinking that the state has duties, and allow this view to guide their action', then the moral dimension of state behaviour should be taken seriously, E.H. Carr asserts.¹⁶ The portrayal of the operation of the Treaty Bodies by Sally Engle Merry as 'a dance between the power and influence of the international legal order and the claims to sovereignty of nation states' offers a concrete

¹⁴ Jeremy Waldron, 'Dignity, Rights, and Responsibilities', *Arizona State Law Journal* 43, no. 4 (Winter 2011): 1107.

¹⁵ Maarten Prak, *Citizens without Nations: Urban Citizenship in Europe and the World, c.1000–1789* (Cambridge: Cambridge University Press, 2018); Luke Glanville, *Sovereignty and the Responsibility to Protect: A New History* (Chicago: University of Chicago Press, 2013); Brendan Simms and D. J. B. Trim, eds., *Humanitarian Intervention: A History* (Cambridge: Cambridge University Press, 2011).

¹⁶ Edward Hallett Carr, *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations*, Second Edition (London: Macmillan, 1946), 147.

illustration of the constant negotiation between rights and responsibilities of states as they position themselves in world society.¹⁷

From this perspective, human rights institutions reflect recognition of what Mathias Risse describes as global responsibilities or rights held vis-à-vis the world society in its entirety.¹⁸ They are distinct from *jus cogens* obligations—e.g. the prohibition of genocide, slavery or racial discrimination—which are also obligations of states towards ‘the international community as a whole’,¹⁹ but the difference is one of degree rather than kind; both follow from the same premiss. These institutions embody institutionalised expressions of the adjustment required for states to balance rights and responsibilities in order to exploit the possibilities available in world society. For world society to exist, states must uphold a common framework, or what Adam Watson calls a *raison de système*, and adjust their behaviour accordingly to manage their relations and pursue their individual projects.²⁰ This dialectic of adjustment can produce effects that might be framed as instances of implementation, accountability, compliance or even enforcement in some cases, but they are not intrinsic or defining properties of these institutions. The extent to which human rights institutions exhibit one, several or none of these attributes, depends entirely on the balance of forces pushing towards rights or responsibilities—a relation that varies drastically in time and space. Consideration of the coordinates and movement of the dialectic of rights and

¹⁷ Sally Engle Merry, ‘Human Rights Monitoring, State Compliance, and the Problem of Information’, in *The New Legal Realism: Volume 2: Studying Law Globally*, ed. Heinz Klug and Sally Engle Merry (Cambridge: Cambridge University Press, 2016), 35.

¹⁸ Mathias Risse, *On Global Justice* (Princeton: Princeton University Press, 2012), 32.

¹⁹ Malcolm Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), 124.

²⁰ Adam Watson, *The Evolution of International Society: A Comparative Historical Analysis* (London: Routledge, 2002), Chapter 21.

responsibilities is therefore fundamental to grasp the rise of human rights institutions and what they come to signify.

2. Explanations

What these human rights institutions signify could be further clarified when considering the broader discussions about the reasons why states would have created them in the first place. Four main explanations stand out from the variety of perspectives adopted in a long-standing debate about the rise and role of institutions in general, and human rights institutions more specifically. These explanations reflect differing assumptions about the role and scope of morality and institutions in world society and highlight different mechanisms to explain their significance.

2.1. Concealment and coercion

The dominant and radical explanation offered by realists is that these institutions reflect the will of powerful states who deem it useful to present their interests in moral terms. Even as realists attach great importance to morality, they are primarily concerned in showing its limitations in constraining the behaviour of states, especially great powers.²¹ Moral talk can serve powerful states to signal self-restraint and make their power more ‘tolerable to other members of the world community’ as E.H. Carr notes²² or merely conceal their ‘aspiration of power’ as Hans Morgenthau asserts.²³ Such appropriation of rights is ‘predictable behaviour’

²¹ Reinhold Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics*, ed. Cornel West, 2 edition (Louisville, KY: Westminster John Knox Press, 2013); Carr, *The Twenty Years’ Crisis, 1919-1939*; Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Alfred A. Knopf, 1948).

²² Carr, *The Twenty Years’ Crisis, 1919-1939*, 168.

²³ Morgenthau, *Politics Among Nations*, 169.

for those countries ‘at the top’, Kenneth Waltz declares.²⁴ There is little if any constraint on the part of those who invoke morality, or institutions more generally.²⁵ To adapt within their environment ‘rulers must honour, perhaps only in talk, certain norms but at the same time act in ways that violate these norms, if they hope to retain power and satisfy their constituents’, Stephen Krasner discovers.²⁶ They must resort to organised hypocrisy to reconcile competing demands and pressures if they wish to secure their power and ability to rule. Absence of enforcement and the selective application of the UN human rights system would illustrate this crucial point.²⁷ Even as they acknowledge cases of genuine concern for human rights, Jack Goldsmith and Eric Posner conclude that ‘most human rights practices are explained by coercion or coincidence of interest’.²⁸

This approach sheds light on the most obvious aspects of state attitudes and behaviour toward human rights norms and institutions within the United Nations, where selective appeals to human rights norms and institutions and their brazen manipulation constitute perhaps the most visible dimension of this activity. Yet it underplays or leaves out basic elements about human rights institutions. Far from being imposed by major powers, they were created by small and mostly non-liberal states, against the will of the most powerful states, including the United States and the Soviet Union, who shared the same goal of obliterating all efforts to challenge absolute sovereignty; China found itself in the same position when it assaulted, but ultimately failed to kill, the Special Procedures in 2007. The effort put in over seventy years

²⁴ Kenneth Neal Waltz, *Theory of International Politics* (Reading, Massachusetts: Addison-Wesley Pub. Co., 1979), 200.

²⁵ John J. Mearsheimer, ‘The False Promise of International Institutions’, *International Security* 19, no. 3 (1 December 1994): 5–49.

²⁶ Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), 66.

²⁷ Eric Posner, *The Twilight of Human Rights Law* (Oxford: Oxford University Press, 2014).

²⁸ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2006), 134.

by most states, including superpowers, gives no indication of any of these institutions being of limited importance to them. But if they were, it would raise the question of why powerful states would engage with a matter of limited importance. More fundamentally, the realist framework cannot account for why appeals to morality should have any effect at all, and if they do not, why rational states would engage in such an aimless activity or be fooled by it; how morality survives instrumental use remains a mystery too.

2.2. Principles and socialisation

The exact opposite explanation is offered by early constructivists, who take seriously the role of moral principles and beliefs in shaping not only the positions that states take, but also how they think of themselves and their position in world society. Moral principles and norms are constitutive of the actors themselves. They are not meaningless slogans but expressions of universal morality: they say something about the identity of the agents and the social environment they inhabit.²⁹ They reflect the values that actors have internalised through socialisation within that environment.³⁰ Recognition of the universality of human rights and the creation of institutions to enhance their respect would therefore embody the values and norms of the social structure that configures the behaviour of states along basic notions of right and wrong –where conformity with social rules is praised, and deviance is met with social opprobrium. Rather than ‘a simple victory of ideas over interests’, Kathryn Sikkink would argue, the creation of institutions must entail a redefinition of the identity and interests of states.³¹ Rather than the result of imposition, it is transnational socialisation driven by

²⁹ Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’, *International Organization* 52, no. 4 (Autumn 1998): 887–917.

³⁰ Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (New York: Oxford University Press, 2013).

³¹ Kathryn Sikkink, ‘Transnational Politics, International Relations Theory, and Human Rights’, *PS: Political Science and Politics* 31, no. 3 (September 1998): 519.

principled activists that will have swayed states to change their identities and behaviour in support of these institutions.³²

The recognition of the centrality of norms and moral argument in world society and the intense activity of pursuing and countering competing moral visions within the United Nations, make this approach compelling. Yet it fails to account for crucial elements. It cannot explain the blatantly instrumental use of human rights norms and institutions by states to justify completely contradictory objectives and practices. Its dependency on socialisation fails to account for radical change in the attitudes and behaviour of states vis-à-vis the role of human rights norms and institutions, let alone radical variation in their positions. The striking stability of the in-built constrictions of human rights institutions over the course of seventy years defies the assumption of socialisation being of relevance. Furthermore, it cannot explain sudden changes endogenously nor change in forms of appropriate behaviour.³³

More specifically, this approach does not account for institutional choices as regards the creation and design of three different institutions to serve the same manifest goal, as from this perspective institutions are not necessarily ‘created consciously by human beings’ but rather something that ‘emerge slowly through a less deliberative process, and that they are frequently taken for granted by the people who are affected by them’.³⁴ At no point have

³² Margareth E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998); Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton: Princeton University Press, 2001); Susan Burgerman, *Moral Victories: How Activists Provoke Multilateral Action* (Ithaca: Cornell University Press, 2001).

³³ Finnemore and Sikkink, ‘International Norm Dynamics and Political Change’, 888; Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999), Chapter 7.

³⁴ John Duffield, ‘What Are International Institutions?’, *International Studies Review* 9, no. 1 (1 May 2007): 6.

political actors taken these institutions for granted: their proponents fear their collapse and their opponents seek their destruction, even as the very fact of engaging with these institutions in itself constitutes radical change in world society.

2.3. Utility and reputation

Areas of convergence between these two rival perspectives represent a third distinct approach to human rights norms and institutions, one that highlights their utility for states to respond to functional demands in pursuit of ulterior goals. Their utility would depend mainly on their capacity to constrain future behaviour of agents domestically or internationally. From an international perspective, institutions have proven their use in institutionalising self-restraint in hegemonic powers, in exchange for acceptance of their power as legitimate by lesser powers, John Ikenberry observes in relation the negotiation of major post-war settlements.³⁵ The imperative of preserving international order and stability, following systemic change as a result of major wars, would have compelled major powers to create institutions to protect foreign populations, especially ethnic minorities and refugees, Bruce Cronin argues.³⁶ But international institutions can also emerge from purely domestic concerns, Andrew Moravcsik asserts; rather than major powers, it would be young and unstable democracies that are most likely to push for the creation of human rights institutions in order to protect themselves against threats from the totalitarian right and left, and more generally as means of exporting domestic practices abroad.³⁷ Pressure for domestic reforms has been so strong that, as a side

³⁵ G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars* (Princeton: Princeton University Press, 2001).

³⁶ Bruce Cronin, *Institutions for the Common Good. International Protection Regimes in International Society* (Cambridge: Cambridge University Press, 2003), 24.

³⁷ Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', *International Organization* 54, no. 02 (2000): 237–38; Andrew Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe', *European Journal of International Relations* 1, no. 2 (6 January 1995): 157–89.

effect, it has required the pursuit of moral foreign policy, Chaim Kaufmann Kauffman and Robert Pape claim in relation to Britain's crusade against the slave trade.³⁸

Putting the importance of the domestic level in high relief, but prioritising the role of nonstate actors, Xinyuan Dai finds that the practice of monitoring of human rights falls on the shoulders of NGOs, given that the interests of the perpetrators and victims of violations of human rights do not align. Even as 'some states may have incentives to protect victims of human rights in another country', Dai predicts, they are 'unlikely to incur costs to detect noncompliance or to help bring noncompliance to light'.³⁹ This is because states would have no obvious incentives to provide for robust monitoring for human rights. But 'to the extent that states allow the emergence of international human rights institutions', Dai assumes, they do so on a transactional basis, in exchange 'for other benefits'.⁴⁰ Yet states do not need to have internalised norms to care about violating them; even if they do not care about the norms themselves, they care about the reputation for rule-compliance, as that would affect their ability to benefit from trade or aid, Andrew Guzman maintains.⁴¹ Mere reputational concerns, rather than socialisation, is sufficient to compel states to declare their support for human rights norms and institutions and bring their behaviour in line with them, even if they had no intention of doing so.⁴²

³⁸ Chaim D. Kaufmann and Robert A. Pape, 'Explaining Costly International Moral Action: Britain's Sixty-Year Campaign Against the Atlantic Slave Trade', *International Organization* 53, no. 4 (n.d.): 632; 664.

³⁹ Xinyuan Dai, *International Institutions and National Policies* (Cambridge: Cambridge University Press, 2007), 43.

⁴⁰ Dai, 108.

⁴¹ Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: Oxford University Press, 2008), Chapter 3.

⁴² Thomas Risse, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013).

This approach sheds light on key aspects of the strategic game that states play in using or resisting human rights norms and institutions, but it fails to account for basic elements. Contrary to what Ikenberry and Moravcsik predict, the design of human rights institutions explicitly excludes the possibility of supposed ‘lock-in’ constraints, that is, the essence of their supposed utility; whilst the Treaty Bodies have been indeed pioneered by major democracies such as the United Kingdom, at the forefront of the creation of the most intrusive human rights institution, the Special Procedures and of the most universal institution, the Universal Periodic Review, have been young and old authoritarian regimes, not fledgling democracies as Moravcsik would predict. The decisive role of states in creating human rights institutions, in producing and assessing information about the degree of compliance with human rights norms, and the systematic and intense deployment of these institutions to expose each other’s noncompliance, contradict Dai’s central prediction that such monitoring process should be driven by domestic and nonstate actors.

Furthermore, the creation of institutions to monitor national human rights practices directly threatens the benefits that states might have obtained by assuming human rights obligations without having or meaning to comply with, that is, the opposite of utility-maximising behaviour. But even the supposed benefits of such behaviour remain elusive; whilst James Lebovic and Erik Voeten indicate that a poor reputation for complying with human rights reduces multilateral aid, with bilateral ties remaining unaffected,⁴³ Richard Nielsen and Beth Simmons find no convincing evidence of either tangible or intangible benefits of ratifying

⁴³ James H. Lebovic and Erik Voeten, ‘The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators’, *Journal of Peace Research* 46, no. 1 (1 January 2009): 79–97.

human rights treaties.⁴⁴ Beyond these explanations, what can be further noted is that for the collective and dynamic processes of constructing and operating human rights institutions to benefit individual states, the latter must show an ability to control collective processes that is beyond what can be reasonably expected of any of them, no matter how powerful.

2.4. Accident and evolution

Recognising the inability of any political agent to fully control collective processes and the real constraints on them to act rationally in pursuit of their objectives, amount to a contrasting and influential approach to explaining the rise and development of human rights institutions. The power of structure and especially temporality, the present influence of past choices, miscalculations and accidents, shape events and institutions in a gradual and evolutionary manner, wherein individual agency is largely irrelevant. Institutions might persist over time even when they are not effective in delivering on their mission for which they have been created. Change is extremely hard to achieve, and when it occurs it occurs rarely and, if at all, incrementally, given the entrenched and powerful countervailing forces of the *status quo*.⁴⁵ Whenever change happens, it happens in a path-dependent manner, meaning that institutional choices at T1 affect the costs and benefits associated with the available strategies that agents

⁴⁴ Richard A. Nielsen and Beth A. Simmons, 'Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime?', *International Studies Quarterly* 59, no. 2 (1 June 2015): 197–208.

⁴⁵ Joseph Jupille, Walter Mattli, and Duncan Snidal, *Institutional Choice and Global Commerce* (Cambridge: Cambridge University Press, 2013), 5; Marie-Laure Djelic and Kerstin Sahlin-Andersson, 'Institutional Dynamics in a Re-Ordering World', in *Transnational Governance. Institutional Dynamics of Regulation* (Cambridge: Cambridge University Press, 2006), 382; Douglass C North, 'Toward a Theory of Institutional Change', in *Political Economy: Institutions, Competition and Representation: Proceedings of the Seventh International Symposium in Economic Theory and Econometrics*, ed. William A. Barnett, Melvin Hinich, and Norman Schofield (Cambridge: Cambridge University Press, 1993), 64; James Mahoney and Kathleen Ann Thelen, *Explaining Institutional Change: Ambiguity, Agency, and Power* (Cambridge; New York: Cambridge University Press, 2010).

can pursue at T2, leading to predetermined, unintended, and inefficient outcomes. More radically, Paul Pierson argues that change does not even result from intentional agency.⁴⁶ Instead of focusing on institutional change or ‘why and how particular sets of actors can be catalysts for institutional change’, he shifts attention towards ‘institutional development’ or how ‘lengthy processes of institutionalization condition the circumstances confronting these reformers’.⁴⁷ His perspective implies that ‘reformers’ should be considered as part of change itself, rather agents of change.

Typically, efforts to explain the creation and expansion of human rights institutions espouse some version of historical institutionalism.⁴⁸ The best articulation comes from Philip Alston, when he seeks to make sense of the growth of the UN human rights regime as a whole, which he sees as a collection of rules, institutions and actions aimed directly at promoting global respect for human rights. In his words:

‘[a]ny depiction of this growth as being systematic, gradual or even rational is largely unwarranted. The system has grown ‘like Topsy’ and the boundaries between different organs are often only poorly delineated. For the most part, this pattern has hardly been accidental. Rather, it is the inevitable result of a variety of actors seeking to achieve diverse, and perhaps sometimes even irreconcilable, objectives within the same overall institutional framework. If an existing body could not do a particular job, whether because of some intrinsic defects, sheer incompetence, or more likely,

⁴⁶ Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton: Princeton University Press, 2004).

⁴⁷ Pierson, 133.

⁴⁸ Gerd Oberleitner, *Global Human Rights Institutions* (Cambridge: Polity, 2007); Roland Burke, *Decolonization and the Evolution of International Human Rights* (University of Pennsylvania Press, 2011), Chapter 3.

political intransigence, the preferred response was to set up another. In a very short space of time States and individual actors would develop a vested interest in the maintenance of the new body in the same form. This pattern simply repeated itself when a new policy agenda, to which none of the existing bodies was sufficiently responsive, emerged'.⁴⁹

This approach raises core issues about the creation, use, reform of human rights institutions, competition among them and their unpredictable development and trajectories. The indeterminacy that underlies this account becomes clearer when Alston seeks to identify the factors that have shaped the evolution of the system as a whole:

‘[i]n general then, the evolution of the regime has reflected specific political developments. Its expansion has depended upon the effective exploitation of the opportunities which have arisen in any given situation from the prevailing mix of public pressure, the cohesiveness or disarray of the key geopolitical blocks, the power and number of the offending state(s) and the international standing of their current governments, and a variety of other, often rather specific and ephemeral, factors. For these reasons, efforts to identify and describe steady and principled patterns in the evolution of the various procedures are generally misplaced. Pragmatism, rather than principle, has been the touchstone of the UN’s evolution’.⁵⁰

⁴⁹ Philip Alston, ‘Appraising the United Nations Human Rights Regime’, in *The United Nations and Human Rights. A Critical Appraisal*, ed. Philip Alston (Oxford: Oxford University Press, 1996), 2.

⁵⁰ Alston, 2.

Alston offers a panorama of all potential factors that could be taken into account in explaining the rise and design of human rights institutions. Yet this is a collection of factors that says nothing about how and when they matter, how and when they shape the development of these institutions in one direction, and not another. It exemplifies both the strength and weakness of historical institutionalism in explaining institutional change. That individual agents do not control the collective process over time does not mean that their agency is not leading the relevant processes, or that this would be an arbitrary and irrational process; it is certainly contingent, but therefore not arbitrary. Power might be mediated by social structure, but it exists and is wielded with force that is directional and destructive as well as constructive, depending on the vantage point. This approach cannot account for radical and sudden shifts in positions or the surprising coherence of the fundamental elements of the system, such as the firm state control over the whole process.

In their entirety, these four major approaches shed light on core elements that are necessary to make sense of the rise of human rights institutions. In virtue of their premisses, they give primacy to one set of factors at the expense of others, but taken together, they demonstrate that all of the factors they prioritise are relevant and, necessarily, all the distinctive explanations they offer, inadequate. The temptation to combine competing explanations to remedy the deficiencies of each only exacerbate the problem; they shed light on distinct dimensions that need to be considered in a holistic manner and not be arbitrarily suppressed, favouring one over the others. A satisfactory explanation requires a consideration of the interrelationships and interaction of the factors highlighted by competing approaches by approximating as closely as possible the way they fit social reality. However, such an explanation cannot be found on the premisses on which each rival approaches rests. That becomes possible when the problem is viewed from a meta level, allowing for an

appreciation of the distinct and combined explanatory power of alternative explanations, in order to make sense of the separate parts and the way they cohere to form a systematic account of the rise of human rights institutions.

3. Argument

The argument of the thesis is that human rights institutions flow from the universalist rhetoric that states employ to position themselves in the world society. Political actors appeal to the general interest and universal principles to justify their particular goals and practices but, in so doing, they construct a universal horizon that compels them to act in ways that reflects more closely the substantive implications of the universal principles they invoke, rather than their particularist intentions for invoking them. States are the relevant agents, always; yet the universal horizon they generate transforms their agency into a third force that is sufficiently autonomous to subvert their particular intentions and oblige them to collectively accept what they individually reject. What is typically mistaken for accidental outcomes is a natural effect of the universal horizon. The universal horizon has its own logic and moves in ways that might coincide but is not responsive to any individual notion of interests, values, utilities. The force that causes and directs the universal horizon is the logic of consistency.

When states or activists support or oppose human rights practices, they evaluate the consistency of particular practices with the universal they supposedly embody. Irrespective of whether political actors believe in the claims they make or not, they render consistency with the universal the ultimate force that institutes shared notions of right and wrong and the measure of adherence to them. States can articulate their practices and goals in universal terms in order to enhance or neutralise the practical effect of a universal principle, or the spirit of the universal principle in itself. When states invoke the universal to stifle indignation

over violations of elementary universal principles, they might exemplify a travesty of universalism. But in so doing they inescapably sow the seeds of self-subversion; brazen manipulation of the universal leaves traces of recognition that rival forces can reanimate into precedents via the logic of consistency, compelling the political actor espousing the universal for cynical reasons to act in accordance with its spirit, exemplifying a triumph of universalism.

The very same appeal of the universal that allows states to distort its spirit for particular ends triggers an autonomous force that subverts the subversion of the universal, forcing states to reap what they sow. That which survives the strategic employment of the universal in pursuit of particular interests is strong enough to secure the viability of the universal: the extraordinary force of the universal arises from extraordinary small traces of recognition that the logic of consistency recovers and reanimates as precedents for future action. Consistency with the universal—which states invoke incessantly for antithetical goals—emerges as the Archimedean point from which they determine the position of political actors individually and collectively in relation to the shared notions of right and wrong they themselves generate in the process. Distance from the universal operates as the defining source of unending strife among rival forces that seek to defend or attack particular practices in relation to the universal. Proximity to the universal determines the movement and direction of the dialectic struggle of antithetical forces that seek to disrupt or deny the inconsistency of particular practices with the universal whose spirit they purport to embody.

The movement of the struggle of states with the universal can go in at least four directions, generating four distinct normative zones or zones of exposure of inconsistency with the universal. These normative zones generate distinct logics that force states to adopt radically

different positions from which to pursue their objectives, depending on the location they occupy in relation to the universal. The baseline normative zone is one of absolute particularism, wherein no shared notions of the universal and therefore inconsistency with shared norms can exist; this is the zone of polarization. In invoking competing notions of the universal, competing forces might leave behind traces of recognition, but they produce neither normative nor institutional change. When forces attacking the inconsistency of a practice get closer to the universal, they generate a zone of recognition. This is a zone in which states must collectively generate consistency with the universal in order for each of them to be able to espouse it with plausibility. It is where traces of recognition left behind in the zone of polarization are reanimated into precedents that require substantive transformation in order to ensure sufficient consistency with the universal horizon which states create in their struggle with one-another.

As the zone of recognition constrains the autonomy of states, it is subject to centrifugal forces that seek to evade the constraints it imposes on them, without relinquishing the appearance of consistency, creating another normative zone –the zone of toleration. In the zone of toleration, competing forces can lay equal claim to the universal, allowing them to articulate alternative standards for what constitutes practices inconsistent with the universal.

Irreconcilable but equally valid universal principles require toleration of rival practices of universals, which might embody emergent or competing moral universals or normative orders. Not everything can be tolerated when the location of forces defending a practice is closest to the universal, giving rise to a fourth zone –the zone of negation. This is a zone of absolute universalism wherein proximity to the universal endows states with hegemonic power, and the practice they defend with hegemonic status. No individual state, or collective group of states, can upend the hegemonic status of norms and practices in this zone, as long

as they remain in the closet proximity to the universal. The flow of consistency that generates these distinct normative zones, their relation and sequential move accounts for the rise, variation and development of human rights institutions, taken individually and as a formation, showing how all of these attributes flow from the distance of competing forces to the universal, rather than some strategic or random process. More broadly, the logic of consistency accounts for the creation, stability and change and significance of norms and institutions.

3.1. Anchoring

This is an argument about moral argument in world society. Argument captures the constitutive elements of human rights and the way political actors employ them for diverse purposes. Claims and counterclaims of appropriate invocation of human rights within the UN reflect the absence of a foundation. Political actors invoke human rights primarily rhetorically, as Norberto Bobbio notes, given that their status and formulation remain ‘very ambiguous, lacking in rigour’, betraying their groundless existence. Incessant and antithetical appeals to human rights blur the critical distinction between rights ‘being campaigned for’ and rights ‘recognised and protected’: ‘[t]he only thing we can establish so far’, Bobbio emphasises, ‘is that they are the expressions of ideals aspired to, and the title of ‘rights’ serves only to give them an aura of nobility’.⁵¹ Nothing is fundamental or inevitable about the meaning or force of human rights: both rest solely on contingent practices. ‘Talk of natural, fundamental, ineliminable or inviolable rights may represent a persuasive formula to back a demand in a political publication,’ Bobbio explains, ‘but it has no theoretical value, and is therefore completely irrelevant to human rights theory’.⁵² Human rights rest on concrete

⁵¹ Norberto Bobbio, *The Age of Rights* (Cambridge: Polity, 1996), xiv.

⁵² Bobbio, xii.

social practices, not something above or beyond. Yet arguments about human rights are not limited to the resources that human rights have to offer. A wide spectrum of arguments can be observed, ranging from technical, scientific, legal, historical and political arguments to cultural, religious and moral arguments, with human rights arguments being part thereof. Struggle about human rights represent a point at which various forms of arguments intersect and determine their relevance in shaping shared notions of right and wrong in world society.

But this is not an argument about arguments per se. It is an argument about how arguments produce fundamental normative and institutional change in world society. This is a terrain that Neta Crawford has explored in an exemplary fashion, showing the nexus between argument and fundamental change, as illustrated most dramatically by the delegitimization and demise of long-standing practices such as slavery and colonialism.⁵³ Persuasion is crucial to her mechanism of change, first normative and then institutional: both forms of change occur when ‘arguments are persuasive among enough individuals and groups’.⁵⁴ Persuasion of large groups is necessary to change normative beliefs about specific practices and then the practices themselves. However, Crawford does not explain when arguments become persuasive in the first place: the number of actors embracing an argument is a description of a phenomenon that requires an explanation, not the explanation, although this is a typical erroneous assumption in norms research. It stems from the influential model of Martha Finnemore and Kathryn Sikkink, which rests entirely on the critical role of a ‘critical mass’ in giving rise and weight to norms.⁵⁵ The same anomaly affects scholarship subscribing to Habermas’ forceless force of the ‘better argument’, exemplified by Thomas Risse’s account

⁵³ Neta Crawford, *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention* (Cambridge: Cambridge University Press, 2002).

⁵⁴ Crawford, 7.

⁵⁵ Finnemore and Sikkink, ‘International Norm Dynamics and Political Change’, 895–96.

of communicative action in world politics,⁵⁶ even as Habermas himself had meant it as a normative statement about ideal speech, not practical discourse.⁵⁷ The same holds for legal reasoning, even as legal claims are made as if they were the views of some impartial spectator, when Martti Koskenniemi asserts that legal rules can be ‘invoked to justify any behaviour’, ultimately rendering international law ‘useless as a means for justifying or criticising international behaviour’.⁵⁸ From such radical indeterminacy no argument can ever become persuasive enough to change minds or practices. This means that something beyond specific arguments must determine their weight and potential for substantive transformation in world society.

Having surveyed the reactionary rhetoric over the span of two centuries, Albert Hirschman reveals the importance of the inner logic of the argument itself in shaping the range and role of arguments, when he remarks that ‘discourse is shaped, not so much by personality traits, but simply by the *imperatives of argument*, almost regardless of the desires, character, or convictions of the participants’.⁵⁹ Beyond demonstrating the force of arguments in bringing about significant change, Hirschman points to factors external to arguments that might determine their weight, without however elaborating on what they might be. The link with precedents and the fit with shared understandings, Darren Hawkins argues, explain when arguments prevail. Even as he ultimately relies on ‘a large number of states’ and large degree of consensus to show when arguments become persuasive, falling back on a typical tautology, the identification of the role of precedent is a crucial element in understanding the

⁵⁶ Thomas Risse, “‘Let’s Argue!’: Communicative Action in World Politics’, *International Organization* 54, no. 1 (1 January 2000): 1–39.

⁵⁷ Jürgen Habermas, *Legitimation Crisis* (Cambridge: Polity Press, 1992), 108.

⁵⁸ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006), 67.

⁵⁹ Albert O. Hirschman, *The Rhetoric of Reaction. Perversity, Futility, Jeopardy* (Cambridge, Massachusetts: Harvard University Press, 1991), x [emphasis in original].

variable weight of arguments.⁶⁰ By drawing links among arguments, precedents and normative change, Wayne Sandholtz makes a more comprehensive and systematic attempt to show how and when arguments matter to bring about change, even as his mechanism for change rests on socialisation, much like Crawford's.⁶¹ What is more, he explicitly recognises the role of consistency to explain the force of international norms: '[w]ithout some fundamental level of consistency, rules cease to be rules', Sandholtz asserts.⁶² Combined with his explicit references to the importance of 'meta-norms', Sandholtz points to core elements of the logic of consistency.⁶³

Even if it remains an untheorized diffuse force, consistency serves as the unsung source for fundamental change in the work of Gunnar Myrdal. He saw clearly that the emancipation of blacks in the United States rested on their ability to expose the staggering gap between the American creed and the practice of segregation. 'The whites have all the power', Myrdal observes, 'but they are split in their moral personality. Their better selves are with the insurgents. The Negroes do not need any other allies'.⁶⁴ This reasoning does not make sense outside the framework of consistency, as are core assertions throughout his prescient work. Within the unstated framework of consistency, blacks have 'the law as a weapon in the caste struggle' and the 'white man's own conscience' as their allies,' revealing that:

⁶⁰ Darren Hawkins, 'Explaining Costly International Institutions: Persuasion and Enforceable Human Rights Norms', *International Studies Quarterly* 48, no. 4 (December 2004): 787.

⁶¹ Wayne Sandholtz, 'Dynamics of International Norm Change: Rules against Wartime Plunder', *European Journal of International Relations* 14, no. 1 (1 March 2008): 104.

⁶² Sandholtz, 107.

⁶³ Sandholtz and Stiles, *International Norms and Cycles of Change*, 331–32.

⁶⁴ Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (New York: Harper & Brothers Publishers, 1944), 1004.

‘[t]he white man can humiliate the Negro; he can thwart his ambitions; he can starve him; he can press him down into vice and crime; he can occasionally beat him and even kill him; but he does not have the moral stamina to make the Negro's subjugation legal and approved by society. Against that stands not only the Constitution and the laws which could be changed, but also the American Creed which is firmly rooted in the Americans' hearts’.⁶⁵

Myrdal illustrates how the logic of consistency subverts a highly unequal balance of power, where consistency serves as a meta-norm that gives meaning to endless strife of competing moral claims. Ian Clark points to the same logic when asserting the existence of world society, showing how the weaponization of human rights during the WWII lent them ‘an immensely powerful role for the post-war future’, thanks to the role of world public opinion or conscience –illustrating world society in action.⁶⁶ Even as it remains implicit, consistency is the logic that lays behind the weight of human rights claims and role in instituting major transformation. The social geometry developed by Donald Black offers the coordinates from which to trace the location, movement and direction of human rights claims, even if he is unconcerned with the question of consistency or human rights.⁶⁷ His pure sociology puts in high relief the decisive role of the location and direction of claims in understanding how the social structure, rather than dispositions of individual agents, determines the character and weight of moral claims. I integrate these insights into a unified framework as I develop the logic of consistency and explicate the relationship between consistency and the universal, and how their interaction can account for the rise of human rights institutions.

⁶⁵ Myrdal, 1009–10.

⁶⁶ Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2007), 147.

⁶⁷ Donald Black, *The Social Structure of Right and Wrong, Revised Edition* (San Diego: Academic Press, 1998).

3.2. Implications

The logic of consistency offers a systematic theory to explain the variable force of arguments and the conditions for normative and institutional change and stability, the central contribution of the thesis. The logic of consistency allows for a systematic explanation of the rise, development and relation amongst the Treaty Bodies, the Special Procedures and the Universal Periodic Review, departing radically from existing grand and middle-range IR theories. It reveals the mosaic of different features of each institution taken separately, and general patterns when seen as a formation, demonstrating how they cohere to form an institutionalised response to the perennial quest of states to balance rights with responsibilities. These institutions represent competing attempts by states to show consistency between their practices and the obligations imposed by the norms they have assumed, the degree of which fluctuates depending on the balance of forces pushing in different directions.

The distinct normative zones that emerge from the dialectic of consistency with the universal—polarization, recognition, toleration, and negation—reach beyond rendering intelligible the variation within and among these institutions. Polarization elucidates the movement and consequences of moral conflict in absence of any shared understanding of the universal or absolute particularism, expressions of which can be found in different domains and times. Toleration helps conceptualise how agents cope with their obligations and gives a systematic account of their attempts to evade and qualify obligations through reservations, declarations and understandings. Negation allows for an understanding of when norms acquire hegemonic status, and how they escape control of even hegemonic powers, who must act according to their dictates too. Crucially, hegemony appears as the result, not the cause of

the primacy of norms: it is the *explanans*, not the *explanandum*. Furthermore, it shows which values and norms are secure and how they can be secured. Recognition identifies the conditions under which the *status quo* gives in, and reform becomes possible, that is, how and when reformist arguments win over reactionary arguments, and how change results from this confrontation; it is where radical indeterminacy ends, and transformation begins. Taken as a formation, these normative zones provide pathways to move beyond the binary discussion of universalism and particularism at the heart of cosmopolitanism, revealing the immanent ground of universalism, rather than viewing it as a measure of consensus or ‘cultural unity’ in world society. Their distinctive and combined insights, interrelations and sequence of movement, lends these normative zones extraordinary explanatory power across domains and disciplines.

3.2. Limitations

The force of the logic of consistency is positively correlated to the degree to which states justify their practices with shared norms. The more political agents rely on shared norms to justify their attitudes and behaviour, the stronger the force of the logic of consistency becomes. The logic of consistency breaks down if political agents operate outside shared norms, and especially if they openly reject them; states or leaders willing to forfeit shared norms are not bound by consistency. Leaders like Rodrigo Duterte, Vladimir Putin, or Donald Trump, who deride and openly reject elementary shared norms and principles, are impervious to the logic of consistency. In fact, Putin has a policy in place to expose and magnify the flaws of liberal democracies in order to destroy shared standards for adjudicating normal and deviant practices, deliberately generating radical uncertainty and erosion of all authority, except his strong leadership, which he presents as indispensable to cope with the

angst he purposely creates.⁶⁸ Putin's policy seeks to destroy the shared universal, eradicating the shared standard of right and wrong, in order to avoid exposure of inconsistency with shared rules and norms—marking a decisive and deliberate move away from the constraints of consistency.

Furthermore, exposure of inconsistency does not necessarily lead to the provision of consistency. In certain situations, it can yield reverse consistency: instead of changing practices to fit the norm, it is the norm that is changed to validate previously transgressive practices. For example, rather than bringing drone warfare in line with existing rules, the Obama administration changed the legalisation to make an illegal practice legal.⁶⁹ In fact, Obama intensified the lawfare to manufacture what Rebecca Sanders calls 'plausible legality' in order to avoid accountability for an illegal practice, which the Trump administration has fully embraced.⁷⁰ Rather than halting the militarization of Japan in violation of its own constitution, the aim of Shinzō Abe's government has been to change the constitution to validate what is an unconstitutional practice.⁷¹ Exposure of inconsistency can also force the agent put in spotlight to distance himself from the norm that renders his behaviour deviant; in

⁶⁸ Peter Pomerantsev, *This Is Not Propaganda: Adventures in the War Against Reality* (London: Faber & Faber, 2019).

⁶⁹ Matthew Evangelista, 'How the Geneva Conventions Matter', in *Do the Geneva Conventions Matter?*, ed. Matthew Evangelista and Nina Tannenwald (Oxford: Oxford University Press, 2017), 331–32; Andris Banka and Adam Quinn, 'Killing Norms Softly: US Targeted Killing, Quasi-Secrecy and the Assassination Ban', *Security Studies* 27, no. 4 (2 October 2018): 665–703.

⁷⁰ Rebecca Sanders, *Plausible Legality: Legal Culture and Political Imperative in the Global War on Terror* (New York: Oxford University Press, 2018); Rebecca Sanders, 'Legal Frontiers: Targeted Killing at the Borders of War', *Journal of Human Rights* 13, no. 4 (2 October 2014): 512–36.

⁷¹ William Choong, 'Defence and Japan's Constitutional Debate', *Survival* 57, no. 2 (4 March 2015): 173–92.

distancing themselves from shared norms, actors elect to forgo the benefits of the justificatory power of norms for their action instead of repairing consistency with them.⁷²

But whilst rejection or avoidance of consistency are realistic options in several cases for several agents, it is unlikely that the rest will follow suit as regards basic universal norms, unless we witness unforeseeable exodus from shared norms or the total collapse of world society due to cataclysmic war or environmental catastrophe. The move towards substantive consistency of particular practices with the universal ideal is subject to unending struggle and strong countervailing forces, but it is the likely course of action so long as world society survives.

4. Cases

The Treaty Bodies, the Special Procedures and the Universal Periodic Review have resulted from the same struggle about the same concern—international scrutiny of national human rights practices—yet they have been studied separately and in isolation.⁷³ They have been treated as a domain of legal scholars who have described in detail the decisions leading to each of these institutions, and mainly the legal implications of their application. Legal scholars have not only created the field; they have actively participated in shaping the system

⁷² Allison Carnegie and Austin Carson, ‘The Spotlight’s Harsh Glare: Rethinking Publicity and International Order’, *International Organization* 72, no. 3 (2018): 627–57.

⁷³ Philip Alston, *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1996); Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights* (Antwerp: Intersentia, 2005); Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000); Helen Keller and Geir Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012); Hilary Charlesworth and Emma Larking, *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge: Cambridge University Press, 2015); Bertrand G. Ramcharan, *The Protection Roles of UN Human Rights Special Procedures* (Leiden: BRILL, 2009); Aoife Nolan, Rosa Freedman, and Thérèse Murphy, *The United Nations Special Procedures System* (Leiden: Brill, 2017).

both from within and without. Their analyses tend to follow the chronological development and evolution of especially the Treaty Bodies and the Special Procedures, focusing primarily on specific cases. Whenever they have considered these institutions as a ‘system’ they have mainly analysed the endogenous development and evolution of each institution separately. It is only in cases where these institutions have been seen to duplicate one another that they have considered the relations among them.⁷⁴ Their preoccupation has been in describing the development and practical use of the separate parts of the system, rather than in theorising it, except for some *ad hoc* theoretical arguments or allusions.⁷⁵ But the material they have produced offers a necessary basis to theorise about the emergence and behaviour of the system as a whole. The discussion below gives a brief outline of the choices made with regard to the examination of representative aspects of these institutions in order to compare them in a systematic manner.

Despite their common source and similarities, these institutions reveal surprising variations that make consideration of the system as a whole necessary to understand both the separate parts and the whole. This is striking given that they all pursue the same manifest goal in the same area, when such variation is typically associated with varying functional demands in

⁷⁴ Nigel Rodley, ‘United Nations Human Rights Treaty Bodies and Special Procedures of the Commission on Human Rights: Complementarity or Competition?’, *Human Rights Quarterly* 25, no. 4 (1 November 2003): 882–908; Nigel S. Rodley, ‘The United Nations Human Rights Council, Its Special Procedures, and Its Relationship with the Treaty Bodies: Complementarity or Competition?’, in *New Institutions for Human Rights Protection*, ed. Kevin Boyle (Oxford: Oxford University Press, 2009), 49–75; Valentina Carraro, ‘Promoting Compliance with Human Rights: The Performance of the United Nations’ Universal Periodic Review and Treaty Bodies’, *International Studies Quarterly*, 2019, 1–15; Valentina Carraro, ‘The United Nations Treaty Bodies and Universal Periodic Review: Advancing Human Rights by Preventing Politicization?’, *Human Rights Quarterly* 39, no. 4 (3 November 2017): 943–70.

⁷⁵ Philip Alston, ‘Hobbling the Monitors: Should U.N. Human Rights Monitors Be Accountable?’, *Harvard International Law Journal* 52, no. 2 (2011): 561–649.

differing issue areas.⁷⁶ These institutions differ along several dimensions, including most importantly their mandate, sources of information and actors that can collect and assess it, the degree of publicity they attract, but share one thing in common: politically binding decisions. The stability of this basic institutional feature—amidst continuous conflict among states about their use and orientation—can hardly be accidental, as it has persisted over seven decades. Nevertheless, whether such variation reflects deliberate institutional choices by states, as Joseph Jupille, Walter Mattli and Duncan Snidal would predict,⁷⁷ accident or something else remains to be explained. Variation is however such a striking feature of the system that it cannot be ignored if the goal is to understand its significance.

4.1. Relational aspects

This variation calls for an examination of each institution individually and in relation to one another to understand their distinct character and combined formation. The simple fact that these institutions have developed in reaction to one another indicates that they are relational bodies, implying that none of them can be understood without assessing their interrelationship. For the study of any of them without considering their relational character would produce only partial insights about both the part and the whole, let alone their broader implications. It is in considering the range of states' positions vis-à-vis these three institutions that we can begin to understand their seemingly contradictory positions—in preferring one institution over another or in reversing their order of preference in time, but also synchronically. For example, it is not possible to explain the position of China or that of the

⁷⁶ Barbara Koremenos, Charles Lipson, and Duncan Snidal, 'The Rational Design of International Institutions', *International Organization* 55, no. 04 (2001): 761–99.

⁷⁷ Jupille, Mattli, and Snidal, *Institutional Choice and Global Commerce*.

European Union vis-à-vis the Universal Periodic Review, without understanding their respective opposition to and support for the Special Procedures.

Choices need to be made even within these three monitoring institutions as there are countless aspects to consider and angles from which to analyse them. One can study their operation and variable effectiveness in specific cases, the attitudes and choices of specific countries or group of countries vis-à-vis specific features or institutions in comparison to other institutions and features. More substantively, one can study the contribution of these institutions in articulating and expanding specific rights or the very emergence and persistence of the norm of monitoring itself, or their performance in specific areas or over time. These are sensible lines of research that could make significant contributions to a more systematic understanding of the monitoring system. All these questions will be relevant in the analysis, but less central that would do justice to any of them, as the focus remains on the rise and design of the system. This in itself involves a conscious choice of excluding *ad hoc*, informal or non-institutionalised forms of monitoring that exist alongside the formal system. These concern specific commissions of inquiry or fact-finding missions that are launched infrequently in parallel to the formal system, but the relation between the two and their significance remain to be explained. The hope is that the choice for the institutionalised system offers a vantage point and firmer ground from where one could analyse regularities and irregularities in state approaches to human rights monitoring more generally.

4.2. Historical development

Seeking an understanding of the rise and development of these institution in relation to one another, the investigation prioritises their historical context in which these institutions came into being, considering the distinct force and interrelationship of actors, structures, processes,

arguments that accompanied their rise and development. Prioritisation of context should not be confused with historical institutionalism. The endeavour is to theorise the relationships of these factors and show how they led to human rights institutions in their natural habitat rather than surrendering all agency to historical context or abstracting it away by focusing on individual agents as if they interacted in the void. Nor should it be equated with the agency-structure debates and how either of them is co-constituted—that is a starting point. Rather, the challenge is to specify what factors and processes give social interaction structure and agency and how they inform shared meaning and action, including transformational change.

Taking the historical context as a starting point of the analysis helps in mitigating the pernicious effect of preconceived ideas about the relative importance attributed to specific factors—leaving the question completely open as to which factor or combination of factors are relevant, how, and when. This also imposes a choice for an aggregate level of analysis – focusing not on specific or particular actions of specific actors, but rather on prevailing positions around which political actors coalesced and how they shaped the final outcomes – which are considered as shared outcomes rather than the sum of individual acts. This implies a more sociological understanding of the phenomenon in question, stressing the demands of association with social positions in specific social structures, rather than the properties and dispositions of agents. In considering all three institutions, the thesis has as ambition to understand the basics of the logic of the monitoring system and develop an analytical map to explore other more substantive questions about their operation and significance in a more systematic and cumulative fashion.

The patterns of political action and its effects captured in the analysis of the rise of human rights institutions emerge from an open-ended perspective rather than theoretical expectations

about what should be observable. For example, the critical role of the Soviet Union in the rise of the Special Procedures or the critical role of the United States in preventing them, the failure of both to prevent the recognition of the right of individual petition or the emergence of permanent international scrutiny, come to light through this perspective; approaches that basically confirm their theoretical premisses (e.g. democratic regimes build and support human rights norms and institutions, authoritarian regimes resist and destroy them) obscure rather than provide insight into the collective processes and how diverse moral visions and logics interact to give rise to collective outcomes. Equally, the investigation does not follow specific periods as recent historiography does, where each work prioritises the period under investigation as the critical period for the breakthrough of human rights –whether it is the 1940s, the 1950s, the 1960s, the 1970s or the 1990s.⁷⁸ Ironically, in showing that each of these distinct periods is ‘critical’ for the rise of human rights, the combined result is that neither of them is: that is, primacy of one period over another makes little sense, other than in offering insight into the advancement of human rights in that period.

This does not mean that the development of human rights norms and institutions has moved according to some flat line, exponential or ‘punctuated equilibria’—they have been subject to constant struggle and pressures pulling in different directions. Yet there is no good reason to overlook supposedly small steps and measures in the search of ‘big bang’ moments, when

⁷⁸ Mark Mazower, ‘The Strange Triumph of Human Rights, 1933–1950’, *The Historical Journal* 47, no. 02 (2004): 379–98; Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen*, 3rd edition (Philadelphia: University of Pennsylvania Press, 2011); Alfred William Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2004); Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Massachusetts: Harvard University Press, 2010); Jan Eckel and Samuel Moyn, eds., *The Breakthrough: Human Rights in the 1970s* (Philadelphia: University of Pennsylvania Press, 2013); Steven L. B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (New York: Cambridge University Press, 2016); Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca, NY: Cornell University Press, 2013).

major changes do not make sense without considering the accumulation of traces stemming from small steps and seemingly unimportant measures over a long period of time. Viewed from the perspective of the dialectic of rights and responsibilities, it becomes possible to trace and connect the various steps and measures taken in time, in their historical context and varying intensities, without placing arbitrary thresholds as to the relevance of specific developments. All these measures are relevant—the relative importance of each step should appear after considering all of them and understanding how they cohere to create the system as a whole. The investigation of the rise of human rights institutions gives no indication of the relevance of such periodization. Visible advances in the construction of the system cannot be understood without considering antecedent steps and the logic driving the movement—the logic of consistency.

5. Evidence

5.1. Data collection

The empirical analysis rests on primary sources and non-participant observation, supplemented with semi-structured elite interviews with directly involved officials and activists as well as scholarly accounts. Each of these sources has limitations but a cross-triangulation can help to mitigate confirmation bias and other types of errors that would distort analysis. Primary materials come from electronic and physical UN documents in Geneva, and New York. Relevant political action with regard to the monitoring system involves several UN organs, including the General Assembly, the Economic and Social Council, and the Commission on Human Rights. The Office of the High Commissioner for Human Rights. The UN archives in Geneva contain most of the relevant documents. This includes official documents and memos from various UN bodies, and state delegations,

private correspondence between different agencies, minutes of meetings, *travaux préparatoires* of different mechanisms. These documents provide direct evidence of the political life and context of the construction and development of human rights institutions, recording the public intentions and objectives of political actors as well as their discursive practices and range of speech acts in supporting or opposing specific measures. However, finding the right sample of information from the population of relevant information remains a challenge. UN archives have their own practices and rules in recording and storing information, so what they store does not contain all the relevant information that could be relevant to this investigation.

Documents from national delegations can help reconstruct or fill in gaps, but they are also selective about the kind of information they release and the timing when they release it. What compounds the problem further is that UN organs and national delegations may dissimilate and deliberately distort the data that they make available. One way to circumvent this problem is to rely on leaked documents and recently declassified documents. These documents can be expected to provide a greater degree of ‘sincerity’ about the intentions of actors and can be treated with a high degree of confidence. Nevertheless, the problem persists, and special care is taken in order to assess which documents inspire a ‘high’ or ‘low’ degree of confidence, based on general expectations about the reliability of the source. One crucial implication is that it is unlikely to find a ‘smoking gun’ text to confirm or reject the argument. What is required instead is a series of documents of different types from different sources that shows a consistent pattern of occurrence the elements underpinning the argument.

Semi-structured elite interviews are another way to minimise the errors that can bias analysis, to obtain non-recorded data and conduct joint verification with archival material. They also allow us to explore and cross-check various different storylines of relevant actors about specific events and are therefore a useful tool to mitigate problems of reliability and validity.⁷⁹ They are especially useful to go beyond written records but also as means to identify specific factors and put in context specific actions and events that are referred to in public records. The aim has been to speak to a representative sample of people from the UN, national delegations and civil society and cover especially key players with consequential positions in the deliberations and negotiations. However, interviews have serious limitations as well. The first obvious defect of this strategy is that it is difficult to find people who were active in negotiations in the late 1950s. This creates an imbalance in the amount of the non-recorded information. In addition, interviews suffer from dissimulation, rationalisation, and loss of memory, partiality and segmentation. It is also unlikely that these people remember their own intentions, and might cast their intentions in contemporary social desirable terms.

That is why triangulation is crucial, as archival inquiry generates original evidence of what really happened at the time and going back to the source seems essential. Yet there is no reason to take archival texts as reliable either—they might also dissimulate and have been produced at a time with a specific goal in mind, not to simply record what happened. In considering the drafting of the Universal Declaration, William Schabas points to the strategic composition and archiving of documents as he observes that: ‘participating States are quite conscious of the fact that they are constructing a documentary record that will be consulted in

⁷⁹ Joel D. Aberbach and Bert A. Rockman, ‘Conducting and Coding Elite Interviews’, *PS: Political Science and Politics* 35, no. 4 (1 December 2002): 673–76; Jeffrey M. Berry, ‘Validity and Reliability Issues in Elite Interviewing’, *PS: Political Science and Politics* 35, no. 4 (1 December 2002): 679–82.

the future and quite possibly invoked in legal disputes. They make statements and reservations that are intended to condition the future interpretation of the text that is being adopted'.⁸⁰ Also, diaries, letters, private or leaked documents, memos, comments at the margins of documents—all of these sources can be critical to double-check public records and reconstruct what happened back then. So, interviews are useful to identify and contextualise specific factors and actors and complement gaps in the archival documents but are not in themselves a basis for the analysis or even less so for the actual argument. Irrespective of the limitations of sources, however, all necessary elements of the argument rest on first-hand empirical evidence that is accessible for everyone to inspect.

5.2. Data analysis

The empirical analysis of texts rests on philosophical assumptions that take social objects as units of analysis. They are texts and other traces that contain claims, counterclaims, promises, commitments, obligations, denunciations, counter accusations...they make up the ontology of the social world. The documentality approach developed by Maurizio Ferraris is particularly relevant given the importance it places on documents. Documents serve as constant reminders of prior promises and obligations, which might contradict actual behaviour. It goes without saying that social objects depend solely and entirely on humans—they would not exist without us.⁸¹ What documents say has no essence or foundation; everything depends on what traces they leave in the form of signs, numbers, and words, come to signify. It follows that utterances or propositions have no inherent meaning but acquire all meaning in context.

⁸⁰ William A. Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge: Cambridge University Press, 2013), xxxviii.

⁸¹ Maurizio Ferraris, *Dove sei? Ontologia del telefonino* (Milano: Bompiani, 2005), 202–4; Maurizio Ferraris, *Documentalità. Perché è necessario lasciar tracce*, 2 edizione (Roma: Laterza, 2009), 176–77.

Reality is created in language and whatever representation that we can obtain of reality is divorced from *das Ding an sich*. What we see is a phenomenon that is entirely the product of our senses. The distinction Frege makes between ‘sense and reference’, illustrated by the example of ‘the evening star’ and ‘the morning star’ having the same reference (Venus) but meaning entirely different things, elucidates the arbitrary relation between meaning and object.⁸² This is in line with the ordinary language philosophy developed by J. L. Austin and applied with fidelity by Friedrich Kratochwil in International Relations.⁸³ Speech acts are the locus of action: performances, not essence. What matters for speech acts is not the intention or the disposition of the speaker, but the performative power of her utterance.

Performances are visible in the public exchanges of views and justifications of positions of different agents in their approaches vis-à-vis human rights institutions. Uncovering their significance requires a deep understanding of texts regarding the intentions that actors seek to convey, the ways in which the audience receives them, the ideational environment and political context in which the utterance was made, and of course the information contained in it. Context is essential for understanding specific utterances or speech acts, as Quentin Skinner shows.⁸⁴ It is crucial to consider the locutionary, illocutionary and perlocutionary force of speech acts in order to grasp what diplomats or activists are *doing* in the way they

⁸² G. E. M. Anscombe, *An Introduction to Wittgenstein's Tractatus*, 2nd Revised edition (New York: Harper Torchbooks, 1965), 13.

⁸³ J. L. Austin, *How to Do Things with Words: Second Edition*, ed. J. O. Urmson, 2 edition (Oxford: Oxford University Press, 1962); Oswald Hanfling, *Philosophy and Ordinary Language: The Bent and Genius of Our Tongue* (London: Routledge, 2003); Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989).

⁸⁴ Quentin Skinner, *Visions of Politics. Regarding Method*, vol. I (Cambridge: Cambridge University Press, 2002).

express themselves on aspects of human rights institutions. The socio-political context, domestic and global events surrounding the production of the text, are particularly important to understand the purpose of speech acts. Understanding what they mean requires also understanding the ideational or discursive environment, especially as specific actions and words may not have the same meaning for different actors in time and space.

These considerations are crucial because political rhetoric is always strategic and always reflects something about the environment of expression and the idea expressed at that time. Interviews are not very useful to obtain this kind of data and are an unreliable source about the context in which specific speech acts are made. To try and gauge their meaning, we need to try and find patterns of consistency among many different texts and sources, by for instance comparing and contrasting official and vernacular texts, from NGOs, media and especially private texts. Yet even individual private texts can be strategic, perhaps in anticipation that they will one day be studied. So, we need to make a contextual judgment and ask questions such as: does the state representative behave in the way it appears in the text? Or is the person likely to have believed what she says? Some individuals of course deviate from normal expectation as Skinner illustrates with the bizarre belief in witches by Jean Bodin, or Aristotle's belief that movement from one place to the other transformed the quality of our bodies.⁸⁵ The focus is instead on what a normal reasonable person would do or say, given her capacity and the environment in which she operated. This problem can be somewhat mitigated by trying to find consistency expressed over different texts and contexts, embedded in their relevant ideational environment. With these important caveats in mind, the focus will be in understanding the character of justifications and range of speech acts in support or opposition of the system of monitoring.

⁸⁵ Skinner, I:28.

The meaning of words found in text is contingent and volatile, depending on the balance of force between competing interpretations. Interpretations are not free-floating elements but a clear expression of power, the result of constant struggle to articulate and dissolve specific meanings to engender a concrete reality for specific interests. As Ernst Gellner protests, meaning is the result of interaction between language and material reality, concrete things, not just words.⁸⁶ It is not either or, but the interaction of both that helps us understand the dynamic use of language and the power that underpins it. Language makes power and power is expressed through language. The impossibility of locating a foundation for the meaning of language should not obscure the power that stands behind it, nor the projections of different meanings of the same words or social objects for specific purposes in time.

Language is in the service of the construction and perpetuation of specific ‘truths’ and ‘objectivity’ about the social world and how agents relate to them. This comes to light in the approach developed by Ernesto Laclau and Chantal Mouffe to study political discourse.⁸⁷

They highlight the discursive struggle for power and the agonistic conflict about meaning and significance, as this struggle seeks to articulate and regulate meaning in absence of foundational meaning. Inevitably, struggle is about the projection and imposition of a particular view as a *common sense* or reflection of the universal, by the mere fact that ‘every object is constituted as an object of discourse’.⁸⁸ The articulation of relations between different objects is central to understanding how the meaning of certain objects is ‘fixated’ in

⁸⁶ Ernest Gellner, *Words and Things: An Examination Of, and an Attack On, Linguistic Philosophy* (Boston: Beacon Press, 1959).

⁸⁷ Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, 2nd Revised edition (London ; New York: Verso Books, 2001).

⁸⁸ Laclau and Mouffe, 107.

certain contexts, and how it relates to other objects and what it signifies. In a nutshell, they summarise their strategy as follows:

‘[w]e will call *articulation* any practice establishing a relation among elements such that their identity is modified as a result of the articulatory practice. The structured totality resulting from the articulatory practice, we will call *discourse*. The differential positions, insofar as they appear articulated within a discourse, we will call *moments*. By contrast, we will call *element* any difference that is not discursively articulated’.⁸⁹

This articulatory practice will be critical to render intelligible and assess the speech acts about the consistency of particular acts in relation to the universal, opening the way to understanding the source and implications of the struggle for the appropriate application of human rights regardless of whether or not agents endorse or violate them in practice. In particular it helps unearth three core elements of the following analysis: a) appeals to the universal, b) demonstration of distance from the universal, and c) addressing the distance with the universal –i.e. producing consistency.

6. Structure

The thesis is developed further in five chapters. Chapter 2 lays the foundations of the logic of consistency behind the argument outlined above. It formulates a theory to make sense of normative and institutional change, specifying the sources of change and stability of human rights norms and institutions without needing to rely on coercion, persuasion, socialisation, or path dependency. The next three chapters contain the empirical investigation of each of the

⁸⁹ Laclau and Mouffe, 105.

human rights institutions under consideration, tracing and making sense of the historical developments leading to their rise, design, and development, taking into account their interrelationships in order to make sense of each of them individually and in formation.

Chapter 3 analyses the emergence of the first institution to establish international scrutiny of national human rights practice – the Treaty Bodies; it emphasises the historical context to understand the contradictory forces that led to their creation, and the principles that make it possible: the recognition of the principle of universal rights in 1945 and the construction of the universal in the Universal Declaration in 1948. It then explains its design in light of the four normative zones of exposure of inconsistency with the universal derived from the logic of consistency –polarization, recognition, toleration and negation.

Chapter 4 adopts the same approach in tracing the emergence of a rival monitoring institution – the Special Procedures. It demonstrates how newly independent countries sought to create a non-conventional mechanism in their struggle against racism and colonialism but in so doing gave rise to a radical and intrusive institution which they came to deeply resent but could not eliminate. Combined with the Cold War rivalry between the United States and the Soviet Union, newly independent countries exposed every one of them to scrutiny with human rights obligations they had not explicitly assumed and constantly violated.

Chapter 5 investigates attempts by countries from the Global South to eradicate the Special Procedures via the creation of yet another institution – the Universal Periodic Review. Opponents of the Special Procedures appealed to the highest forms of the universalism in order to discredit and undermine their role in addressing some of the worst violations of universal rights, but in so doing they created an institution that operates in tandem with the

Special Procedures and the Treaty Bodies, rather than in contradiction to them; the universal horizon they employed to delegitimize legitimate concern with the scrutiny of universal rights compelled them to move toward an institution that reviews all human rights in all countries in addition, rather than as a substitute for the Special Procedures.

Chapter 6 offers some concluding observations about how the logic of consistency forced states to shift from zero international scrutiny of human rights to permanent, universal scrutiny of all rights in all countries at all times, with and without the consent of individual states. It then considers the application of consistency across different fields, showing how the unified framework of the logic of consistency with its four normative zones can illuminate a wide range of social, legal, political and philosophical phenomena.

Chapter II. The Logic of Consistency

Let me begin by reminding you that we found our way hither in the search after justice and injustice. [...]. I was only going to ask whether, if we have discovered them, we are to require that the just man should in nothing fail of absolute justice; or may we be satisfied with an approximation, and the attainment in him of a higher degree of justice than is to be found in other men? [...]. We were enquiring into the nature of absolute justice and into the character of the perfectly just, and into injustice and the perfectly unjust, that we might have an ideal. We were to look at these in order that we might judge of our own happiness and unhappiness according to the standard which they exhibited and the degree in which we resembled them, but not with any view of showing that they could exist in fact.

— Plato, *The Republic*, Book V⁹⁰

No matter how different the positions of political actors, and how opposed to and supportive of international scrutiny of national human rights practices, the arguments they employ to justify their action represent an arbitration in the realm of the ideal, whether they know it or not. The ideal can be observed in all positions that are articulated and projected from the point of view of the common good and the general interest, sometimes, of the highest universal aspirations. Portraying these speech acts as merely hypocritical or epiphenomenal utterances, is to profoundly misunderstand their meaning and force. What is at stake here is the need for an understanding of why political agents feel compelled to assume obligations they can never fulfil, and how the exposure of the gap between what they say and what they do affects their behaviour and the shared outcomes they give rise to, as well as the weight of moral arguments they rely on.

This task requires moving beyond an analysis of individual claims and counterclaims of inconsistency on their own terms, and considering instead the meta dimension that animates

⁹⁰ Benjamin Jowett, trans., *Dialogues of Plato*, Third Edition, vol. III (London: Oxford University Press, 1931), 169 (§472).

and lends meaning to specific claims. The meta-level is necessary to make sense of incessant appeals to high ideals by different political actors in pursuit of antithetical purposes, their dynamic and consequences. Plato's theory of ideas serves as a vantage point from which to explore the actual struggle of diplomats and activists in the name of universal rights. In the Platonic sense, the idea stands for the universal, the shared 'essence' of a family of particular acts—such as for instance a set of particular *just* acts that have in common an underlying idea of *justice*.⁹¹ Plato's idea in itself can never be a particular and therefore cannot exist in a way that is accessible to our senses.⁹² Instead, it should be viewed as a paradigm by which the possession by political agents of specific attributes can be considered and approximated. We can thus imagine various expressions of the idea but never access the idea itself. All particular representations are therefore imperfect copies of the universal, never exemplifying the universal itself. The particular is the opposite of the universal, the interaction of which is fundamental to the theory outlined here.⁹³

When political agents defend or attack particular practices in universal terms, they assess each other's actions according to the degree of adherence to the universal: they assess whether and to what extent their attitudes and behaviour is consistent with the universal professed. Consistency is what gives these appeals weight and makes sense of the dialectical struggle between singularity and universality. Consistency refers here to the absence of contradiction between two distinct standards, however they may be defined and irrespective of whether it refers to association between standards and action or any combination of them. It is an expression of the law of contradiction that underpins Aristotelian logic. In the spirit of

⁹¹ Bertrand Russell, *The Problems of Philosophy* (Oxford: Oxford University Press, 1978), 52.

⁹² Russell, Chapter 9.

⁹³ Russell, 53.

Plato's theory of ideas, no consistent act can ever exemplify the idea of consistency itself: particular acts of consistency are imperfect representations of the imperceptible idea of consistency. Imperceptible and unattainable it may be, consistency has nonetheless extraordinary material force.

The idea of consistency is the Archimedean point from which political agents navigate the endless and unavoidable contradictions with themselves and one another in world society, this chapter will argue. Consistency makes sense of both the existence of contradictions and the way political actors cope with them. What is revealed is that the distance of the particular from the universal forms the underlying current that fuels concerns about consistency and the behaviour of moral conflict in world society. Or, to be more precise, as consistency cannot exist in fact, the struggle is always about inconsistency with the universal; since consistency is never attainable, political agents expose each other's inconsistencies with the universal. In so doing, they generate pressure and galvanize support in favour of or against particular practices, leading to their stability or dissolution depending on their distance to the universal. However, the idea of consistency does not presume any form of 'pure essence'. Rather, it rests on the assumption that consistency becomes real if and for as long as the agents that invoke it act as if consistency were to have an ideal form towards which all political action must be oriented. As it is the political agents alone that enact its 'essence' in their practices, consistency is an immanent force; it can be described as a form of *social gravity*, akin to gravity in physics. Its gravitational pull is so strong that it configures agents and their positions and relentless adjustment in world society.

What follows below considers how consistency renders universal claims meaningful and significant, establishing the coordinates of its movement and the directions it takes. It points

to the extraordinary material force of consistency in configuring the parameters of political action within the human rights field and beyond. What emerges is a structural theory that offers a systematic explanation for the conditions under which moral argument makes a difference in the real world, in this case, in respect to normative and institutional change. It is imagined as a stand-alone theory and therefore forms the reference point from which other theories and logics are assessed to anchor it within the broader landscape of attempts to make sense of moral argument in world society.

The chapter is in three parts. It begins with an exposition of the assumptions and elements of consistency and the dynamic strife for consistency between particular practices and the universal which they are expected to embody. It then identifies four zones of exposure of inconsistency with the universal, or normative zones, that the strife for consistency generates, and articulates their distinctive implications and potential for substantive transformation. It concludes with an analysis of the interaction among normative zones in an attempt to trace the behaviour of the flow of consistency and its broader ramifications.

2.1. Contradiction and Consistency

The typical portrayal of perennial conflict in international society as a struggle for power does not point to a conducive environment for consistency to exist. Quite the contrary. What seems obvious is that the insoluble conflicts among the multitude of political agents produce endless contradictions and disparities, illustrating the revolutionary idea of Heraclitus that everything is in permanent flux and tension.⁹⁴ The struggle for power is seen to reflect what

⁹⁴ Heraclitus, *Art and Thought of Heraclitus: A New Arrangement and Translation of the Fragments with Literary and Philosophical Commentary*, ed. Charles Kahn (Cambridge: Cambridge University Press, 2004); David Wiggins, *Continuants: Their Activity, Their Being, and Their Identity* (Oxford: Oxford University Press, 2016), Chapter 6.

Martin Wight calls the ‘primacy of contradiction’—a central preoccupation in the thinking of Machiavelli, Hegel, Marx and Habermas amongst others.⁹⁵ These thinkers disagree deeply about many aspects of contradictions, including most importantly the level at which contradictions operate. As Martin Jay shows, whilst for Hegel and Marx contradiction operates at the level of social ontology (e.g. the irreconcilable conflict between capital and labour), for Habermas it is to be found in the use of language (e.g. ‘what is said is undercut by *how* it is said’).⁹⁶ What no one disputes, however, is that contradictions exist, are widespread and ineluctable. The international level only compounds countless aggregations of contradictions of a multitude of actors and their interactions. Furthermore, the deliberate and active attempts of political agents to pillory their adversaries by exposing their contradictions, magnifies the salience of contradictions even more. In their manifold forms, contradictions can be taken as the normal condition in international society.⁹⁷ In fact, they serve—mostly implicitly and sometimes explicitly—as a starting point of scholarship on international relations.

But this basic condition raises elementary questions. How can we know that there are contradictions in the first place? What makes them problematic? And why does that matter, and for whom? Necessarily, Bertrand Russell observes, ‘(...) the existence of some sort of thing, A, is a sign of the existence of some other sort of thing, B, either at the same time as A or at some earlier or later time, as for example thunder is a sign of the earlier existence of

⁹⁵ Martin Wight, *Four Seminal Thinkers in International Theory: Machiavelli, Grotius, Kant, and Mazzini* (Oxford: Oxford University Press, 2005), 10–14.

⁹⁶ Martin Jay, ‘The Debate over Performative Contradiction: Habermas versus the Poststructuralists’, in *Philosophical Interventions in the Unfinished Project of Enlightenment*, ed. Axel Honneth et al. (Cambridge, Massachusetts: The MIT Press, 1992), 165–266.

⁹⁷ Krasner, *Sovereignty*.

lightening'.⁹⁸ René Magritte echoes the same reasoning when he asserts that '[o]ne object suggests that there is another lurking behind it'.⁹⁹ What could that sign or object be?

In his early work, Ludwig Wittgenstein uncovers an old answer: contradiction appears as the sign of consistency or the object lurking behind it. Contradiction is inseparable from consistency, for it is impossible to speak of contradiction in the absence of a conception of consistency. In stark contrast to his later work, here Wittgenstein accepts the Aristotelian logic based on the law of contradiction, without which logic would be impossible.¹⁰⁰ Thought beyond consistency is illogical, and what is illogical is unthinkable, G.E.M. Anscombe infers from Wittgenstein's assertions.¹⁰¹ As he himself put it: '[i]t used to be said that God could create anything except what would be contrary to the laws of logic.—The truth is that we could not say what an 'illogical' world would look like'.¹⁰² This is a fundamental proposition because 'if you choose to be inconsistent, then you are, in effect opting out of the game of life that we are playing', Tushar Sarkar asserts.¹⁰³

Without an obvious link, Leszek Kołakowski comes to a strikingly similar conclusion, even as his intention is to praise inconsistency and condemn consistency. In his mind, inconsistency is 'simply a secret awareness of contradictions in the world'.¹⁰⁴ By

⁹⁸ Russell, *The Problems of Philosophy*, 33.

⁹⁹ Cathrin Klingsohr-Leroy, *Surrealism* (Köln: TASCHEN, 2004), 62.

¹⁰⁰ Consistency is critical to what Russell calls the 'Laws of Thought', which are: '(1) The law of identity: 'Whatever is, is', (2) The law of contradiction: 'Nothing can both be and not be', (3) The law of excluded middle: 'Everything must either be or not be' Russell, *The Problems of Philosophy*, 40.

¹⁰¹ Anscombe, *An Introduction to Wittgenstein's Tractatus*, 165.

¹⁰² Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, trans. D. F. Pears and B. F. McGuinness, 2 edition (London: Routledge, 2002), 3.031.

¹⁰³ Tushar Sarkar, 'Logics Beyond Consistency', in *Logic, Identity and Consistency*, ed. Pranab Kumar Sen (New Delhi: Allied Publishers, 1998), 199.

¹⁰⁴ Leszek Kołakowski, *Marxism and Beyond: On Historical Understanding and Individual Responsibility*, trans. Jane Zielonko Peel (London: Pall Mall Press, 1969), 234.

contradictions he means the ‘various values that are, notoriously throughout history, introduced into society by mutually antagonistic forces’.¹⁰⁵ These values are in contradiction because they are mutually exclusive and in permanent conflict, constantly vying for primacy and threatening to overtake one another, to affirm one value and negate another—a synthesis never being possible. A similar point is made by Jurgen Habermas when he argues that ‘[t]here can only be talk about “contradiction” in the light of consistency requirements’.¹⁰⁶ Contradiction is the idea of inconsistency and can only arise when ‘we are making assertions’, Wittgenstein insists.¹⁰⁷

Consistency is an expression of social reality, a social object; it is a form of the mind, a figment of the imagination—a necessary fiction. It does not exist in the physical reality. For indeed, as Graham Priest explains, ‘it makes no sense to suppose that reality is inconsistent or consistent’.¹⁰⁸ Contradictions are the result of the assertion of values and norms in associating specific behaviours with specific attributes at the creation of society that ineluctably contradict one another, Bernard Mandeville explicates.¹⁰⁹ If the values that contradict one another are a product of social reality, so is consistency; both division and unity are a product of our imagination, not a reflection of reality.¹¹⁰

But herein lurks a fundamental paradox. The process of contriving basic notions of right and wrong to create society, generates conflicts not only between different values, norms, and

¹⁰⁵ Kołakowski, 234.

¹⁰⁶ Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*, trans. Frederick G. Lawrence (Cambridge, Massachusetts: MIT Press, 1998), 188.

¹⁰⁷ Ludwig Wittgenstein, *Philosophical Remarks*, ed. Rush Rhees, Raymond Hargreaves, and Roger White (Chicago: University Of Chicago Press, 1980), 321.

¹⁰⁸ Graham Priest, *Doubt Truth to Be a Liar* (Oxford: Oxford University Press, 2006), 51.

¹⁰⁹ Mandeville, *The Fable of the Bees See: An Enquiry into the Origins of Moral Virtue*.

¹¹⁰ Paul Lodge, ‘Leibniz’s Notion Of An Aggregate’, *British Journal for the History of Philosophy* 9, no. 3 (October 2001): 467–86.

interests but also between biological instincts of human persons and their social attributes. Yet the survival of society depends on its capacity to mitigate the contradictions that necessarily flow from its creation. If left unmanaged, contradictions rip apart the social bonds that make up society and ultimately obliterate social structure, removing the basis on which contradictions can exist. Contradictions are a necessary condition for society to exist yet the survival of society rests precisely in coping with such contradictions. This is a perennial paradox that can never be resolved, not in any society, and certainly not in world society. Indeed, the main message of the relevant scholarship, especially of the early constructivists and the English School, is that world society exists despite deep and irresolvable divisions, not that the latter can ever be overcome.¹¹¹

What is striking is not that values and interests clash with one another—that is simply the human condition.¹¹² What is striking is that *shared* concerns of right and wrong arise, persist, and thrive, despite permanent antagonistic conflict. Divisions and contradictions that drive world society apart are painfully obvious; what is less obvious, and perhaps more critical, is ‘what makes the world hang together’ in face of such divisions.¹¹³ Consistency, then, is one of those less than obvious forces that are paramount not only for making manifold contradictions intelligible, but most importantly, for moulding them to fit world society. It is

¹¹¹ Friedrich Kratochwil, ‘The Force of Prescriptions’, *International Organization* 38, no. 4 (Autumn 1984): 685–708; Kratochwil, *Rules, Norms, and Decisions*; Nicholas Onuf, *World Of Our Making* (Columbia, S.C.: University of South Carolina Press, 1989); Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 2002); Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (Oxford: Oxford University Press, 2007), Chapter 3.

¹¹² Black, *The Social Structure of Right and Wrong, Revised Edition*; Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).

¹¹³ John Gerard Ruggie, ‘What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge’, *International Organization* 52, no. 4 (1 October 1998): 855–85.

a force whose presence has been recognised since antiquity and remains central to core questions in IR theory and far beyond (see Chapter 6).

But the idea of consistency is so powerful that it can lead to a paralysis of both thought and action. This was a central concern when Wittgenstein made a U-turn in his thinking about the philosophy of mathematics, reversing his position from complete submission to the law of contradiction, to outright rebellion against it: ‘Contradiction’, he rhetorically asks, ‘Why just this one *bogy*? That is surely very suspicious’.¹¹⁴ In later years he returned to the same problem in the hope of breaking free from it: ‘I predict a time when there will be mathematical investigations of calculi containing contradictions, and people will actually be proud of having emancipated themselves even from consistency’.¹¹⁵ This hope has been partially fulfilled, in relation to limited contradictions. Indeed, it has proven possible, as Pierce shows, to work with, rather than exclude, contradiction in logic, giving birth to a new branch of logic: paraconsistent or transconsistent logic.¹¹⁶ This is a form of a non-Euclidian, imaginary geometry wherein the Aristotelian law of contradiction does not hold, meaning that it is not absolute.

Starting from a different angle, Kołakowski mounts an astounding ideological assault on consistency, praising inconsistency instead.¹¹⁷ He denounces consistency for its fanatical and dogmatic tendencies and the deceitful idea of imposing a veneer of order upon an inherently

¹¹⁴ Ludwig Wittgenstein, *Remarks on the Foundations of Mathematics/Bemerkungen Über Die Grundlagen Der Mathematik*, ed. G. H. von Wright, R. Rhees, and G. E. M. Anscombe, trans. G. E. M. Anscombe (Cambridge, Massachusetts: The MIT Press, 1967), 130e [Emphasis in original].

¹¹⁵ Wittgenstein, *Philosophical Remarks*, 332.

¹¹⁶ Graham Priest, *In Contradiction: A Study of the Transconsistent*, Expanded edition (Oxford: Oxford University Press, 2006); Priest, *Doubt Truth to Be a Liar*, Chapter 1.

¹¹⁷ Kołakowski, *Marxism and Beyond*, 231–40.

and permanently contradictory social world. And yet he is pulled back by the gravitational force of consistency when he is forced to concede that inconsistency would be indefensible in what he calls ‘elementary situations’: genocide, torture and aggression.¹¹⁸ In these cases, he advocates consistent objection: under no circumstances should they be permissible. Yet he is forced to explicitly acknowledge that such a stance would be impossible without a notion of consistency. In fact, even the pursuit of inconsistency in a consistent fashion would in itself be consistent: consistently inconsistent. Conversely, inconsistent inconsistency would not be inconsistent either. Despite this effort, Kołakowski could not escape the iron law of consistency, and his attempt at discrediting consistency overlooks its underlying force in making the organisation of social and political life possible.

Nevertheless, the Sisyphean struggle against consistency points to the inescapable and permanent strife between consistency and inconsistency. Whilst neither consistency nor inconsistency are inherently good or bad, they are forces to be reckoned with; they are in constant tension and flux, but it might still be possible to point to their general tendencies and broad coordinates of movement and patterns of effects that flow from them.

2.2. Dialectic of consistency

The unending strife between consistency and inconsistency reflects a dialectic struggle about order and disorder, continuity and change, or even further between ‘orderly and disorderly souls’ in the Platonic sense.¹¹⁹ The method that has been used fruitfully to capture this type of conflict is the dialectical method, which resonates strongly with what Wight calls the

¹¹⁸ Kołakowski, 39–40.

¹¹⁹ Catherine H. Zuckert, *Plato’s Philosophers: The Coherence of the Dialogues* (Chicago: University of Chicago Press, 2012), Chapter 1.

‘primacy of contradiction’, and has become inseparable from analyses of contradictions across disciplines.¹²⁰ This method can be observed in Machiavelli when he discusses the tension between *essere* and *dover essere*, between *is* and *ought*.¹²¹ It is otherwise expressed as a dialectic between *fortuna* and *virtù*, between the contingent condition of the world and the attempt to master and remake it.¹²² Nietzsche recasts Machiavelli’s classical understanding of *virtù* in exclusively moral terms, framing the dialectic struggle as being between moralism and morality, between virtue and *virtù*. Whereas virtue encapsulates the generic and political use of morality as a means to naturalise and stabilize a specific order, *virtù*, in sharp contrast, is that extremely rare and onerous ethical perspective that can destabilise and transform the established order.¹²³ A similar logic underpins the work of critical theorists such as Bonnie Honig and Antonio Negri.¹²⁴ In the case of Negri, the struggle is one between constituted and constitutive power, where the former aims at preserving a specific order whilst the latter seeks to disrupt and alter it, amounting to an endless struggle between hegemonic and counter-hegemonic forces.¹²⁵ It is a dialectic that is inherent to power, Michel Foucault notes, never in a position of exteriority vis-à-vis

¹²⁰ Wight, *Four Seminal Thinkers in International Theory*, 10–14; Leszek Kołakowski, *Main Currents of Marxism: The Founders - The Golden Age - The Breakdown*, trans. P. S. Falla (New York: W. W. Norton & Company, 2005), Chapter 1.

¹²¹ Benedetto Fontana, *Hegemony and Power: On the Relation Between Gramsci and Machiavelli* (Minneapolis: University of Minnesota Press, 1993), Chapter 5 and 7.

¹²² I. Hannaford, ‘Machiavelli’s Concept of Virtù in the Prince and the Discourses Reconsidered’, *Political Studies* 20, no. 2 (June 1972): 185–89; W. R. Newell, ‘How Original Is Machiavelli?: A Consideration of Skinner’s Interpretation of Virtue and Fortune’, *Political Theory* 15, no. 4 (November 1987): 612–34.

¹²³ Friedrich Nietzsche, *The Will to Power*, ed. Walter Kaufmann, trans. Walter Kaufmann and R.J. Hollingdale, 1st edition (New York: Vintage Books - Random House, 1968), 175–76.

¹²⁴ Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press, 1993).

¹²⁵ Antonio Negri, *Insurgencies: Constituent Power and the Modern State* (Minneapolis: The University of Minnesota Press, 1999).

power.¹²⁶ When Hans Morgenthau asserts that the ‘revolt against power’ is ‘as universal as the aspiration for power itself’,¹²⁷ he is presumably referring to the same dialectic.

What exactly animates unending strife is not evident from strife itself—it is something that is beyond it. To the extent that conflict can be reduced to conflict about right and wrong, as Black maintains,¹²⁸ the dialectical conflict is about the constant struggle of agents to assert or deny particular practices as being right or wrong in the context within which they arise. But for that to happen there must be an ideal for competing forces to assess what act or practice is consistent or inconsistent with the notion of right or wrong they defend. The general terms in which agents articulate their positions points to the underlying idea of the universal, and the dialectic struggle is a struggle about the consistency of particular practices with the universal ideal they ought to embody. It is a struggle of consistency with the universal, which Pierre Bourdieu observes in a different context, where consistency appears as the central—albeit implicit—force when he ventures that:

‘[a] possible point of departure for reflections on ethics is the existence of universally witnessed, metadiscursive or metapractical, second-order strategies that agents employ in order to appear (in act or intention) to conform to a universal rule, even when their practice is at variance with perfect obedience to the rule or when it does not have perfect obedience to the rule as its principle’.¹²⁹

¹²⁶ Michel Foucault, *Histoire de la sexualité I: La Volonté de savoir* (Paris: Gallimard, 1976), 125–26.

¹²⁷ Morgenthau, *Politics Among Nations*, 169.

¹²⁸ Black, *The Social Structure of Right and Wrong, Revised Edition*.

¹²⁹ Pierre Bourdieu, *Practical Reason: On the Theory of Action* (Stanford: Stanford University Press, 1998), 141.

Bourdieu's incisive proposition uncovers the material force of the universal in shaping attitudes and behaviour, illustrating the nexus between consistency and the universal as well as the practical consequences of exposure of inconsistency of particular practices with the universal—from which they derive their force, and therefore, purport to embody. The force of the universal is not only explicit but constitutive of human rights norms and institutions: a practice is consistent or inconsistent only in relation to the universal. The unending strife among governmental representatives and civil society activists in world society gravitates towards basic choices of defending or attacking concrete appropriations of human rights norms and institutions in relation to the universal they purport to embody—which is what lends human rights the coveted value for which they are appropriated in the first place. Willingly, but perhaps unwittingly, agents are engaged in a practice of the universal: they are engaged in a struggle to appropriate the universal as much as they possibly can to best defend their particular practices and objectives.

How one political agent employs the universal to advance her position in world society constitutes one distinct practice, but since there are multiple and different types of agents that invoke the universal for multiple purposes, there will be manifold forms of practices of the universal. Yet some practices will appeal more convincingly to the universal than others, which means that some agents will be able to espouse the universal with more plausibility than others, even as no agent can ever exemplify the universal. It is a necessary corollary of the universal that all particular practices are at the very best imperfect representations of the universal; actual practices remain particular interpretations of the universal. This means that any practice of the universal can be exposed for not embodying the universal ideal it invokes, given the unending strife about the degree to which particular practices reflect the universal ideal, that is, about degrees of their inconsistency. Crucially, the power of agents in this

context is measured in terms of distance to the universal. The forces that defend or attack a specific practice are antithetical forces: forces that seek to defend a specific practice as embodiment of the universal and forces that seek to attack and disrupt a specific practice as embodiment of the universal. It is a struggle that can be reduced to attack on and defence of inconsistency in particular invocations of the universal.

2.2.1. Attacking inconsistency

It is impossible for any actor ever to employ universal rights in an unquestionably universal spirit—that is an ideal, not a real possibility. But logically, concerns about the abuse of universal norms begin only when they can be associated with particular interests of actors espousing them. Practically, this means *always*. Exposure of inconsistency in relation to basic notions of fairness has been an integral part of the struggle to disrupt specific orders or practices, and a force of major change. For example, the double standard that underpinned the order created by Europeans, which applied toleration in Europe and pursued the civilisation of inferior peoples outside of Europe, as Edward Keene points out, became the focal point of liberation movements seeking to bring down imperial rule.¹³⁰ European powers pursued the colonization of the world at the same time as they recognised political freedom in their own societies they, denying the same freedoms to the majority of the indigenous people, Uday Singh Mehta demonstrates.¹³¹ The challenge to this ‘prevailing regime of unequal entitlement’, Chris Reus-Smit maintains, served as the driving force in delegitimising empires and in installing individual rights.¹³² Exposure of the inconsistency of ‘Europeans

¹³⁰ Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002), 147.

¹³¹ Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought*, 2nd ed. (Chicago: University of Chicago Press, 1999), 7.

¹³² Christian Reus-Smit, *Individual Rights and the Making of the International System* (Cambridge: Cambridge University Press, 2013), 5.

embracing civil and political rights at home while denying such rights to their colonial peoples', Reus-Smit shows, featured prominently in the post-1945 decolonization struggle.¹³³

Exposure of inconsistency might be a common form of critique, but as Michael Walzer argues, it might be as 'the most important form of moral criticism'.¹³⁴ In fact, exposure of inconsistency can be so powerful that it can devour existing orders and turn into a destructive force of moral cruelty, Judith Shklar asserts.¹³⁵ But what is striking about the findings of Keene, Singh Mehta and Reus-Smit is that exposure of inconsistency is possible even in the absence of a shared universal, which the Universal Declaration introduced in 1948. That is, exposure of inconsistency in relation to idiosyncratic projections of universalism in accordance with their own terms, was sufficiently strong to fuel fundamental change in world society. Yet the rise of the shared universal marks a fundamental break with past critique, as it renders exposure of inconsistency harder to deny and therefore far more consequential, as shown in Chapters 3-6. Exposure of inconsistency with the shared universal is an expression of unending resistance to attempts at crystallising particular practices as hegemonic or universal practices. Given the ineluctably particular use of universal norms, exposure of discordance with whatever notion of their substantive implications is always possible. In fact, exposure can be seen as a normal and necessary corollary of any use of any universal norm at any time.

Forces that attack a specific inconsistency in human rights practice are forces that question a practice that is presented as an expression of the universal. They seek to unsettle the

¹³³ Reus-Smit, 11.

¹³⁴ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Fourth Edition (New York: Basic Books, 2006), xxiii.

¹³⁵ Judith N. Shklar, *Ordinary Vices* (Cambridge, Massachusetts: Harvard University Press, 1984), 86.

naturalness of that practice by revealing contradictions with the universal, as exemplified by efforts to politicise common sense practices. It is a way to expose, unmask and resist to a practice, entailing demands to revise or upend a norm or practice. The force of exposure has been felt across the United Nations, pushing towards the preservation and enhancement of universal validity of rights, but also towards their destruction; it can be used to blur distinctions between right and wrong so as to reduce social pressure on those that deviate from shared morality. The academic literature itself, especially by legal scholars, can for the most part be seen as an attempt to expose the normative incoherencies of the global system in order to increase its unity, rather than offering an ‘objective’ analysis of its dynamics and consequences. In the final analysis, the application of rights is always particular and never incontestable.

Precisely because the question of universal pretensions is so central and ubiquitous, it is crucial to ascertain when and what type of attack on inconsistency becomes relevant in world society and how it behaves in different contexts. The intensity and magnitude of exposure may seem like plausible answers. The literature emphasises the importance of a ‘critical mass’ of actors and their normative standing, especially if they are small liberal democracies.¹³⁶ It is however unclear whether these accounts explain, or describe the emergence and consequences of such exposure; furthermore, they exclude the role non-liberal countries — disregarding a critical force in the rise and development of human rights institutions, as the thesis shows —and the combined effect of their interaction over time. It is also not just a matter of sheer numbers, as typically asserted: a small minority can make a

¹³⁶ Finnemore and Sikkink, ‘International Norm Dynamics and Political Change’, 901; Emilie Hafner-Burton, *Making Human Rights a Reality* (Princeton: Princeton University Press, 2013); Alison Brysk, *Global Good Samaritans: Human Rights as Foreign Policy* (Oxford: Oxford University Press, 2009).

compelling universal case that a majority cannot, depending on their distance to the universal, as is explicated below.

2.2.2. Defending inconsistency

If the revelation of a certain inconsistency corresponds with certain interests, so does its concealment. Actors may have a vested interest in preserving or justifying behaviour that external observers may come to regard as flagrantly inconsistent.¹³⁷ This is because effective attacks that expose contradiction can bring down any form of authority, given that all of them rely on thinly veiled hypocrisy, as Nils Brunsson shows.¹³⁸ Exposure represents a critical intervention in political space, forcing actors to reaffirm the justifications that underpin their power and relations, especially in opposition to the deviant actor. To the extent that exposure disrupts the *status quo*, it provokes rival forces to restore the *status quo ante*. Instead of changing their behaviour, they will seek to deflect and divert pressure that demands them to change.

Political orders make constant efforts ‘to stabilise themselves as the systematic expression of virtue, justice or the telos of community’ which involves deception and concealment in order to deflect or undercut the lethal force of Nietzsche’s *virtù* –*virtú* being the nemesis of pseudo-virtuous political orders.¹³⁹ It is not a one-off measure that can fix the problem once and for

¹³⁷ Robert Jervis, *How Statesmen Think: The Psychology of International Politics* (Princeton: Princeton University Press, 2017), 182; Krasner, *Sovereignty*.

¹³⁸ Nils Brunsson, ‘The Necessary Hypocrisy’, *The International Executive* 35, no. 1 (1 January 1993): 1–9; Nils Brunsson, *The Organization of Hypocrisy: Talk, Decisions and Actions in Organizations* (Copenhagen: Copenhagen Business School Press, 2002); Nils Brunsson, *The Consequences of Decision-Making* (Oxford: Oxford University Press, 2007); Nils Brunsson, *Reform as Routine: Organizational Change and Stability in the Modern World* (Oxford: Oxford University Press, 2009).

¹³⁹ Honig, *Political Theory and the Displacement of Politics*, 3.

all or something that comes into being spontaneously. Quite the contrary, as Bonnie Honig outlines the implications of Nietzsche's thought:

'[m]oral and political orders must work to maintain the fittednesses they presuppose, daily. To that end, they rely on such practices as respect, responsibility, punishment and friendship to discipline dissonances and resistances ranging from the criminal to the idiosyncratic'.¹⁴⁰

Strategies of subverting change in the *status quo* can take many forms and directions.

Covering the struggle for reform for over two hundred years, Hirschman discovers that reactionary forces have employed arguments of perversity, futility, and jeopardy to naturalise or depoliticise the arbitrariness of the *status quo* and resist the shift towards the installation of civil rights in the eighteenth century, political rights in the nineteenth century, and social rights in the twentieth century.¹⁴¹ Contemporary resistances to human rights norms and institutions allude to such arguments, even if not explicitly framed as such. In some cases, instead of open refutation or confrontation, opponents prefer to reinterpret the norm and the degree to which they adhere to it.¹⁴² They can also formulate rival norms to normalise deviance with an antecedent interpretation of the norm that has been transgressed.¹⁴³

Ultimately, resistance to revelations of inconsistency is about the extent to which actors can

¹⁴⁰ Honig, 3.

¹⁴¹ Hirschman, *The Rhetoric of Reaction. Perversity, Futility, Jeopardy*.

¹⁴² Alexandru Grigorescu, *Democratic Intergovernmental Organizations? Normative Pressures and Decision-Making Rules* (Cambridge: Cambridge University Press, 2015).

¹⁴³ Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2013); Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

rely on universal morality to defuse and disavow both the frame of deviance and responsibility for causing or rectifying it.

Some forms of objections resonate more than others. A common rebuttal is based on principles of non-interference and sovereignty, as a defence of the intranational legal order.¹⁴⁴ Despite being premised on antagonism, law represents ‘an effort to move from a state of contestation and conflict into one governed by rational rules, principles and institutions’, as its main point is ‘to lead society away from politics’, Koskenniemi observes.¹⁴⁵ As international law aims to ‘depoliticise’ international relations’, it provides strategic anchoring for agents to defend specific practices with seemingly objective arguments. Intrinsically, strategic lawfare goes both ways, to upset or defend order, but it gravitates towards the latter.

In its most compelling form, denial of inconsistency consists of what might be called a *moral veto*. Actors can refer to the sacred or divine, to their particular regimes or some type of exceptionalism, in an attempt to resist acknowledgment of deviance or responsibility for rectifying it. The selective engagement of the United States with the human rights regime is typically attributed to either ‘exceptionalism’ or domestic veto players that would prevent them from ratifying core human rights treaties or being consistent with their own rhetoric.¹⁴⁶ But this is not unique to the United States. Other countries routinely invoke idiosyncratic traditions and domestic practices to deflect exposure. They can derogate from normal politics and norms in the name of responding to whatever they frame as emergency situations, vindicating exceptional measures. These measures can bring about momentous and

¹⁴⁴ R. J. Vincent, *Nonintervention and International Order* (Princeton: Princeton University Press, 1974).

¹⁴⁵ Koskenniemi, *From Apology to Utopia*, 599.

¹⁴⁶ Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005).

transformative changes in the political system, including constitutional powers.¹⁴⁷ This strategy is particularly powerful as the state of exception is ‘not the exception but the rule’, Walter Benjamin maintains.¹⁴⁸ These are just a few of the myriads of strategies and tactics that states rely on to neutralize the publicity that comes from transgressing norms, limiting the possibility of normative pressure to extremely rare events and extremely circumscribed conditions.

2.2.3. Exemplarity and association

If the dialectic of attack and defence of inconsistency of particular practices with the universal helps us in elucidating the location and direction of conflict, it begs the question of what this conflict is concretely about. Norms research locates conflict in rhetoric, where discordance between rhetorical commitment and subsequent behaviour takes centre stage.¹⁴⁹ Not only are rhetorical commitments not empty gestures, but they are critical standards for

¹⁴⁷ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2005); Giorgio Agamben, *State of Exception*, trans. Kevin Attell, 1 edition (Chicago: University Of Chicago Press, 2005); Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton, NJ: Princeton University Press, 2011); David Dyzenhaus, *The Constitution of Law: Legality In A Time Of Emergency* (Cambridge: Cambridge University Press, 2006); Oren Gross and Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2002); Marc de Wilde, ‘Just Trust Us: A Short History of Emergency Powers and Constitutional Change’, *Comparative Legal History* 3, no. 1 (2 January 2015): 110–30; Karin Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (New York: Cambridge University Press, 2016); John Reynolds, *Empire, Emergency and International Law* (Cambridge: Cambridge University Press, 2017); Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs*, 1 edition (The Hague: Springer, 1998); Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss, ‘Emergency and Escape: Explaining Derogations from Human Rights Treaties’, *International Organization* 65, no. 04 (October 2011): 673–707.

¹⁴⁸ Walter Benjamin, *Walter Benjamin: 1938-1940 v. 4: Selected Writings*, ed. Michael W. Jennings and Howard Eiland, trans. Edmund Jephcott (Cambridge, Massachusetts: Harvard University Press, 2006), 392.

¹⁴⁹ Risse, Ropp, and Sikkink, *The Persistent Power of Human Rights*.

evaluating the appropriateness of behaviour of states and exerting pressure to bring it in line with them.¹⁵⁰ Agents can use these rhetorical commitments to exert pressure, even when they do not espouse them sincerely.¹⁵¹ Exposure of discordance generates pressure that agents – in particular, moral entrepreneurs – can use to force states to change their conduct. This body of scholarship provides numerous illustrations of how normative pressure induces states to conform to norms. However, its major contribution is in describing the process of social pressure but it not explain how and when a certain discordance becomes salient in the first place, how and when normative pressure leads to what type or level of change, and how deviance is possible in face of conflicting views and indeterminacy.

The approach adopted here concentrates on what states do with norms, the practice of norms, rather than rhetorical commitments to norms. Actual use of norms offers a better approximation of the ways in which norms enter the dialectical struggle of attack and defence of inconsistency, and whether and how they shape actual behaviour and produce substantive transformation. Formal commitments to norms may serve as a powerful normative resource, but with perhaps the exception of *ius cogens*, they are too generic and contradictory to provide clear guidance for evaluating the appropriateness of behaviour without consideration of the social context. Whilst boundaries of common morality exist even as they evolve in time and space, they remain too frail to automatically ‘entrap’ states into doing anything they would otherwise not do, contrary to what Frank Schimmelfennig asserts.¹⁵² Necessary

¹⁵⁰ Ronald R. Krebs and Patrick Thaddeus Jackson, ‘Twisting Tongues and Twisting Arms: The Power of Political Rhetoric’, *European Journal of International Relations* 13, no. 1 (3 January 2007): 35–66.

¹⁵¹ Frank Schimmelfennig, ‘The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union’, *International Organization* 55, no. 01 (2001): 47–80; Risse, Ropp, and Sikkink, *The Persistent Power of Human Rights*.

¹⁵² Schimmelfennig, ‘The Community Trap’; Risse, Ropp, and Sikkink, *The Persistent Power of Human Rights*.

indeterminacy of norms leaves significant leeway for states to articulate contrasting interpretations of the same norm, making it hard to assess which actors transgress or act in accordance with it. Lack of an intermediary force above the parties to adjudicate conflicting interpretations makes such judgments necessarily contextual, thus without a foundation, entirely subject to the combined effect of rival forces.

Once formally endorsed, conflict revolves around particular practices of general principles, not general principles in the abstract. Specific invocations of norms provide points of reference from which actors assess the meaning of norms and the extent to which they conform to them or not. Concrete practices represent crystallising moments in an otherwise fluid and acrimonious struggle about the meanings and application of norms. It is in their concreteness that norms reveal the scope and limits of their normativity or ‘normative exemplarity’ as Alessandro Ferrara and Angela Condello would say.¹⁵³ From their perspective, normative exemplarity emerges from constant negotiation between singularity and universality or moments of tension between facts and norms.¹⁵⁴ It arises from a ‘selection process’ through which a concrete case becomes an example that stands for something else – a part to represent the whole. These examples then become reference points to evaluate the meanings and implications of the norm in question. In this sense, human rights norms acquire meaning and tangible impact through conflict about the concrete precedents they set, not their original formulation or formal intent. Particular use of human rights norms generates examples that serve as steppingstones towards the stabilisation, or dissolution, of their

¹⁵³ Alessandro Ferrara, *The Force of the Example Explorations in the Paradigm of Judgment* (New York: Columbia University Press, 2008); Angela Condello, ‘Casi esemplari’, *Mélanges de l’École française de Rome - Moyen Âge*, no. 127–1 (2 February 2015); Angela Condello, ‘Exemplarity: Story, Time and Gesture of a Threshold’, *Law & Literature*, 29 November 2017, 1–12.

¹⁵⁴ Condello, ‘Exemplarity’, 7.

meanings and substantive implications. Normative exemplarity comes before norms gain their social recognition through arguing, as Thomas Risse observes,¹⁵⁵ or what Antje Wiener calls the ‘meaning-in-use’ of norms, which she also sees as constituted through social practices in specific contexts;¹⁵⁶ exemplarity is what gives norms recognition, meaning and weight.

Equally important is the perspective of conflict being about how actors associate specific practices to either the particular or the universal to either undermine or support them, without making assumptions about whether they genuinely subscribe to them as a matter of principle. Contrasting approaches that rely on socialisation to assert the weight of norms, the focus on association renders that assumption unnecessary. From this perspective, political actors seek to associate specific actions with specific attributes, which vary in accordance with the objectives they pursue and the structural constraints they encounter. They may cast their action in particular or universal terms without actually adhering to their substantive implications. In fact, they can rely on universal principles to pursue particular agendas or undermine universal principles proper. What is relevant here is how particular or universal narratives that actors construct for specific uses fit within the social context they inhabit – whether specific associations they make are compelling or not, not whether they believe in them or not.

Association is mediated by the relational position of actors in political space, as highlighted by approaches that stress the mutual constitution of agency and its relational dimension.¹⁵⁷

¹⁵⁵ Risse, ‘Let’s Argue!’

¹⁵⁶ Antje Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters* (Cambridge: Cambridge University Press, 2008).

¹⁵⁷ Mustafa Emirbayer, ‘Manifesto for a Relational Sociology’, *American Journal of Sociology* 103, no. 2 (1997): 281–317; Wendt, *Social Theory of International Politics*, 171.

This points to the force of social structure, rather than the dispositions of actors, in shaping their positions in specific junctures in political space. Positional exigencies take precedence over dispositional features in determining the relative attachment of actors to specific norms in pursuing their objectives: how these associations are received (e.g. how compelling they are to the relevant audience) is more significant than whether or not actors believe in them. Concentration on association helps account for the dynamic and seemingly contradictory use of norms by virtually all actors (e.g. ‘democratic’ and ‘authoritarian’ actors alike) for wildly different and antithetical objectives, whilst being agnostic about the degree, if at all, of their internalisation.

2.3. Zones of exposure

If we can view normative conflict as being primarily about association of exemplary practices of human rights norms with their universal aspirations, we can also envisage how those associations can take many forms. This is specially so given that conflict within the United Nations is rarely between two isolated actors with two distinct positions. Even if each conflict has its protagonists, the conflict itself involves an amalgamation of actors that are held together by multiple, crosscutting, and conflicting loyalties –historical, geographical, cultural, ideological, and so on– some of which are more fixed or fluid than others. It is therefore reasonable to assume that the multiplicity of actors and the grievances they project as well as the volatility of their positions in time and space might steer conflict in more than one direction. That is a point that is made forcefully by Donald Black who shows that ‘conflict has a multidimensional location and direction—higher or lower, upward or downward, closer or farther—in relation to everything else’.¹⁵⁸ Paraphrasing his notion of social geometry, it is

¹⁵⁸ Black, *The Social Structure of Right and Wrong, Revised Edition*, xx.

of crucial importance to consider who expresses normative grievances and against whom, whether their social direction is downward (against an inferior) or upward (against a superior), or horizontal (against an equal). These considerations make it possible to understand particular practices as contingent but not arbitrary practices, no matter how contradictory they might appear.

Identifying the geometry of social structure offers a way of tracing the movement, direction, and consequences of relentless attack on and defence of the inevitable inconsistencies of particular practices with the universal they ought to embody. In imagining that social geometry, we can envisage at least four idealised types of conflict that can be best described as ‘zones of exposure of inconsistency’, or normative zones. These zones exhibit distinct dynamics and tendencies but are not separate spheres –they are in constant interaction and tension with one another. The form of each zone is moulded by rival interventions, endowing them with a core and periphery, shifting boundaries and liminal spaces that are in constant flux. In spite of their volatility, however, they reveal distinct shapes and tendencies that help locate the movement and direction of struggle across the universal/particular spectrum. These zones emanate from the aggregate effects of individual interventions of political actors that supersede individual intentions. They are not the creation of any one state: no state can control them, however powerful. Furthermore, all states must adapt to the imperatives of the distinct zones they themselves create in order to pursue their individual or shared goals. That may require settling in one zone or migrating from one zone to another, to achieve their objectives without being singled out for transgressing shared norms.

Zones of exposure can be seen as normative superstructures that states generate in their struggle with the universal that in turn requires them to adapt to their imperatives if they are

to be successful in each of them. Depending on where political actors stand in relation to the universal, they will find themselves in a distinct normative zone that can be characterised by polarization, recognition, toleration, and negation, as shown in Table 2. Variable levels of exposure of inconsistency of particular practices with the universal implies that, different levels of pressure of consistency are required for rectifying inconsistency, and thereby moving towards substantive transformation, as explicated below.

Table 1. Zones of exposure of inconsistency of particular practices with the universal

Attack on inconsistency	Defence of inconsistency	
	<i>Particular</i>	<i>Universal</i>
<i>Particular</i>	Polarization (1)	Negation (4)
<i>Universal</i>	Recognition (2)	Toleration (3)

2.3.1. Polarization

The normative zone characterised by polarization captures conflict about practices that are fought with particular weapons: both attack and defence rest on particularist grounds. Neither side can appeal to general, let alone, universal norms to articulate their respective positions on the practice in dispute. It is a state defined by radical factionalism and polarization with no evident escape on the horizon. The justifications of political actors for denouncing or denying inconsistency do not rise above singular or particular normative resources; conflict moves

along a horizontal plane. Whatever the asymmetry of power resources of rival forces may be, the distribution of issue-specific power within this zone is roughly equivalent; no party is strong enough to win the battle, or weak enough to give in. Neither side recognises the other side's standing, generating streams of *tu quoque* exchanges; this is a tactic actors employ to undermine each other's standing for making accusations despite their validity, the debilitating effects of which have been expounded in different contexts by Jerry Cohen and Cécile Fabre, but are particularly insightful in the context of the United Nations.¹⁵⁹ Polarization is a state in which neither side recognises an intermediate standard to adjudicate competing claims.

Incessant charge and counter-charge of inconsistency of rival practices cancel each other out, producing noise, but no sound. This is a zone where criticism is silenced, and indignation is not possible, as Cohen would put it. It is this zone that attracts most attention in public and academic debates and is typically mistaken for the defining feature of moral argument in world society, and used as a reason for dismissing its relevance. Clashes over competing visions of order and justice and appeals to universal values to justify antithetical objectives, as discussed by Vincent Pouliot and Jean-Philippe Thérien, illustrate aspects of the type of conflict that occurs in the zone of polarization.¹⁶⁰ It is also a zone that gives acute relevance to Koskenniemi's argument about international law being 'singularly useless as a means of justifying or criticising international behaviour'.¹⁶¹ It is a state of radical indeterminacy where rival claims of right and wrong prevent a shared assessment of right and wrong, rendering such judgments contestable.

¹⁵⁹ G. A. Cohen, *Finding Oneself in the Other* (Princeton, N.J.: Princeton University Press, 2012), Chapter 7; Cécile Fabre, *Economic Statecraft: Human Rights, Sanctions, and Conditionality* (Cambridge, Massachusetts: Harvard University Press, 2018), Chapter 6.

¹⁶⁰ Vincent Pouliot and Jean-Philippe Thérien, 'Global Governance: A Struggle over Universal Values', *International Studies Review* 20, no. 1 (1 March 2018): 59.

¹⁶¹ Koskenniemi, *From Apology to Utopia*, 67; 600.

Two factors fuel polarization. One obvious reason is that a shared or universal standard may not be available for actors to appeal to; this is especially the case before the adoption of the Universal Declaration in 1948. This does not mean that the major empires and powers such as France, Britain and the United States did not project their values in universal terms—what it means is that there was no shared understanding and therefore general acknowledgment of those claims as reflecting universal aspirations. But appeals to the universal might not be possible even after 1948, where actors must do with particular justifications. This may occur when two rival states or groups of states violate the universal in roughly equal measure: neither side can credibly employ the universal – e.g. ‘the conscience of the world’ –to put pressure on the other side if they tried. This is a situation where critique of particular practices remains unintelligible, and concerns over their inconsistency are effectively deflected.

2.3.2. Recognition

A radically different type of normative conflict can be observed in the zone of recognition, where agents are engaged in a highly unequal struggle. The location from which rival forces argue about inconsistency is inversely related to the universal: attack is closest to the universal, whilst defence is farthest from it. The movement of consistency pressure is vertical, downwards from the top to bottom. Inconsistency becomes a salient matter, rising above and demanding priority over, other types of grievances and considerations; exposure of the inconsistency of a practice or form of political action is no longer a question of mere opinion or particular reading of shared norms: it is universally confirmed and condemned. The political salience of inconsistency becomes so strong that it momentarily suspends the normal operation of manifold loyalties and affinities, forming a near universal wave against

the transgressor. It is the point at which a practice becomes so outrageously deviant from shared moral knowledge that it provokes near universal opprobrium.¹⁶²

No matter how powerful a given state or group of states are or how hard they might try, they never manage to fully neutralise or control *virtú*. Not only because there are political actors that at specific points in time are visibly driven by *virtú*. But also, because states cynically employ *virtú* to harness its lethal force in order to antagonise or destabilise the position of their adversaries, a hegemonic power in a given order, or the order proper. In constantly questioning each other's behaviour in relation to the universal—praising behaviour that reaches for the universal, and admonishing behaviour that drifts away from it—states collectively move towards the universal, willingly but perhaps unwittingly. The universal is generally appealing especially because norms are framed in the most general terms so that evasion is easier than it would be with detailed stipulations. States can frame opposition or support in general terms in order to claim virtue without incurring any cost on them. Yet this is another reason why states acting for whatever purpose render the universal a formidable force; states might support or accept universal stipulations in order to avoid concrete constraints but, in through their competing appeals and exchanges, they construct a universal horizon that in specific junctions neutralises particularist interests and defences, elevating the universal as the ultimate standard against which their behaviour is evaluated. For as long as states operate within this universal horizon, the force of the universal is always lurking in the background waiting to be harnessed against particular practices—the force of which being a function of the location of the attacker or defender in relation to the universal.

¹⁶² Giovanni Mantilla, 'Forum Isolation: Social Opprobrium and the Origins of the International Law of Internal Conflict', *International Organization* 72, no. 2 (2018): 317–49.

The extraordinary force of the universal arises from extraordinary small traces of recognition left behind from the strategic appeals to the universal. These are elements that actors do not notice, or cannot erase, after appealing to the universal in pursuit of their particular interests in time and space; it is what survives the strategic use of norms and of the universal in the zone of polarization, allowing for the emergence of exemplary cases that serve as precedents for future action. Every particular invocation of the universal leaves at least two distinct forms of traces: intrinsic and extrinsic. What is readily evident is the *intrinsic* or immediate trace when adversaries expose each other's inconsistencies with the universal, as for example the Soviet Union exposing violations of human rights in the United States or the United States in Cuba. These attacks expose violations of universal norms in limited cases, even if done for the wrong reasons. But what is much more significant is the *extrinsic* or extended traces of these attacks: the traces they leave behind are more important than the immediate exposure resulting from the attack itself. This is because the traces that these limited attacks leave behind serve as points of reference for other similar cases retrospectively and synchronically. Further strategic invocation of the universal leads to the accumulation of traces of recognition that can be exploited for future action.

Traces of recognition gain weight through consistency because rival forces can reanimate and transform them into precedents against the original attacker and beyond. Whatever the original intentions or context, actors can employ the logic of consistency to reanimate these traces to turn universal appeals into substantive transformation. Consistency gives weight to these traces and pulls all actors towards them, some faster than others. In so doing it elevates the universal into a constant force that pulls actors towards the substantiation of the universal principles they invoke, even if some offer more resistance than others, depending on their distance to the universal. In creating these traces, states sow the seeds that subvert their

particular intentions, despite their efforts to prevent or destroy precedents; they are helpless because they are owned by the cunning of the universal or the universal horizon, which they themselves construct, but cannot control.

Recognition arises at the point at which all justifications for a given practice of the universal break down. It is the point at which manipulation of the universal ends, and the constraining effect of appealing to it, begins. It is the point at which Koskenniemi's radical indeterminacy ends, where all reason hits bedrock, and the spade is turned, as Wittgenstein's answer to the basic question of "How am I able to obey a rule?" shows: 'if this is not a question about causes', he asserts, 'then it is about the justification for my following the rule in the way I do. If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: "This is simply what I do."'.¹⁶³ There is no need for individual state representatives to come to this conclusion individually, but that is what their position in relation to the universal requires them to do; substantive consistency with the universal becomes the only viable option for them to be able to invoke the universal in future action. This is when moral argument engenders substantive transformation.

2.3.3. Toleration

The pressure for change is largely gone when the dialectical struggle moves towards a normative zone characterised by toleration. Toleration is a state in which rival forces have alternative standards for what constitutes practices inconsistent with the universal. Both sides are equidistant from the universal which they can employ in equal measure to denounce or silence claims of inconsistency. It is a horizontal struggle wherein consistency moves both

¹⁶³ Ludwig Wittgenstein, *Philosophical Investigations*, ed. P. M. S. Hacker and Joachim Schulte, 3rd edition (Oxford: Basil Blackwell, 1986), 58e (§217).

ways in equal measure. This zone reveals ongoing processes of moral de-centring and the existence of competing moral universes or normative orders, reflecting the pluralist dimension of world society or a ‘multiplex world’ as Amitav Acharya terms it.¹⁶⁴ The move towards toleration becomes particularly evident when the dialectical conflict hits first principles, entering the terrain of incommensurability, rendering it impossible to define the contours and hierarchy of two or more competing values. This is the case when competing forces rely on irreconcilable but equally valid universal principles, such as equality and liberty—although much depends on how actors frame these values, as Ronald Dworkin and Étienne Balibar demonstrate.¹⁶⁵ Another example is the recognition of religious liberty, especially when Catholics and Protestants decided after thirty years of war to tolerate competing interpretations of the Christian faith, leading to the Peace of Westphalia in 1648. The nationalist and liberal conception of human rights, the first emphasising the primacy of the community and the second the primacy of the unencumbered individual, reflect two competing visions of good life that have led to a bifurcation of the normative and institutional architecture of human rights within the United Nations and beyond.

What is essential to note here is that this type of conflict results from a ‘conflict of obligations’ or the substantive implications of these obligations rather than the mode of their application, as Bernard Williams would note.¹⁶⁶ Disagreement about first principles make it impossible to determine which interpretation takes or should take precedence, no matter how

¹⁶⁴ Amitav Acharya, ‘After Liberal Hegemony: The Advent of a Multiplex World Order’, *Ethics & International Affairs* 31, no. 3 (ed 2017): 271–85.

¹⁶⁵ Ronald Dworkin, ‘Do Liberty and Equality Conflict?’, in *Living as Equals*, ed. Paul Barker (Oxford: Oxford University Press, 1996), 39–59; Étienne Balibar, *Equaliberty: Political Essays*, trans. James Ingram (Durham: Duke University Press Books, 2014).

¹⁶⁶ Bernard Williams, *Problems of the Self: Philosophical Papers 1956-1972* (Cambridge: Cambridge University Press, 1973), 170–71; Bernard Williams, *Moral Luck* (Cambridge: Cambridge University Press, 1982), Chapter 5.

they are applied. This type of disagreement pushes towards pluralisation and multipolarity. Beyond mere value conflict, it is possible to imagine how this conflict might take the shape of conflict among sets of values which might reflect embryonic forms of alternative or emergent moral universes. They can be driven by forces seeking to resist or overcome European universalism by pushing for moral pluralism, as evidenced in the ‘Asian Values’ debate and other forces challenging the hegemonic interpretation of the universal. What starts as an unequal antagonist struggle might morph into agonistic struggle leading to the emergence of ‘plural hegemonies’, as Chantal Mouffe argues.¹⁶⁷ This is a zone where attempts to destabilise a practice can be as compelling as attempts to stabilize it. Both attack and defence can appeal in equal measure to the universal and come with two contrasting interpretations of the standards of appropriate practices. It is a zone where the degree to which a given practice is inconsistent with the universal remains an open question.

2.3.4. Negation

In the zone of negation rival forces fight a highly unequal battle, where defence always wins, and attack always loses; it is the inverse of recognition. Rival forces occupy inversed locations in relation to the universal: the forces seeking to maintain the practice in question are closest to the universal, whereas those seeking to disrupt it are farthest from it. It is a deeply hierarchical conflict, where the consistency pressure moves downstream. The forces that defend a given practice can espouse the universal with plausibility and thus harness its energy to preserve the *status quo*. Those on the defence can effectively assimilate or negate all attempts that seek to disrupt or upend their practice of the universal. The forces that are

¹⁶⁷ Chantal Mouffe, *On the Political*, 1 edition (London: Routledge, 2005), 118.

closest to the universal are effectively the hegemonic power that defines the proper interpretation of the universal, and deviance from it; they are the guardians of the universal.

What is crucial to distinguish here is that the zone of negation creates the conditions for the emergence of hegemonic power as a function of the proximity of rival forces to the universal, not some external material resource, as typically assumed. Power in this context is something to be explained, not something that does the explaining: the zone of negation is where hegemonic power is *made*, not reflected. Far from being ‘concealed claims to imperial power’,¹⁶⁸ universal claims emanating from the zone of negation reflect the supreme power of absolute universalism, the force of which obliterates and transcends any and all imperial projections. It is a structural configuration that transcends all individual agency, subverting the intentions and objectives of what are otherwise considered hegemonic powers. It is proximity with the universal that determines the parameters of issue-specific power of political agents, drastically limiting the fungibility of material sources of power.¹⁶⁹ It is the agents that reside closest to the universal that represent what Rebecca Adler-Nissen calls ‘the audience of normals’,¹⁷⁰ the group of agents that can define appropriate behaviour and at the same time delimit and denounce deviance from the universal. They set the standard for the practice of the universal.

The zone of negation is the realm within which fundamental norms such as *ius cogens* can exist and survive. In this zone, the validity of a norm or practice cannot be questioned even as

¹⁶⁸ Jens Bartelson, *Visions of World Community* (Cambridge: Cambridge University Press, 2009), 1.

¹⁶⁹ David A. Baldwin, ‘Power Analysis and World Politics: New Trends versus Old Tendencies’, *World Politics* 31, no. 2 (1 January 1979): 161–94.

¹⁷⁰ Rebecca Adler-Nissen, ‘Stigma Management in International Relations: Transgressive Identities, Norms, and Order in International Society’, *International Organization* 68, no. 01 (January 2014): 143–176.

disagreement about interpretation is unavoidable—it is where norms are ‘robust’.¹⁷¹ This perspective differs radically from dominant views that count the number of important countries or ‘critical mass’ behind a norm to describe the ‘tipping point’ in its support, a position that Sandholtz and Stiles exemplify when they conclude that ‘[n]ormative claims are more likely to prevail when multiple major powers support them’.¹⁷² Ultimately, these are tautological statements. The zone of negation *explains* why norms acquire unquestionable status without needing to rely on the number of countries supporting them—it does not describe, but explains their ‘robustness’ and preeminent appeal.

A good example of such norms is the universality of human rights. There can be a question of whether all rights are universal, as embodied by the relative priority of different rights within the Universal Declaration, or how they should be interpreted, but not whether or not universal human rights exist. No particular attack can articulate a compelling justification that questions this norm in relation to the universal; all efforts to expose inconsistency between this hegemonic practice and the universal, fail. It might be tempting to equate the zone of negation with the universalisation of one particular standard of civilization,¹⁷³ or the value system of a single hegemon, thus ‘pseudo-universalism,’¹⁷⁴ or simply the solidarist dimension of world society.¹⁷⁵ But that is not what the zone of negation stands for. Instead, it depicts the effects of proximity to the universal. It is not the generic power of major powers, but the universability of their standards, that renders them powerful in the context of human rights,

¹⁷¹ Nicole Deitelhoff and Lisbeth Zimmermann, ‘Norms under Challenge: Unpacking the Dynamics of Norm Robustness’, *Journal of Global Security Studies* 4, no. 1 (1 January 2019): 2–17.

¹⁷² Sandholtz and Stiles, *International Norms and Cycles of Change*, 333.

¹⁷³ Immanuel Wallerstein, *European Universalism: The Rhetoric of Power* (New York: The New Press, 2006).

¹⁷⁴ Mouffe, *On the Political*, 117.

¹⁷⁵ Hurrell, *On Global Order*, Chapter 3.

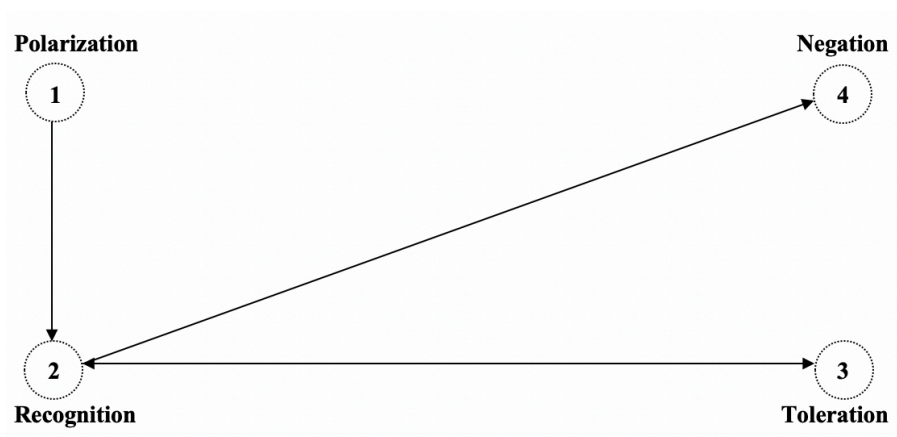
where power is a function of the proximity to and therefore control over the shared universal, which is a collective product; power in human rights is power over the universal. Major powers obviously shape the shared universal but then only to the extent they act according to its logic, not because they are major powers. The forces defending the hegemonic application of the standard in question are so close to the universal that they can harness its infinite energy to obliterate or negate any type of particular resistance. In this way, the zone of negation provides a sanctuary for the beating heart of human rights.

2.4. Flow of consistency

None of forgoing normative zones should be understood as fixed realities: everything is in flux, always. What they represent are artificial interventions in a fluid process with the purpose of locating the coordinates of its movement and direction to allow for a systematic consideration of the behaviour of moral argument in world society and the wildly different and competing forms it exhibits, in order to approximate its actual weight. The dialectical struggle between political actors can expand or shrink the reach or importance of phenomena captured by the four normative zones given that they depend entirely on the balance of forces engaging in an unending strife over conflicting interests and visions. There is nothing inevitable about anything that this idealized framework could reveal about the behaviour of moral argument in world society.

Nevertheless, the forces that configure these zones do show a recognisable pattern of movement of efforts to cope with inconsistency of particular practices with the universal ideal they are expected to embody. There are clear interrelationships of activities in different zones, pointing to distinct forms of interaction, endowing them differential weight and degrees of permanency, as shown in Figure 1.

Figure 1. Flow of Consistency



The zones characterised by polarization and toleration is where the largest volume of activity takes place and towards which most political action gravitates, given that the pressure of consistency is the lowest. Recognition is a transient phase between polarization and toleration. It is the most transient of passages where the relevant actors must pay heed to the universal and move out as quickly as they can. It is a zone that consists of brief moments of recognition rather than a continuous process of recognition. But when it takes place, recognition must lead towards substantive transformation and therefore structure the future behaviour of actors. Agents can migrate in two entirely different directions: towards negation or toleration. Those political actors that seek to preserve the gains of attained in moments of recognition will push towards negation, where they can defend their gains against any form of attack. But the instances they can afford to transport in that direction are extremely limited to elementary principles and norms, also because once in the zone of negation, they are themselves bound by them without the possibility of escape.

Hence, in most cases, the flow will gravitate towards toleration, where actors have greater latitude in determining the very standards against which they allow themselves to be judged. What they aim for in this zone is to avoid automatic and general constraints they cannot tailor

to fit their visions and desires, especially if their values or interests change. Here they endeavour to espouse the universal without assuming substantive universal obligations. We can envisage certain back and forth movements, where certain practices can be transported from recognition to toleration, and back. But it does not seem plausible to assume that any such movements take place between negation and polarization, or toleration and negation. These sets of movements point to a sequential flow of consistency, the forms and consequences of which emerge clearly in the following empirical analysis of three cases of major normative and institutional change in world society, beginning with the rise of the Treaty Bodies, the Special Procedures and the Universal Periodic Review. This sequential movement should be observable throughout the process that resulted in the creation, design, and development of these human rights institutions—the three pillars of the UN human right monitoring system.

Chapter III: The Treaty Bodies

‘On the surface, an intelligible lie; underneath, the unintelligible truth’.

— Kundera, *The Unbearable Lightness of Being*¹⁷⁶

The recognition of the universality of human rights inevitably raises the question of their implementation, this chapter will argue. Yet the incessant attempts by various groups of states to suppress that question produced a disfigured institution to demonstrate consistency with their formal commitment to universal human rights—the Treaty Bodies. Their rise cannot be divorced from the strategic employment of human rights in the ideological warfare of Allied forces against the Nazi regime during World War Two. Raising the profile of human rights in the war gave rise to worldwide expectations about their reach and implementation after the war. These questions became more pressing once human rights were enshrined in the United Nations Charter in 1945, and later articulated and expanded in the Universal Declaration in 1948, and its ten supplementary human rights treaties. Each of these treaties have been endowed with expert bodies that serve to interpret the obligations that states assume by ratifying these treaties, and evaluate the degree to which they comply with them. Understanding the rise, design and development of the Treaty Bodies requires taking into account all these momentous developments.

The framework provided by the logic of consistency allows for identifying, connecting, and making sense of the interventions of various political actors in different UN organs at specific points in time over the course of seven decades. Building on primary sources, known and

¹⁷⁶ Milan Kundera, *The Unbearable Lightness of Being: A Novel*, trans. Heim, Michael Henry (New York: Harper & Row, 1987), 63.

new ones, the framework allows for a theoretically informed empirical investigation that rearticulates and recasts familiar arguments about the recognition and meaning of human rights provisions in the UN Charter, the drafting and significance of the Universal Declaration, and ultimately the emergence and design of the Treaty Bodies. In particular, the framework makes sense of the seemingly contradictory positions of states regarding the Treaty Bodies and their role-reversals in time. Above all, the framework explains how human rights and the Treaty Bodies developed and expanded despite shifts in positions, and in the face of formidable opposition from major powers, such as the United States and the Soviet Union.

Following the four normative zones revealed by the logic of consistency, the chapter is in four parts. The first part explores the weaponization of human rights in the ideological warfare during World War Two and how that informed their meaning and subsequent development. The second part traces the origins of the recognition of human rights in the UN Charter and their development in the Universal Declaration and the core human rights agreements, demonstrating the collective process through which states constructed the Treaty Bodies. The third part uncovers the sources and consequences of the variation in the design of the Treaty Bodies. The fourth and concluding part identifies the fundamental norms that emerged in the process of constructing the first institution of the UN monitoring system of human rights, and illustrates the significance of this institution for the further development of human rights monitoring.

3.1. Polarization

On 24 June 1919, George Clemenceau presented the Polish Government with a Treaty that Poland had to sign to be recognised as a sovereign state.¹⁷⁷ In the letter introducing it, Clemenceau explained the rationale of the Treaty—the first of the ‘Minority Treaties’ signed along the Treaty of Versailles—which specifically concerned the inclusion of provisions on the protection of minorities. This provision had to be seen as part of the ‘general principles of justice and liberty’ that the Allies had taken upon themselves to enshrine in the new world order. A sense of responsibility on the part of the Allies, created, as he put it:

‘[...] an obligation, which they cannot evade, to secure in the most permanent and solemn form guarantees for certain essential rights which will afford to the inhabitants the necessary protection whatever changes may take place in the internal constitution of the Polish State’.¹⁷⁸

Radically breaking past practice, it would not be the Great Powers the ones entrusted with the obligation to uphold these provisions, to avoid suspicion of politically motivated interference in the internal affairs of states. The responsibility for the protection of minority rights was to be placed with a new organisation—the League of Nations. More precisely, it would be a Court attached to the League that would handle disputes about their implementation. In this way, Clemenceau emphasises,

¹⁷⁷ ‘Letter from Georges Clemenceau to Ignace Paderewski of 24 June 1919 (Introducing the Peace Treaty between the United States, the British Empire, France, Italy, Japan and Poland Concerning Protection of Minorities)’, in *Encyclopedia of the United Nations and International Agreements: N to S*, ed. Anthony Mango, Third Edition, vol. Volume 3 (New York: Taylor & Francis, 2003), 1810.

¹⁷⁸ *Ibid.*

‘[...] differences which might arise will be removed from the political sphere and placed in the hands of a judicial court, and it is hoped that thereby an impartial decision will be facilitated, while at the same time any danger of political interference by the Powers in the internal affairs of Poland will be avoided’.¹⁷⁹

The move towards impartial adjudication of minority rights in the highly politicised environment in which the League came into existence, was indicative of the aspiration for ‘a new system of international relations’.¹⁸⁰ But politicisation could not be overcome. To begin with, the purview of the League’s new system rested on a glaring double standard: the Great Powers refused to recognise the rights they imposed upon a few European states.¹⁸¹ What is more, they refused to extend these rights to non-Europeans, upon the instance of Woodrow Wilson.¹⁸² Even more flagrant was the preservation of racial hierarchy. The Allied leaders, Wilson in particular, vehemently opposed a proposal by Japan to introduce the idea of racial equality in the League’s Covenant.¹⁸³

The Japanese proposal itself, as Antonio Cassese observes, was rather modest and sought to ensure that foreigners who were citizens of the League’s members would not be discriminated on the basis of race and nationality; Japan was primarily concerned about racism against Japanese immigrants in the United States and Australia and the long-standing goal of obtaining equal status among Western powers: it had very little to do with the

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Clark, *Legitimacy in International Society*, 119.

¹⁸² Rowland Brucken, *A Most Uncertain Crusade: The United States, the United Nations, and Human Rights, 1941-1953* (Northern Illinois University Press, 2013), 9.

¹⁸³ Margaret MacMillan, *Peacemakers. Six Months That Changed The World* (London: Hachette, 2001), Chapter 23.

recognition of racial equality as a universal principle.¹⁸⁴ Its proposal was far from recognising the principle of equality, let alone on an universal scale.¹⁸⁵ Still, Japan acquired a reputation for being a champion of racial equality whilst its proposal inspired activists fighting white supremacy in the United States and in the British colonies, and turned the question of racial equality into a global concern.¹⁸⁶ The failed proposal nevertheless revealed a glaring inconsistency at the heart of the new system: anglophone countries such as Australia, United States, the United Kingdom explicitly disavowed the principle of racial equality in order to preserve white supremacy and discriminatory practices domestically and in the colonies.¹⁸⁷ Yet they could not suppress the question of racial quality.

The rise of Hitler in the 1930s brought the question back with a vengeance. Hitler installed a race regime premised on the absolute denial of racial equality. Common ideas of nineteenth-century racial theorists, such as Gobineau and Chamberlain, who defended the racial purity of the Aryans, became the official state ideology of the Nazi Regime. The Nazis stigmatised the Jews as alien, powerful and therefore dangerous for the German nation, and enacted numerous anti-Jewish laws to deny them their rights and exclude them from the German nation.¹⁸⁸ A Jewish resident of Upper Silesia who had been dismissed due to racist laws, Franz Brenheim, made a petition to the Council of the League of Nations in 1933. Whilst the German delegate tried to undermine the standing of Brenheim to submit such an appeal, other delegates, especially the Polish one, asserted that the Council had the moral right to receive

¹⁸⁴ Naoko Shimazu, *Japan, Race and Equality: The Racial Equality Proposal of 1919* (London: Routledge, 1998).

¹⁸⁵ Antonio Cassese, *I Diritti Umani Oggi* (Bari: Laterza, 2005), 20.

¹⁸⁶ Marc Gallicchio, *The African American Encounter with Japan and China: Black Internationalism in Asia, 1895-1945* (Chapel Hill: The University of North Carolina Press, 2000), 7; Shimazu, *Japan, Race and Equality*, 7.

¹⁸⁷ Cassese, *I Diritti Umani Oggi*, 20.

¹⁸⁸ Lynn Hunt, *Inventing Human Rights: A History* (W. W. Norton, 2007), 190–96.

the petition and demand that Germans respect the rights of Jews in Silesia, referring primarily to the 1922 Polish–German Treaty on Silesia.¹⁸⁹

The Brenheim petition brought back to the centre stage the question of racial equality and equality before the law amongst the ‘civilised nations’ who had sought to suppress it. The majority of the League’s members affirmed the principle, with France proposing that it should hold not only in Silesia but in all Germany; Germany dissented, claiming that this question was an internal sovereign matter. It was no coincidence, as Cassese notes, that Germany voted against the French proposal on 11 October 1933, and on 14 October 1933 Hitler announced the withdrawal of Germany from the League, allegedly because the other members had not granted ‘real equal rights to Germany’ and had treated it in a ‘non-dignified manner’.¹⁹⁰ The subsequent course of events that culminated with the Nazi attack on Poland on 1 September 1939 and the outbreak of the most cataclysmic war in history demonstrated in the most tragic way the virulent denial of the principle of racial equality.

3.1.2. The United States weaponizes rights

Hitler’s aggression and the brutal racial policies of his race regime provoked a radical volte-face in the position of the United States and its allies on the question of racial equality, and human rights more generally. Strangely, they now came to embrace racial equality and human rights as part of their ideological campaign against the Nazi regime. The clearest articulation of this sudden U-turn came with a now famous speech that the United States President Franklin D. Roosevelt delivered before a trembling Congress on 6 January 1941. In that speech, Roosevelt proposed ‘four essential human freedoms’ to counter the Nazi threat

¹⁸⁹ Cassese, *I Diritti Umani Oggi*, 20.

¹⁹⁰ Cassese, 24.

and to project an alternative vision of world order, which included freedoms of ‘speech and expression’ and ‘worship’ and freedoms from ‘want’ and ‘fear’.¹⁹¹ With these ‘four freedoms’, Roosevelt had offered the first articulation of human rights that would come to apply universally.

Yet his goal was purely political—the four freedoms formed an integral part of a broader strategy to canvass internal and external support in the struggle against the threat posed by the Nazi vision of world order. Roosevelt made this goal explicit when he articulated his world visions as:

‘the very *antithesis* of the so-called new *order of tyranny* which the dictators seek to create with the crash of a bomb. To that new order we oppose the greater conception—the *moral order*. [...]. The world order which we seek is the cooperation of free countries, working together in a friendly, civilized society. This Nation has placed its destiny in the hands and heads and hearts of its millions of free men and women; and its faith in freedom under the guidance of God. Freedom means the *supremacy of human rights everywhere*. Our support goes to those who struggle to gain those rights or keep them. Our strength is in our unity of purpose. To that high concept there can be no end save victory.’¹⁹²

Roosevelt deploys the language of human rights to construct and delineate the boundaries of two competing, antithetical visions of world order. He presents the struggle as an existential

¹⁹¹ United States Congress, Address of the President of the United States, Congressional Record-House, Volume 87, Part 1, 6 January 1941, p. 46-47 [Emphasis added].

¹⁹² United States Congress, Address of the President of the United States, Congressional Record-House, Volume 87, Part 1, 6 January 1941, p. 47 [Emphasis added].

battle of values with binary choices: it is either the ‘new order of tyranny’ or ‘the moral order’, ‘civilized society’ or ‘world domination’, ‘freedom or ‘unfreedom’. The opposition between these two competing visions could not be made sharper. Seemingly naturally, Roosevelt positioned the United States at the heart of a world-wide struggle for freedom till human rights prevail everywhere in the world. But this placement was all but self-evident. Whilst it resonated with the United States creed, it directly contradicted with the race regime operating in the United States. It was a race regime from which the Nazis drew inspiration and used as a model to build their own race regime in Germany, exhibiting striking parallels, James Whitman reveals.¹⁹³ The Nazis considered the United States ‘the innovative world leader in the creation of racist law’ and saw a potential for friendship on the basis of ‘a shared commitment to white supremacy’.¹⁹⁴ The irony, Whitman notes, is that even the Nazis rejected some parts of American race law because they deemed them as excessively cruel, as ‘too racist’.¹⁹⁵

But the United States had to take distance from the Nazis in order to present themselves as a distinct alternative to them—making association with human rights a necessity. For as Gunnar Myrdal, writing at the time, observes:

‘[i]n fighting fascism and Nazism, America had to stand before the whole world in favour of racial tolerance and cooperation and of racial equality. It had to denounce German racialism as a reversion to barbarism. It had to proclaim universal

¹⁹³ Stefan Kuhl, *The Nazi Connection: Eugenics, American Racism, and German National Socialism* (Oxford: Oxford University Press, 1994); James Q. Whitman, *Hitler’s American Model: The United States and the Making of Nazi Race Law* (Princeton: Princeton University Press, 2017).

¹⁹⁴ Whitman, *Hitler’s American Model*, 5;7.

¹⁹⁵ Whitman, 5.

brotherhood and the inalienable human freedoms. The fact that the Japanese utilized anti-white feelings in Asia and elsewhere made it even more necessary to stress the racial equality principle'.¹⁹⁶

Whether or not Roosevelt had undergone a sudden conversion to human rights is irrelevant for the significance that his decision had for human rights. It directly exposed the glaring inconsistency between what the United States claimed to represent and what they were in reality (a country segregated along race lines), further intensifying the wrath of black people and their struggle for racial equality.¹⁹⁷ Despite the obvious costs and the mounting pressure coming from the emancipatory struggle of black people, the United States had to stay the course, at least for as long as the ideological battle was ongoing. On 14 August 1941, Roosevelt and the British Prime Minister Winston Churchill issued the Atlantic Charter consisting of eight war aims, one of which incorporated Roosevelt's 'four freedoms'. In the Charter's sixth war aim, they resolve that:

'[...] after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that *all the men in all lands* may live out their lives in freedom from fear and want'.¹⁹⁸

The Atlantic Charter enshrined human rights as an integral part of the Anglo-American vision for the post-war order, despite Churchill's misgivings that such an act would encourage

¹⁹⁶ Myrdal, *An American Dilemma*, 1004.

¹⁹⁷ Myrdal, 1007.

¹⁹⁸ United Nations Yearbook, 1946-47, Part I, p. 2 [Emphasis added].

(http://cdn.un.org/unyearbook/yun/chapter_pdf/1946-47YUN/1946-47_P1_SEC1.pdf)

colonial peoples to revolt against British colonial rule—which is what they eventually did. Still, in 1942 they came up with the ‘Declaration by United Nations’ (this time drafted in cooperation with the Soviet Union and China) to formalise the alliance of Allied countries in World War Two, conferring a central role to human rights. The Declaration states that:

‘[b]eing convinced that complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands, and that they are now engaged in a common struggle against savage and brutal forces seeking to subjugate the world’.¹⁹⁹

Human rights became an official war aim for the Allied Powers, for whom the total defeat of the enemy became a *sine qua non* for the institution of human rights everywhere. Human rights became the sharpest separation device between the two warring blocs, the Allied Powers and the Axis Powers, the latter consisting of Nazi Germany, Fascist Italy, and Imperial Japan. The Axis Powers, especially Nazi Germany, accentuated this separation by publicly and violently denouncing human rights, making it the hallmark of their political identity. The Nazi elite forged an unholy alliance with the mob—the underprivileged group from all classes—to make a radical break with the existing liberal order and values. Publicly and violently they demonstrated that ‘no such thing as inalienable human rights existed and that the affirmation of the democracies to the contrary were mere prejudice, hypocrisy [...] the evidence of hopeless idealism or fumbling feeble-minded hypocrisy’, Hannah Arendt observes.²⁰⁰ The mob and the Nazi elite ‘were satisfied with blind partisanship in anything

¹⁹⁹ United Nations Yearbook, 1946-47, Part I, p. 1.
(http://cdn.un.org/unyearbook/yun/chapter_pdf/1946-47YUN/1946-47_P1_SEC1.pdf)

²⁰⁰ Hannah Arendt, *The Origins of Totalitarianism* (San Diego: A Harvest Book-Harcourt, 1979), 269.

that respectable society had banned [...] and they elevated cruelty to a major virtue because it contradicted society's humanitarian and liberal hypocrisy'.²⁰¹ Having been 'excluded and oppressed from the memory of mankind', they rejoiced at destroying any form of 'respectability', to make a mockery of official history, which they saw as 'only the outward façade erected explicitly to fool the people'.²⁰²

The intensity of polarization between the Allied and Axis Powers on the question of human rights is unprecedented in history. It became a key facet of a broader, ferocious struggle among rival ideologies—liberalism, fascism, and communism—that projected and sought to impose radically competing visions of world order.²⁰³ Human rights became the hallmark of the liberal vision of the world propagated by the United States and United Kingdom, deployed to demarcate and delegitimise rival visions. The weaponization of human rights in the ideological warfare served to demarcate antithetical visions about the future world order, indicating maximum divergence about their existence and meaning. Even racial equality, the fundament of all human rights, remained in dispute. The ideological war could be fought on particular grounds only, generating intense polarization, but no shared understanding of human rights. The war increased the salience of the idea of human rights, but it did not bring about a qualitative change in their conception or application.

3.2. Recognition

Whatever the intentions of Allied Powers in deploying human rights as an ideological weapon against Nazi Germany, they appealed to the highest aspirations of people across the

²⁰¹ Arendt, 331.

²⁰² Arendt, 333.

²⁰³ Mark Mazower, *Dark Continent: Europe's Twentieth Century* (New York: Vintage Books - Random House, 1998), 2.

world, particularly the oppressed, and generated strong expectations about concrete action to protect them. Such aspirations could be observed even in the midst of war, as Myrdal observes:

‘[d]eclarations of inalienable human rights for people all over the world are now emanating from America. Wilson's fourteen points were a rehearsal; Roosevelt's four freedoms are more general and more focused on the rights of the individual. The national leaders proclaim that the coming peace will open an age of human liberty and equality everywhere. This was so in the First World War, too. This time something must be done to give reality to the glittering generalities, because otherwise the world will become entirely demoralized. It will probably be impossible to excite people with empty promises a third time’.²⁰⁴

Myrdal recovers the traces of recognition that had survived the weaponizing of human rights against Nazi Germany and their potential for substantive action to meet widespread expectations. It is arguable whether the victors of the war cared about their ability to use or sustain human rights in the future, but that is irrelevant for their continued relevance. The mere fact that they had weaponised human rights with unprecedented intensity had left indelible moral traces for posterity. Anyone, especially those to whom appeals to human rights were directed, could reclaim the traces that they had left behind and invoke them as a ground for demanding consistency with their substantive implications, irrespective of the strategic interests of those who deployed them initially. As Myrdal demonstrates, the blacks

²⁰⁴ Myrdal, *An American Dilemma*, 1019.

made recourse to these traces to intensify their struggle against racial discrimination in the United States.²⁰⁵

The weaponization of human rights had ignited a struggle for recognition and justice across the colonised world, not least in South Africa where Nelson Mandela found hope for the liberation of his people from white rule. Mandela would later observe that:

‘[s]ome in the West saw the Charter as empty promises, but not those of us in Africa. Inspired by the Atlantic Charter and the fight of the Allies against tyranny and oppression, the [African National Congress] created its own Charter . . . We hoped that the government and ordinary South Africans would see that the principles they were fighting for in Europe were the same ones we were advocating at home’.²⁰⁶

But this is not how the Allied Powers saw it. Despite their readiness to deploy human rights as a propaganda weapon to mobilise support against the Axis powers, they later demonstrated with their actions that they had no intention of following through with concrete measures once the war was over.²⁰⁷ This stark contradiction became apparent when the Allied Powers met in Dumbarton Oaks in autumn 1944 to draw up plans for a successor to the League of Nations, to secure world peace. On 7 October 1944, the Allied Powers agreed on a tentative plan - ‘the Dumbarton Oaks proposals’- for the creation of a ‘general international organization’, or what became the United Nations, which drastically downgraded the role of human rights. Completely absent from the principles and purposes of the new organization,

²⁰⁵ Myrdal, Part 11.

²⁰⁶ Quoted in Schabas, *The Universal Declaration of Human Rights*, lxxiv.

²⁰⁷ Brucken, *A Most Uncertain Crusade*, 49; Schabas, *The Universal Declaration of Human Rights*, lxxv; Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Bloomington: Indiana University Press, 2008), 93–94.

human rights received only one passing reference in the context of social and economic development, in Chapter IX of the organization's constitution, reading as follows:

‘[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the Organization should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms’.²⁰⁸

3.2.1. From traces to precedents

The minimal role accorded to human rights in the constitution of the new organization stood in stark contrast with their central role in the war propaganda, but what is even more striking is that even such minimal recognition could not be taken for granted. The Allied Powers disagreed strongly about their inclusion and meaning. It was only after the United States overcame the strong opposition offered by the Soviet Union and the United Kingdom that human rights could be incorporated in that minimal form. But the preferences of the Allied Powers diverged from those of other countries, especially from Latin America, who had far more ambitious and concrete plans for human rights. Panama had proposed a catalogue of rights to be included in the founding document of new organization, which later would inspire the drafting of the Universal Declaration.

In the same spirit, on 31 October 1944, Mexico came out with a substantive memorandum, offering a concrete alternative to the Dumbarton Oaks Proposals. The place given to human

²⁰⁸ United Nations Information Organisation, Documents of the United Nations Conference on International Organization, San Francisco, 1945. Volume III, Dumbarton Oaks Proposals, Comments and Proposed Amendments, p. 19.

rights marks the defining difference between the two proposals. The Mexican proposals accord human rights top priority, namely in Article 1 of Chapter I of the purposes of the organization, as can be gleaned from the comparison below:²⁰⁹

Dumbarton Oaks Proposals

Article 1. ‘To maintain international peace and security; and to that end to take effective collective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means adjustment or settlement of international disputes which may lead to a breach of the peace’.

Mexican Proposals

Article 1. ‘International Law is recognized as the fundamental basis for the conduct of Governments. In order to determine the essential principles of International Law, the members of the community of nations engage themselves to observe the standards set forth in the “Declaration of Rights and Duties of Nations” and in the “Declaration of the International Rights and Duties of Man” which are appended to the present Pact, and which shall be revised from time to time, to the end that they may reflect the necessities and aspirations of international harmony’.

²⁰⁹ United Nations Information Organisation, Documents of the United Nations Conference on International Organization, San Francisco, 1945. Volume III, Dumbarton Oaks Proposals, Comments and Proposed Amendments, p. 60.

The Mexican proposals envisaged a committee of experts to draft the said Declarations before the signing of the Charter of the new organization.²¹⁰ What is more, the organization would be ‘charged with seeing to it’ that observance of these principles contained in those Declarations would be ‘faithfully put into practice’.²¹¹ Breaking radically with the role given to human rights previously, and in addition to a declaration of rights adopted by all states, the new organization had to establish an ‘international system to ensure practical application’, which combined would signify an ‘enormously important step forward’.²¹²

Unambiguously, Mexico justified these proposals by reanimating the traces of recognition left behind by the deployment of human rights in the war propaganda. They express concern about Dumbarton Oaks Proposals containing ‘(...) a serious hiatus in regard to the International Rights and Duties of Man, respect for which constitutes one of the essential objectives of the present War, as expressed in the Preamble of the Declaration by the United Nations (...)’.²¹³ Furthermore, the Mexican proposals explicitly refer to the traces that survived the weaponization of human rights, when it describes the inferior role accorded to human rights as the main deficiency of the Dumbarton Oaks Proposals. This is not trivial deficiency but something that is ‘(...) necessary to correct, since they establish situations which do not harmonize with the fundamental principles for which the United Nations have

²¹⁰ United Nations Information Organisation, Documents of the United Nations Conference on International Organization, San Francisco, 1945. Volume III, Dumbarton Oaks Proposals, Comments and Proposed Amendments, p. 60.

²¹¹ United Nations Information Organisation, Documents of the United Nations Conference on International Organization, San Francisco, 1945. Volume III, Dumbarton Oaks Proposals, Comments and Proposed Amendments, p. 69.

²¹² Ibid.

²¹³ United Nations Information Organisation, Documents of the United Nations Conference on International Organization, San Francisco, 1945. Volume III, Dumbarton Oaks Proposals, Comments and Proposed Amendments, p. 63.

been fighting for five years (...).²¹⁴ Mexico sought to harness the power of consistency to make its proposals compelling, by exposing the inconsistency between the invocation of human rights as a war aim and their suppression in the organization that was supposed to secure the world peace. The results of these efforts would not be immediately visible, however.

3.2.2. Rescue of the individual

The unprecedented recognition of human rights would come during the San Francisco conference in 1945, where delegations from forty-six nations gathered to finalise the Dumbarton Oaks plans for a world organization. The Charter establishing the United Nations, signed on 26 June 1945, radically transformed the Dumbarton Oaks Proposals with regard to the place given to human rights, according them seven important mentions instead of one, the hierarchy and significance of which has been laid out by Charles Malik in an exemplary fashion.²¹⁵ Starting with the Preamble, the determination ‘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’ is second only to the determination ‘to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind’. Article 1 declares ‘promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’ to be one of the purposes of the United Nations. Article 13 paragraph 3 places assistance in the realization of human rights and fundamental freedom on an equal footing

²¹⁴ United Nations Information Organisation, Documents of the United Nations Conference on International Organization, San Francisco, 1945. Volume III, Dumbarton Oaks Proposals, Comments and Proposed Amendments, p. 159.

²¹⁵ Commission of Human Rights, Summary Record of the 50th Meeting (E/CN.4/SR.50) 4 June 1948, p. 4-6.

with the promotion of international cooperation in economic, social and cultural fields.

Article 55 paragraph (c) declares ‘universal respect for, and observance of human rights and fundamental freedoms’ to be among the necessary conditions for world ‘stability and wellbeing’. Article 62 makes the promotion of respect for, and observance of human rights, one of the main functions of the Economic and Social Council. The most significant form of recognition came with Article 68, expressly mandating the creation of a commission for the promotion of human rights – the only commission mentioned explicitly in the Charter, which was to become the fulcrum of the UN human rights system. Finally, encouragement of respect for human rights became one of the objectives of the trusteeship system.

Taken together, these provisions mark a momentous development for human rights, not only because of the universal significance given to human rights in the Charter. But primarily because, as Antonio Cassese observes, the individual became the object of protection in virtue of being an individual. No longer would the moral worth of the human person depend on being a member of a group or minority. The very *ratio* underpinning international human rights norms had changed, Cassese notes. Total disrespect for human rights and human liberty as propagated by the Nazis came to be seen as the main cause of the catastrophic war and the inspiration for the human rights provisions in the Charter, making peace inseparable from rights and giving substance to the expectation of a post-war order that would rest on this peace-rights binomial, Cassese observes.²¹⁶ The importance of the rescue of individual rights in international relations cannot be overstated, as John Humphrey, a key architect of the UN human rights system declares: ‘[t]here has never been a more revolutionary development in

²¹⁶ Cassese, *I Diritti Umani Oggi*, 25.

the theory and practice of international law and organization than the recognition that human rights are matters of international concern'.²¹⁷

'How this was achieved', Humphrey concedes, 'has never been explained'.²¹⁸ In the rush to finalise the negotiations, he ventures, the delegates might have not given 'much thought' to the 'revolutionary character of what was happening'.²¹⁹ This appears distinctly implausible, given the unprecedented salience of human rights throughout the war and specially since Dumbarton Oaks. This question has produced significant debate with various positions favouring awareness of the Holocaust, the power of the United States, or the determined activism by NGOs as possible answers.²²⁰ Cassese views this outcome as a compromise between strong obligations proposed by mainly Latin American countries, involving the recognition of human rights in principle but the exclusion of the UN from playing any role in protecting them, as proposed by major powers from the West, especially the United States, and Socialist countries under the leadership of the Soviet Union, who pressed for the right to work, education and especially the right of self-determination of peoples, antagonised Western countries.²²¹ The United States and the Soviet Union were united in their determination to suppress the far-reaching proposals that came from Latin American countries, as no obligation for the protection of human rights was upheld. The right to self-determination was proclaimed in Articles 1 and 55 as a general principle for the UN but then in an emasculated form as 'self-government'. The competences of the UN were doubly constrained by the politically binding character of the decisions of the General Assembly and

²¹⁷ John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Transnational Publishers Inc., U.S., 1983), 46.

²¹⁸ Humphrey, 13.

²¹⁹ Humphrey, 13.

²²⁰ Clark, *Legitimacy in International Society*, 137–38.

²²¹ Cassese, *I Diritti Umani Oggi*, 30.

the Economic and Social Council charged with human rights, and the primacy of domestic jurisdiction enshrined in Article 2 paragraph 7.²²² These are critical elements that inform the analysis throughout, but the language of compromise describes the character of the agreement, it does not explain its form.

Adopting a fresh perspective in a saturated debate, Ian Clark provides new evidence to show that the United States had already included provisions of human rights in their proposals before they were lobbied by NGOs, and that the Soviet Union put forward concrete proposals irrespective of whether or not they had ‘been playing its propaganda game, or seeking to stall American initiatives by dragging them into the bog of ideological debate’.²²³ Instead of prioritising one factor or a collection of them, Clark seeks to uncover their interaction and mutual relations, drawing a connection between the use of human rights during the war and the need to respond to the expectations they had generated after the war. As he put it: ‘[t]o the extent that respect for human rights came to be the badge distinguishing the wartime allies from the axis powers, this took on an immensely powerful role for the post-war future’.²²⁴ Regardless of intentions, they became ‘an important part of the structure of the post-war expectation’. ‘Having fed it’, Clark continues, ‘(...) political leaders had also to be seen to respond to it: they were constrained by what they themselves had created’.²²⁵ For Clark this is an example of ‘world society’ in action, in which appeals to the world public opinion and conscience carry significant weight. It is an illustration of how the logic of consistency reanimates traces of recognition to bring about fundamental change.

²²² Cassese, 31.

²²³ Clark, *Legitimacy in International Society*, 139.

²²⁴ Clark, 147.

²²⁵ Clark, 147.

In fact, it is a perspective pioneered in the early 1940s by Myrdal, who saw the need to respond to the expectations raised by the invocation of rights as crucial for their advancement in the US context. More specifically, he saw the exposure of ‘inconsistency between American ideals and practice’ as a simple and effective strategy for black people to fight for their rights. He develops this strategy by extracting speech acts from the public debate of the time, as this quote from an editorial may indicate: ‘...this strange and curious picture, this spectacle of America at war to preserve the ideal of government by free men, yet clinging to the social vestiges of the slave system’.²²⁶ In particular, two quotations Myrdal deploys as illustration of the strategy, which he calls ‘ideological attack’, bring to life the unseen power of traces of recognition. The first comes from a newspaper editorial:

‘[i]f the United Nations win this war the principle of the world-wide legal equality of races will have to be recognized. Since this is largely a war of ideas, and since racial equality before the law has become one of the central ideas on the democratic side, we can almost say that this principle, in itself, may be the deciding factor. The Chinese, the East Indians, the numerous African peoples and many other groups are on our side, or would be so if they were completely convinced that we mean what we say by equality just as unreservedly as the Nazis mean what they say by inequality. But we Americans cannot very well talk convincingly in these terms unless we prove our sincerity in our own country’.²²⁷

The second comes from the speech delivered by the Republican party leader Wendell Willkie before the National Association for the Advancement of Colored People in July 1942:

²²⁶ Myrdal, *An American Dilemma*, 1008.

²²⁷ Myrdal, 1008.

‘Today it is becoming increasingly apparent to thoughtful Americans that we cannot fight the forces and ideas of imperialism abroad and maintain a form of imperialism at home. The war has done this to our thinking (...). So we are finding under the pressures of this present conflict that long-standing barriers and prejudices are breaking down. The defence of our democracy against the forces that threaten it from without has made some of its failures to function at home glaringly apparent. Our very proclamations of what we are fighting for have rendered our own inequities self-evident. When we talk of freedom and opportunity for all nations the mocking paradoxes in our own society become so clear they can no longer be ignored’.²²⁸

These remarkable passages are testimony of how appeals to the universal subvert the intentions of the agents appealing to it, leaving indelible traces that serve as steppingstones towards the substantiation of the universal ideal. Both Clark and Myrdal point towards the inclusion of human rights in the UN Charter as being a form of recognition produced by political actors seeking to preserve the relevance of human rights in defining the appropriateness of their interactions and behaviour. It is an attempt to repair the cataclysmic damage wrought by the war on the ability of states, singly and collectively, to espouse moral principles with plausibility. It is not the result of one actor or event, but rather the outcome of collective agency consisting of different actors pursuing their respective positions according to the imperatives of ideological struggle in relation to the universal. It is to this universal that we now turn, using the drafting of the Universal Declaration as a prime example of the power behind the emergence and expansion of human rights.

²²⁸ Myrdal, 1009.

3.2.3. Shared universal

The undeniable failure to enshrine a declaration of rights in the Charter did not discourage Latin American countries such Panama and Cuba from pressing harder for such a declaration from the very first session of the General Assembly.²²⁹ On 5 January 1946, Cuba moved to expand the Assembly's agenda with a new item on a 'Declaration of the International Duties and Rights of Man' and a 'Declaration of the Duties and Rights of Nations'.²³⁰ The Cuban representative, Ernesto Dihigo, presented both initiatives as the embodiment of the expectations generated during the war for a world order based on law and justice, and urged the Assembly to set up working groups to study these matters and possibly take a decision by the end of its first session.²³¹ Dihigo's plea for action alludes to the logic of consistency, when he argues that:

'[a]ll through the war that brought into existence the United Nations, it has been repeatedly said by our great leaders that victory would lead us into a new world organization based on justice and on law; and if that is true, now that victory has been won and the United Nations has come into existence, carrying the expectations of the whole world, we need to tell [the] world that we have not forgotten the promise that were made in San Francisco, and that though there are urgent matters that will requires our attention in the days to come, from the very beginning the United Nations stands by its obligations, and that we are going to establish these human rights and those rights of nations'.²³²

²²⁹ Schabas, *The Universal Declaration of Human Rights*, lxxvii–lxxviii.

²³⁰ General Assembly, Memorandum by the Executive Secretary (A/3) 5 January 1946, p. 6.

²³¹ General Assembly, Verbatim Record Seventh Plenary Meeting (A/PV.7) 14 January 1946, p. 203.

²³² General Assembly, Verbatim Record Seventh Plenary Meeting (A/PV.7) 14 January 1946, p. 202-203.

Dihigo presented urgent action in the field of human rights by the Assembly as an imperative to ensure consistency with prior commitments assumed by the Allied Powers, which gave the justification for the establishment of the United Nations. However, the Assembly rejected the Cuban proposals, with its President arguing that this was a matter for the Human Rights Commission, which was mandated by the UN Charter and was to operate under the authority of the Economic and Social Council, not the Assembly.²³³ After this defeat, on 12 February 1946, the Cuban delegation brought the matter before the Council by means of submitting a draft declaration of human rights.²³⁴ Here again, Cuba justified a call for urgent action as a necessity to meet the Charter's promise to defend human rights.²³⁵ In the same session, the Council decided to establish the Human Rights Commission, endowing it with a broad mandate to promote human rights.²³⁶ But as no definition of human rights existed, the first task of the Commission had to be the drafting of 'an international bill of rights'.²³⁷ This was a task that the Commission would return once it had, in its nuclear formation consisting of nine individuals, defined its procedures, agenda and final composition.²³⁸

The full Commission met for the first time on 27 January 1947, and already in its first meeting appointed Eleanor Roosevelt (Chair), together with Peng Chun Chang (Vice-Chair) and Charles Malik (Rapporteur) to commence the work on formulating a preliminary draft of the 'international bill of human rights'.²³⁹ Upon their appointment, they charged John

²³³ Schabas, *The Universal Declaration of Human Rights*, lxxviii.

²³⁴ Schabas, lxxviii.

²³⁵ Commission of Human Rights, Draft Declaration on Human Rights and Letter of Transmittal (E/HR/1) 22 April 1946, p. 1.

²³⁶ Economic and Social Council resolution (E/27) 16 February 1946.

²³⁷ Economic and Social Council resolution (E/27) 16 February 1946, Section A (a).

²³⁸ Schabas, *The Universal Declaration of Human Rights*, lxxix.

²³⁹ Commission on Human Rights, Report to the Economic and Social Council, 1st Session (document E/259) 1947, paragraph 10 (a) and paragraph 13.

Humphrey (Canada), head of the Division of Human Rights, with the task of preparing a preliminary draft declaration, what became the Draft Outline consisting of forty-eight brief articles and indications of what might be included in the Preamble.²⁴⁰ Humphrey's draft declaration, revised twice by René Cassin (France) to give it greater unity,²⁴¹ formed the basis of the drafting process, informed also by other suggestions and proposals, most notably from Latin American countries. It was a living document that underwent thousands of alterations in the drafting process, involving first an eight-member Drafting Committee appointed by the Commission, followed by the Commission itself with its eighteen members, and finally the Assembly, which after working on it for two months adopted it as the Universal Declaration of Human Rights on 10 December 1948.

It is impossible to convey the variety of opinions, the richness of the discussions and the implications of nearly two years of intense deliberations on the draft declaration. The main recurring themes related to questions of the *content* of the declaration (e.g. which rights should go in), its *form* (e.g. whether it should consist of a 'manifesto' or contain a convention with measures for implementation), and *style* (e.g. whether it should be a short or long and detailed). These deliberations generated such a massive volume of work that, following the suggestion of Chun Chang (China), and later Dehousse (Belgium), three working groups were set up to concentrate on three tasks: the question of Declaration, Convention or

²⁴⁰ Commission on Human Rights, Draft Outline of International Bill of Rights (prepared by the Division of Human Rights) (E/CN.4/AC.1/3) 4 June 1947.

²⁴¹ Commission on Human Rights, Suggestions Submitted by the Representative of France for Articles 7-32 of the International Declaration of Rights (E/CN.4/AC.1/W.2/Rev.1) 18 June 1947; Commission on Human rights, Revised Suggestions Submitted by the Representative of France for Articles of the International Declaration of Rights (E/CN.4/AC.1/W.2/Rev.2) 20 June 1947.

Conventions, and Implementation.²⁴² Yet the Commission had time to consider only the draft Declaration before transferring it to the Assembly, and therefore postponed discussion on the Convention and the crucial question of implementation.²⁴³

However, uneven progress and the bifurcation of the drafting process of the elements that initially were envisaged to fit under the umbrella of an ‘international bill of human rights’ did not diminish the animating idea behind it: the search for a shared universal. The obvious place to look for evidence is in the title. As Schabas points out, it was René Cassin (France) who proposed to change the title from ‘international declaration’ to ‘universal declaration’.²⁴⁴ This might appear as a ‘minor alteration’ as Schabas correctly observes, but it is not –it was not a symbolic or stylistic modification. Quite on the contrary: it exemplifies a new *ratio* of the organisation world society. The ‘International’ refers to nation states members of the UN, whereas the ‘Universal’ includes every human being. The Soviet representatives readily recognised the significance of this alteration and did not agree with it. But whilst we owe the ‘universal’ in the title of the declaration to René Cassin’s perceptive initiative, this was only one prominent appearance of an unprecedented process of universalisation. The title change marked the formal recognition of what the body of the text signified and embodied at a deeper level.

The search for a shared universal is what gives unity to the Universal Declaration and what sets it apart from other declarations. It is not the imposition of one particular conception of

²⁴² Commission on Human Rights, Summary Record of the 4th Meeting (E/CN.4/AC.1/SR.4) 12 June 1947, p. 11; Commission on Human Rights, Belgian Proposal (E/CN.4/44) 3 December 1947, p. 1.

²⁴³ General Assembly, Draft International Covenants on Human Rights. Annotation Prepared by the Secretary-General (A/2929) 1 July 1955, p. 7; Commission on Human Rights, Report of the Drafting Committee (E/CN.4/21) 1 July 1947, Annex H.

²⁴⁴ Schabas, *The Universal Declaration of Human Rights*, cviii.

the universal over others, but rather the discovery of a universal that could be shared by all participants irrespective of their particular visions of it, marking a fundamental break with the past, especially with the particular universalism of imperial orders of the 19th and 20th century. Without an appreciation of the profound transformative force of the shared universal, it would be impossible to make sense of the coalescence of a plurality of positions and views into a single coherent text. The search for the shared universal is a force that animates virtually all positions on various article in the Declaration, whether it concerns supporting or opposing a specific wording. Each time a delegate proposed an article, or an amendment based on a particularistic concern, wittingly or unwittingly, the response and resulting pressure from the exchange of views pushed toward framing of the relevant proposal in universal terms.

The question of gender offers a typical illustration of the construction of the shared universal. In an almost natural fashion, ‘men’ appeared as the default subject of rights in the drafting process, which for Roosevelt (United States) and Wilson (United Kingdom) was a non-issue. Yet for Koretsky (Soviet Union) it was all but a trivial matter, since it implied ‘an historical reflection on the mastery of men over women’.²⁴⁵ In response, Harry (Australia) contended that the word posed an ‘insoluble problem’, and that the UN Charter itself referred to mankind to mean all human species; Koretsky retorted that the human species included both women and men. Likewise, Roosevelt could not see a reason to object to the word because ‘it had become customary to say “mankind” and mean both men and women without differentiation’.²⁴⁶ The issue was taken up again at the Commission, where Hansa Mehta (India) objected to the wording of ‘all men’ in Article 1 of the draft declaration and proposed

²⁴⁵ Summary Record of the 13th Meeting (E/CN.4/AC.1/SR.13) 20 June 1947, p. 7

²⁴⁶ Ibid.

to have it replaced with ‘human beings’ or ‘persons’; again, Roosevelt opposed the change, insisting that the wording ‘was generally accepted to include all human beings’.²⁴⁷ To avoid further discussion on the matter, she put article 1 to a vote and won, with five abstentions. As the vote did not produce closure, Lord Dukeston (United Kingdom) proposed to add a footnote to Article 1, qualifying that the word ‘men’ in that context ‘referred to all human beings’, a proposal that was later adopted.²⁴⁸ This footnote marked just the beginning of recognition of gender bias, and after several iterations of the question, the reformist views of Hansa Mehta (India) carried the day throughout the text. Now Article 1 of the Universal Declaration reads ‘all human beings’ rather than ‘all men’, and the Declaration became a Declaration of ‘human rights’ rather than a declaration of the ‘rights of man’. Mehta could achieve this subtle change by harnessing the force of the universal to filter out what Koretsky called ‘historical atavisms’²⁴⁹ and reduce the gender bias in the Declaration. It is only from a universal point of view that this form of naturalised discrimination could become a problem to be resolved.

It is no accident that the defining terms in the Universal Declaration are universals: ‘all’, ‘person’, ‘human’, ‘everyone’, ‘every person’, ‘without distinction’, including their antonyms, such as ‘no one’. These terms reflect the pursuit of the highest forms of universalism, untainted by specifications of particularisms. The force of universalisation process was so strong that became virtually impossible to justify any particular reference to special groups, even if the intention was to empower them. For example, when the problem of equal pay for equal work was addressed, Pavlov (Soviet Union) and Stepanenko (Belorussia) insisted on specifically adding ‘equal pay for women’, as it was they who had

²⁴⁷ Summary Record of the 34th Meeting (E/CN.4/SR.34) 12 December 1947, p. 4.

²⁴⁸ Summary Record of the 34th Meeting (E/CN.4/SR.34) 12 December 1947, p. 5.

²⁴⁹ Summary Record of the 13th Meeting (E/CN.4/AC.1/SR.13) 20 June 1947, p. 6.

faced discrimination in the matter of pay.²⁵⁰ It did not come as a surprise that Roosevelt (United States) did not see ‘the need for a specific provision’, but what astonished Stepanenko (Byelorussia) was that even Mehta (India) expressed her opposition to such a provision.²⁵¹ Her reasoning was that specific mentioning of women would only weaken their position. Employment was not the only area where women were discriminated against, yet the Universal Declaration did not mention women specifically in those areas – ‘everyone’ was understood as including women too.²⁵² The Soviets were joined by the representative of the Commission on the Status of Women who appealed to the ‘sense of justice’ of the Commission to accept such a provision, but the Commission rejected it by eight votes to five, with four abstentions, in favour of ‘everyone’.²⁵³ Despite good intentions, specific reference to women would hamper universal recognition of their interests when view from a purely universal point of view.

Another case is the recognition of minority rights, supported by Pavlov (Soviet Union), Klekovkin (Ukraine), Vilfan (Yugoslavia). In line with her previous stance, Mehta (India) argued that the protection of every human being rendered specific provision on the protection of minorities redundant.²⁵⁴ In this she could count on the support of Chun Chang (China), Loutfi (Egypt), Wilson (United Kingdom), and Roosevelt (United States) – all of whom favoured the deletion of a specific provision contained in Article 31 of the draft

²⁵⁰ Commission on Human Rights, Summary Record of the 66th Meeting (E/CN.4/SR/66) 9 June 1948, p. 5-7.

²⁵¹ Commission on Human Rights, Summary Record of the 66th Meeting (E/CN.4/SR/66) 9 June 1948, p. 5-6.

²⁵² Commission on Human Rights, Summary Record of the 66th Meeting (E/CN.4/SR/66) 9 June 1948, p. 7.

²⁵³ Commission on Human Rights, Summary Record of the 66th Meeting (E/CN.4/SR/66) 9 June 1948, p. 10.

²⁵⁴ Commission on Human Rights, Summary Record of the 73rd Meeting (E/CN.4/SR.73)15 June 1948, p. 6.

declaration.²⁵⁵ Whilst acknowledging the dangers of forced assimilation, Lebeau (Belgium) pointed to the uses of minority rights by Hitler as a pretext for aggression to caution against including them in the declaration.²⁵⁶ Charles Malik (Lebanon) asked for a more careful consideration of the question which he saw as revealing two fundamentally different conceptions of the State: ‘the uni-national, uni-cultural State’ which pursued assimilation of groups and ‘the multi-national, multi-cultural State’ which actively embraces diversity and the recognition of difference.²⁵⁷ Assimilation and homogenisation as applied in France or in the United States might not apply to other parts of Europe or Asia, he argued. Therefore, a formula that reconciles these two competing models, mindful of not endorsing or undermining either of them – had to be found.²⁵⁸ Neither his plea nor the vigorous opposition from socialist delegates could stop the Commission from moving to delete the provision, by 10 votes to 6.²⁵⁹ The plight of minorities could only enter the Universal Declaration in their most general form as enshrined in Articles 2, 16 and 18. The treatment of these two questions exemplifies a general pattern: all rights contained in the Universal Declaration had to be articulated in the purest universal terms in order to reach everyone and pre-empt any foreseeable pretext for the arbitrary exclusion of anyone. Inescapably, inclusion of some rights entails the exclusion of some other rights, but the ethos of the framers was inclusion and avoidance of exclusion through their appeal to the universal.

²⁵⁵ Commission on Human Rights, Summary Record of the 73rd Meeting (E/CN.4/SR.73)15 June 1948, p. 6.

²⁵⁶ Commission on Human Rights, Summary Record of the 73rd Meeting (E/CN.4/SR.73)15 June 1948, p. 6.

²⁵⁷ Commission on Human Rights, Summary Record of the 73rd Meeting (E/CN.4/SR.73)15 June 1948, p. 8-9.

²⁵⁸ Commission on Human Rights, Summary Record of the 73rd Meeting (E/CN.4/SR.73)15 June 1948, p. 12.

²⁵⁹ Commission on Human Rights, Summary Record of the 74th Meeting (E/CN.4/SR.74)15 June 1948, p. 5.

In a general sense, the Declaration itself reflects a rearticulation of particular existing rights through the prism of the universal. This perspective does not reveal a ‘distinctive synthesis of previous thinking about rights and duties’ as Ann Glendon finds.²⁶⁰ The ‘organic unity’ that Glendon sees is what is here conceptualised as the product of the universalisation of particular rights, not some synthesis of them. A closer approximation comes from Norberto Bobbio when he viewed the Declaration as containing an:

‘embryonic synthesis of a dialectical movement which commences with the abstract universality of natural rights, passes through the concrete specificity of national positive rights, and terminates with a universality which is no longer abstract but itself a concrete expression of the universal positive rights’.²⁶¹

The dialectic between the national practice and universal principle is certainly visible throughout the negotiations, but nevertheless the lens of synthesis mischaracterises what the Universal Declaration embodies. Indeed, the Declaration contains rights that embody disagreement on first principles and are there because they were able to survive the litmus test of the universal and not because agreement was found about them. From the outset, the framers of the Declaration drew explicitly from existing rights recognised in national constitutions,²⁶² but they did so to defend competing objectives. To justify a separation between social-economic and civil and political rights, Cassin (France) pointed to their philosophical difference, especially pertaining to their adjudication, but also to the need to

²⁶⁰ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, 1 edition (New York: Random House, 2001), xviii.

²⁶¹ Bobbio, *The Age of Rights*, 16–17.

²⁶² Commission on Human Rights, International Bill of Rights - Documented Outline (E/CN.4/AC.1/3/Add.1) 11 June 1947.

follow ‘the example to be found in all constitutions’ adopted after World War Two.²⁶³ This at a time when socialist delegates argued against their separation. Using the same analogy, Cassin went against the position of the United Kingdom when he argued that omitting ‘the modern and widely accepted concept of social security’ from the Declaration would be a ‘grave error’.²⁶⁴ What Cassin did was incorporate rights that could not be objected to from a universal point of view, but that clearly does not mean that there was or is universal agreement about those rights; in fact, as shown in section 3 of this chapter, the opposite is true. By and large, the Declaration does not ‘invent’ new rights, with the exception perhaps of socio-economic rights, but rearticulates particularistic rights in universal terms, what Cassin refers to as ‘an explanation of the human rights in existence before the [UN] Charter’.²⁶⁵ The Declaration involves an exercise in translating particular existing rights coming from different traditions into universal norms that would supersede all particular norms.

This means that the critical force in drafting process is not specific individuals or visions but the structure of justification that frames used to advance or oppose specific rights: the universal. Proposals that entered the Universal Declaration were those that passed the filter of what the agents considered or could not deny as universal. A fortiori, if they can pass the test of the universal, these proposals are not exactly particular either but rather universals that are discovered by particular actors, who may consider them as part of their identity and are invested in elevating them as a universal for everyone – as *universal universals*. This logic

²⁶³ Commission on Human Rights, Summary Record of the 72nd Meeting (E/CN.4/SR.72) 14 June 1948, p. 4.

²⁶⁴ Commission on Human Rights, Summary Record of the 72nd Meeting (E/CN.4/SR.72) 14 June 1948, p. 4.

²⁶⁵ Commission on Human Rights, Summary Record of the 48th Meeting (E/CN.4/SR.48) 26 May 1948, p. 8.

subverts the particular intentions of individual agents and pushes them inevitably towards one direction. That is what was required to offer an alternative to the race regime of Hitler, to avoid arbitrary exclusion of some people in all circumstances. In accordance with the logic of consistency, the framers embraced the universal in their attempt to avoid any possibility for anyone excluding any human being anywhere, anytime. It is this unprecedented universalisation process fuelled by the logic of consistency that explains the birth of the shared universal.

3.2.4. Towards international scrutiny

No sooner than the Assembly adopted the Universal Declaration it had created the largest discrepancy with its aspirations ever: the standard set by the Declaration revealed how hopelessly inadequate the Assembly's response had been to repeated calls for concrete action in realising human rights promised during the war; in fact, it had failed to provide any means whatsoever to implement them. Instead, all the Assembly could do is request the Council and the Commission to 'continue to give priority in its work to the preparation of a draft Covenant on Human Rights and draft measures of implementation'.²⁶⁶ But that did not exonerate states of their responsibility for managing the yawning gap they themselves had just created. The imperative of managing this dissonance is a thread that runs throughout their deliberations and choices regarding the ways for safeguarding the rights contained in the Declaration. It helps make sense of the association between the proclamation and actualisation of rights that emerge in the discussions throughout the drafting process, where the Drafting Committee 'acted on the assumption that the international community must ensure the observance of the rights to be included in the International Bill of Human

²⁶⁶ General Assembly Resolution 217(III) 10 December 1948, Section F.

Rights'.²⁶⁷ That the Universal Declaration could not retain its authority without additional measures to implement its provisions, was acknowledged from the onset of the drafting process.

For a '[d]eclaration without implementation', Roosevelt (United States) acknowledged, 'would be a great travesty and deception to the peoples of the world'.²⁶⁸ The task of the Commission ought to 'not be merely the enunciation of principles', Mehta (India) argued, but also 'the improvisation of adequate machinery to implement those principles'.²⁶⁹ It is a connection Laugier made in the first meeting of the nuclear Commission as he charted the core tasks of the Commission, including 'the difficult but essential problem to define the violations of human rights within a nation' and 'the establishment of a machinery of observation which will find and denounce the violations of the rights of man all over the world'.²⁷⁰ Equipped with these new elements, Laugier hoped, the Commission could mobilize the world public opinion about violations of human rights before they reached catastrophic proportions, as they had under Fascism and Nazism.²⁷¹ More broadly, speaking on behalf of the nuclear Commission as a whole, Roosevelt affirmed that:

²⁶⁷ Commission on Human Rights, Report of the Drafting Committee (E/CN.4/21) 1 July 1947, p. 6.

²⁶⁸ Commission on Human Rights, Summary Record of the 11th Meeting (E/CN.4/AC.1/SR.11) 19 June 1947, p. 13.

²⁶⁹ Human Rights Commission, Summary Record of the 2nd Meeting, (E/CN.4/AC.1/SR.2) 27 January 1947, p. 4.

²⁷⁰ Commission of Human Rights, Summary Record of the 1st meeting (E/HR/6) 29 April 1946, p. 3

²⁷¹ Commission of Human Rights, Summary Record of the 1st meeting (E/HR/6) 29 April 1946, p. 3

‘the purposes of the United Nations with regard to the promotion and observance of human rights as defined in the Charter of the United Nations would only be fulfilled if provisions were made for the implementation of an International Bill of Rights’.²⁷²

The question of implementation had to be addressed with urgency, for failure to do so would jeopardise the role of the United Nations in the field of human rights in its entirety. The ‘ultimate test of the United Nations human rights programme would’, Humphrey avowed, ‘be whether it could create effective procedures for its implementation’.²⁷³ At a deeper level, however, the question of implementation cannot be separated from the recognition of human rights: it is a natural extension, from the point of view of consistency. The demand for implementation is not a matter of inflated expectations or an unforeseen development, but a necessary corollary of the adoption of the universal horizon as a means to respond to the moral decay wrought by Nazism and Fascism.

3.2.4.1. *Nyet to a Court*

What states had accepted to recognise in principle they had to follow through in practice. But this time producing consistency between principle and practice required an unprecedented leap forward. The imperative of establishing measures for the implementation of the Universal Declaration conflicted with the imperative of preserving the principle of non-interference as the foundation of the post-war order. The Soviet representative Koretsky (Soviet Union) acknowledged the dilemma from the outset as he warned that:

²⁷² Commission on Human Rights, Summary Record of the 8th meeting (E/HR/16) 8 May 1946, p. 3.

²⁷³ Humphrey, *Human Rights and the United Nations*, 33.

‘the [Drafting] Committee might be embarking on a voyage which would lead it in the direction where it might cross the border which divides international law from internal law. The border which divides the inter-relationship of governments from the field where sovereign rights of nations must prevail (...). Having beaten fascism [the UN] must formulate a Bill of Rights which would *prevent the rebirth of fascist systems* and of fascist ideology. Such a Bill, however, *must not be of such a nature as to interfere* in the internal system of various governments’.²⁷⁴

How the UN could prevent the revival of Fascism without being able to interfere in the internal affairs of sovereign states, he does not say. A learned man as Koretsky could of course grasp the contradiction, as Humphrey notes, but nevertheless he did not admit the basic fact that preventing the revival of fascism necessarily required violating the principle of non-interference.²⁷⁵ Instead, he continued to advocate for both goals at the same time. The persistent push by the Soviet Union to give universal recognition to racial equality, the right to education and other social and economic rights were explicitly framed as a strategy to tackle the root-causes of Nazism and Fascism or the ‘destruction of discrimination and inequality’ had to be the overarching aim of the Declaration.²⁷⁶ Yet the Soviet Union remained extremely sensitive to the possibility of infringement upon their sovereignty.

Even the vaguest of allusion to supranational implementation would have Koretsky (Soviet Union) warn against the danger of ‘interfere[nce] with the jurisdiction of national

²⁷⁴ Commission on Human Rights, Summary Record of the 5th Meeting (E/CN.4/AC.1/SR.5) 12 June 1947, p. 4-5. [Emphasis added]

²⁷⁵ Humphrey, *Human Rights and the United Nations*, 40–41.

²⁷⁶ Commission on Human Rights, Summary Record of the 5th Meeting (E/CN.4/AC.1/SR.5) 12 June 1947, p. 5.

governments'.²⁷⁷ This anxiety put him also at odds with the idea of 'independent and impartial tribunals' because, in his eyes, they ultimately implied an independent evaluation of sovereignty as such and embodied a critique of certain types of courts in certain countries.²⁷⁸ Surprisingly, he was careful to frame his opposition in universal terms. Each time that the Soviet Union rejected or supported a proposal it did so because it represented that which all states could agree on. This came in the form of 'the text of the bill should be acceptable to each and every government'²⁷⁹ or that the Declaration could include solely rights that 'all government could enforce', or that every right 'ought to be set forth in such a manner that all the governments, and each government separately, should be in a position to agree to enforce them'.²⁸⁰ Whether it was meant to weaken or evade the question of implementation altogether or to accommodate for pluralism of legal systems across the world, the Soviets felt compelled to articulate their positions in universal terms.

The Soviet views contrasted sharply with those of Australia, and to a lesser extent with those of the United Kingdom and France. The key challenge for Ralph Harry (Australia) was to endow the Declaration with provisions for effective implementation, as 'mere declaration of principles would not offer assurance against revival of oppression'.²⁸¹ To that end, Australia had proposed an International Court of Human Rights.²⁸² The Court would be endowed with

²⁷⁷ Commission on Human Rights, Summary Record of the 3rd Meeting (E/CN.4/AC.1/SR.3) 11 June 1947, p. 2.

²⁷⁸ Commission on Human Rights, Summary Record of the 3rd Meeting (E/CN.4/AC.1/SR.3) 11 June 1947 p. 6.

²⁷⁹ Commission on Human Rights, Summary Record of the 6th Meeting (E/CN.4/AC.1/SR.6) 13 June 1947, p. 1.

²⁸⁰ Commission on Human Rights, Summary Record of the 5th Meeting (E/CN.4/AC.1/SR.5) 12 June 1947, p. 5.

²⁸¹ Commission on Human Rights, Summary Record of the 7th Meeting (E/CN.4/AC.1/SR.7) 17 June 1947, p. 3.

²⁸² Commission on Human Rights, Draft Resolution for an International Court of Human Rights Submitted by the Representative from Australia (E/CN.4/15) 5 February 1947.

the power ‘to hear and determine all disputes concerning the rights of citizenship and enjoyment of human rights and fundamental freedoms provided for in the Declaration of Human Rights’.²⁸³ Crucially, the Court’s decisions would have had binding force for states that had accepted its jurisdiction.

Unsurprisingly, Koretsky (Soviet Union) came out strongly against the idea of a Court, pointing to the far-reaching implications it would have on the state system in general, and on the relation between the citizen and the state in particular. He reasoned that:

‘any action creating a Court which would stand higher than the separate governments as regards the inter-relations between governments and their citizens would inevitably lead to the destruction of governments. It would [...] be an organism which would be working against governments - a new, outside, disconnected organism which would take upon itself the function of regulating the relations between the governments and their citizens’.²⁸⁴

In sharp contrast, William Hodgson (Australia) saw the Court as a way of providing consistency with the recognition of human rights, stating that ‘the Commission should not confine itself to abstractions but was bound to consider immediately effective machinery for implementing human rights and fundamental freedoms, in accordance with its solemn obligations’.²⁸⁵ As Humphrey notes, the proposal of a Court was not as far-fetched as

²⁸³ Commission on Human Rights, Draft Resolution for an International Court of Human Rights Submitted by the Representative from Australia (E/CN.4/15) 5 February 1947, paragraph 2.

²⁸⁴ Commission on Human Rights, Summary Record of the 5th Meeting (E/CN.4/AC.1/SR.5) 12 June 1947, p. 9.

²⁸⁵ Commission on Human Rights, Report of the Drafting Committee (E/CN.4/21) 1 July 1947, p. 92.

Koretsky made it out to be. There were enough precedents where states had agreed to adjudicate disputes about human rights, such as the minorities regime under the League of Nations;²⁸⁶ Hodgson added precedents set by the Court of Upper Silesia, the International Court of Justice, and the mixed courts of Egypt. What was missing, he thought, was a Court where ‘individuals or minorities can seek redress when their human rights and freedoms have been violated’.²⁸⁷ In any event, nothing prevented states from voluntarily binding themselves by treaty, Humphrey adds.²⁸⁸ At the same time, Humphrey’s derision of most of Koretsky’s pronouncement as ‘utter nonsense’ seems unwarranted. In fact, Koretsky’s reading of the broader ramifications of a World Court are quite compelling, and surprisingly close to Carl Schmitt’s concept of ‘new sovereignty’. For in its mission of administering justice, the Court would be closer to the idea of justice itself than to the particular views of states to whom it owed its existence, growing into an autonomous authority with its own personality that would ultimately decide who is sovereign, and who is not.²⁸⁹ Far from being nonsensical, this development would be ‘the natural extension of the logical consistency’ Schmitt maintains.²⁹⁰

The Soviet *nyet* to the Court was perhaps forcefully formulated but it resonated with the views of other delegates who also opposed the idea of a Court. A Court for Cassin (France) appeared as ‘the normal step in the evolution of the world’ but ‘the moment was not yet ripe’.²⁹¹ In a similar way, Santa Cruz (Chile) felt that it was at that stage ‘utopian and

²⁸⁶ Humphrey, *Human Rights and the United Nations*, 42.

²⁸⁷ Commission on Human Rights, Summary Record of the 5th Meeting (E/CN.4/AC.1/SR.5) 12 June 1947, p. 10.

²⁸⁸ Humphrey, *Human Rights and the United Nations*, 42.

²⁸⁹ Carl Schmitt, *Roman Catholicism and Political Form*, trans. G. L. Ulmen (Westport, Conn.: Greenwood Publishing Group, 1996), 30–31.

²⁹⁰ Schmitt, 30.

²⁹¹ Commission on Human Rights, Summary Record of the 11th Meeting (E/CN.4/AC.1/SR.11) 19 June 1947, p. 11.

something for the future'.²⁹² Previously, Cassin had pronounced himself in favour of a Declaration with 'an assertive character'²⁹³, and supported a proposal for setting up an 'agency of implementation' for the promotion and observance of human rights.²⁹⁴ But now that 'civilized nations' had recognised human rights, Cassin suggested that the Commission ought 'to study the constitution of an appropriate International organ with a view to ensuring effective observance of those rights'.²⁹⁵ In the following year, he came up with a more concrete plan, envisaging the creation of a specialist commission with the power to examine state performance in relation to their obligations, consider petitions by individuals, NGOs and states, and conduct inquiries, including the possibility of referral to the International Court of Justice. He thought that this plan should be acceptable at that stage of international law and would 'meet the general desire for international action' in the matter.²⁹⁶ Given the 'tragic results of unlimited national sovereignty', Cassin declared that France 'was ready to give part of sovereignty, provided such an action was reciprocated'.²⁹⁷

Calling for immediate action in the matter, Cassin added that he would also support universal jurisdiction under a UN Attorney-General, responding among others to 'the need to free all cases from any political implications'.²⁹⁸ However, for Chun Chang (China), the Australian proposal did not go far enough, for reliance on law alone would not suffice to achieve the

²⁹² Commission on Human Rights, Summary Record of the 11th Meeting (E/CN.4/AC.1/SR.11) 19 June 1947, p. 12.

²⁹³ Commission on Human Rights, Summary Record of the 48th Meeting (E/CN.4/SR.48) 26 May 1948, p. 8.

²⁹⁴ Commission on Human Rights, Draft Report (E/HR/19) 15 May 1946, p. 3.

²⁹⁵ Commission on Human Rights, Proposal Submitted by the French Delegation to the Drafting Committee (E/CN.4/AC.1/5) 9 June 1947, p. 1-2.

²⁹⁶ Commission on Human Rights, Summary Record of the 73rd Meeting (E/CN.4/SR.73) 24 June 1948, p. 3.

²⁹⁷ Commission on Human Rights, Summary Record of the 73rd Meeting (E/CN.4/SR.73) 24 June 1948, p. 2-3.

²⁹⁸ Commission on Human Rights, Summary Record of the 73rd Meeting (E/CN.4/SR.73) 24 June 1948, p. 4.

desired result. Instead, the ‘intention and goal should be to build up better human beings, and not merely to punish those who violate human rights’.²⁹⁹ Laws should put an emphasis on ‘the promotion of the extension and refinement of human rights through education and moral means’. ‘Implementation’, he continued, ‘does not only mean punishment, but also measures for the full development of man’.³⁰⁰ In each case, the Court did not appear as a desirable course of action, and most of what Cassin suggested would appear in the basic features of the monitoring system that was to come.

3.2.4.1. ‘not imposed upon, but adhered to’

What resonated more with the spirit of the time was a proposal that came from Geoffrey Wilson (United Kingdom). He felt the need to open his remarks by reminding everyone of the historical conditions in which the Drafting Committee had gathered, ‘where Germany and other enemy countries during the war had completely ignored what mankind had regarded as fundamental human rights and freedoms. Its work marked only the first step ‘toward providing maximum possible safeguards against that sort of thing in the future’.³⁰¹ Achieving that goal demanded more than a mere proclamation of rights –that had to be complemented with ‘a substantive body of law, *not imposed upon, but adhered to*, by Governments’.³⁰² Wilson’s views built on an earlier proposal that Britain had submitted and which the Drafting Committee had considered alongside Humphrey’s draft declaration.³⁰³ In that proposal,

²⁹⁹ Commission on Human Rights, Summary Record of the 11th Meeting (E/CN.4/AC.1/SR.11) 19 June 1947, p. 10.

³⁰⁰ Commission on Human Rights, Summary Record of the 11th Meeting (E/CN.4/AC.1/SR.11) 19 June 1947, p. 11.

³⁰¹ Commission on Human Rights, Summary Record of the 7th Meeting (E/CN.4/AC.1/SR.7) 17 June 1947, p. 5.

³⁰² Commission on Human Rights, Summary Record of the 7th Meeting (E/CN.4/AC.1/SR.7) 17 June 1947, p. 5 [Emphasis added].

³⁰³ Commission on Human Rights, United Kingdom Draft International Bill of Human Rights (E/CN.4/AC.1) 10 June 1947.

Britain had put forward a draft treaty containing a basic set of civil and political rights that would acquire binding force for the states that ratified it. The draft stipulated precise obligations for states to safeguard rights for everyone under their jurisdiction and foresaw effective remedy for those whose rights had been violated. Implementation, however, would remain firmly in the hands of sovereign states.³⁰⁴ But, a failure by any state to fulfil its obligations would constitute ‘an *injury to the community of states* and a matter of the United Nations as the community of states organised under the rule of law’.³⁰⁵ Only in such exceptional circumstances, the exclusivity of national implementation could be questioned – confirming the supremacy of national implementation.

This proposal did not convince Koretsky. It was unacceptable because it could not apply to every country, the universal litmus test he invoked repeatedly when presenting the Soviet view. He saw in the proposal ‘an attempt to transfer certain principles of law accepted in the United Kingdom to other countries –not only principles but also the mechanism of their implementation’.³⁰⁶ Framing the British proposal as an imposition of a particularistic system on the rest of the world, Koretsky concluded that it ‘was not quite applicable to other nations whose historical development was different’.³⁰⁷ Koretsky appealed to the universal ideal in order to dismiss a particular proposal to realise universal rights. This is a default strategy that political actors deploy to project fundamental opposition to the implications of universal principles as a principled stance, when the purpose is to effectively neutralise the substantive implications that follow from the universal principle. This is a travesty of universalism. But

³⁰⁴ Humphrey, *Human Rights and the United Nations*, 38.

³⁰⁵ Commission on Human Rights, United Kingdom Draft International Bill of Human Rights (E/CN.4/AC.1) 10 June 1947, Article 5. [Emphasis added].

³⁰⁶ Commission on Human Rights, Summary Record of the 5th Meeting (E/CN.4/AC.1/SR.5) 12 June 1947, p. 4-5.

³⁰⁷ Commission on Human Rights, Summary Record of the 5th Meeting (E/CN.4/AC.1/SR.5) 12 June 1947, p. 4-5.

somehow this brazen manipulation of the universal could not get Koretsky very far. Despite his persistent objections, the dynamic of negotiations moved in the direction charted by the British proposal: its 'not imposed upon, but adhered to'-formula became attractive as it offered an acceptable way out to most delegates in search for a balance between implementation and non-interference.

The British formula captures at once both the anxiety of states over the dangers of autonomous supranational oversight and the need to provide for the establishment of a credible system to ensure observance of the rights enacted in the Universal Declaration. But what pushed the dynamic in that direction even more was the combined effect of selective actions by states themselves: defence of their particular interests in universal terms required the violation of universal opposition to external interference. They subverted their opposition to interference with their own action and opened the way towards the installation of permanent oversight that came to be enshrined in the human rights agreements that followed. Not even the Soviet Union was able to pursue its interests without violating the principle of non-interference which they defended so passionately. For whilst the Soviets championed the principle of non-interference in general, they forcefully advocated for measures to implement of economic and social rights, which ultimately amount to interference. For instance, when advocating for the recognition of the right to work, Pavlov (Soviet Union) stated that:

‘the worst fault of the old democracy was that it was too formal. It proclaimed certain rights but did not guarantee their observance. The Soviet Union would always be in

favour of full implementation. If the means to exercise a certain right were not specified, the fact of proclaiming that right had no great value'.³⁰⁸

Here the Soviets believed that, as Antonio Cassese observes, these rights were fully implemented in the socialist bloc but violated every day in the capitalist bloc. Hence there would be no point in proclaiming these rights without the requisite instruments to protect them in the capitalist bloc.³⁰⁹ But even as Pavlov insisted on the implementation of only a limited set of rights, that left traces of recognition which could be invoked by rival states to advance the implementation of other rights they objected to, but could no longer stop. In fact, it is such particular interventions that would ultimately subvert the Soviet unconditional attachment to the principle of non-interference.

3.2.4.2. From Convention to Covenants

The British proposal served as a basis for the discussion on a future Convention between 1947 and 1954, which was to include obligations on state parties to acknowledge that the rights contained in it would be 'enforceable by domestic laws in domestic courts'.³¹⁰ Among the possible 'deterrents against violations' the framers considered primarily the deterrent effect of publicity and 'international censure' as well as individual and group petitions, which John Humphrey had included in his initial draft declaration,³¹¹ the expansion of the powers of the Commission and the 'creation of new machinery within the framework of the United

³⁰⁸ Commission on Human Rights, Summary Record of the 65th Meeting (E/CN.4/SR.65) 9 June 1948, p. 3.

³⁰⁹ Cassese, *I Diritti Umani Oggi*, 35–36.

³¹⁰ Commission on Human Rights, Report of the Drafting Committee (E/CN.4/21) 1 July 1947, p. 6.

³¹¹ Commission on Human Rights, Draft Outline of International Bill of Rights (prepared by the Division of Human Rights) (E/CN.4/AC.1/3) 4 June 1947, Article 28.

Nations to receive, sift, examine and deal with communications alleging the violation of human rights'.³¹² Individual petitions were to serve as a catalyst for supranational action – a 'means of initiating procedures for enforcement of human rights'.³¹³ The right to petition would operate in conjunction with a 'special organ of the United Nations with jurisdiction and the duty to supervise and enforce human rights *motu proprio*'.³¹⁴ These proposals already entailed unprecedented levels of interference in the internal affairs of states, but Mehta (India) moved that the Security Council ought to 'investigate [alleged violations] and enforce redress' within the UN framework.³¹⁵ Expulsion from the UN was also considered as a possible moral deterrent against persistent violators of human rights.³¹⁶

Yet, the actual draft convention that the Working Group on implementation issued in December 1947 did failed to include any of these elements.³¹⁷ What is more, it completely omitted any reference to economic and social rights, as Ribnikar (Yugoslavia) was the first to denounce. To him the draft convention represented simply a sketch that satisfied the wishes of the United States and United Kingdom—nothing more.³¹⁸ This omissions remained unaddressed in the second draft convention that was discussed the following year.³¹⁹ The

³¹² Commission on Human Rights, Report of the Drafting Committee (E/CN.4/21) 1 July 1947, p. 6-7.

³¹³ Commission on Human Rights, Report of the Drafting Committee (E/CN.4/21) 1 July 1947, p. 88.

³¹⁴ Commission on Human Rights, Report of the Drafting Committee (E/CN.4/21) 1 July 1947, p. 88.

³¹⁵ Commission on Human Rights, Report of the Drafting Committee (E/CN.4/21) 1 July 1947, p. 94; Commission on Human Rights, Draft Resolution for the General Assembly Submitted by the Representative of India (E/CN.4/11) 31 January 1947, Section V.

³¹⁶ Commission on Human Rights, Report of the Drafting Committee (E/CN.4/21) 1 July 1947, p. 7.

³¹⁷ Commission on Human Rights, Report Of The Working Party On An International Convention On Human Rights (E/CN.4/56) 11 December 1947.

³¹⁸ Commission on Human Rights, Report Of The Working Party On An International Convention On Human Rights (E/CN.4/56) 11 December 1947, p. 3.

³¹⁹ Commission on Human Rights, Report of the Drafting Committee (E/CN.4/95) 21 May 1948, Annex B.

draft contained twenty-seven articles containing exclusively civil and political rights and completely excluding economic, social and cultural rights. In response, the Soviet Union submitted a series of proposals to incorporate a multitude of social rights, including the right to work, right to equal pay for women, right social security, trade union rights, right to strike and the right to education, amongst others.³²⁰

Views regarding implementation differed widely. One view saw the rights contained in the draft convention as a legal matter to be settled by a judicial body such as an international Court, along the lines of the Australian proposal. The other view maintained that such disputes should be settled by diplomatic negotiations among states, and if that proved unsuccessful, then *ad hoc* fact-finding committees could be set up to settle disputes as they arise—a view strongly defended by the United States. Another view favoured setting up a permanent, independent organ with fact-finding and conciliation powers, which could review state-to-state complaints only, or complaints from states, individuals, and NGOs. These disagreements did not stifle the idea of a permanent body—a human rights committee—to implement the convention; in practice however, this committee could consider only inter-state complaints and explicitly suppressed the possibility of individual complaints, preserving full state control over the institution, as the United States had proposed.³²¹

As the discussions moved from the Commission to the Assembly, the resistance to the draft convention grew stronger, decrying what many members considered unacceptable omissions. Deploring the total disavowal of social and economic rights, Altman (Poland) denounced also

³²⁰ Commission on Human Rights, Recapitulation of Proposed Additional Articles for Part II of the Draft Covenant (E/CN.4/313) 10 June 1949.

³²¹ Commission on Human Rights, Proposal for A Human Rights Convention Submitted by The Representative Of The United States (E/CN.4/37) 26 November 1947, Articles 4 and 5.

the omission of the right to participate in the government of the state, to elect and be elected.³²² This is a proposal that the Soviet Union had made frequently during the drafting of the Declaration so as to pillory the United States for excluding blacks through poll taxes or literacy tests amongst others. This created a dilemma for Roosevelt, as it was hard for her to publicly refuse such a constitutive element of democratic government, but she still tried to harmonize the language of this provision with the ‘American practice and constitutional principles’.³²³

For Cortina (Cuba), the draft was totally inadequate because it failed to address basic civil, political, economic and social rights.³²⁴ In a similar vein, the Chilean representative Valenzuela ‘could not imagine a covenant on human rights worthy of the name which did not include economic, social and cultural rights and particularly the right to work and the right to social security’.³²⁵ Responding to these strong objections, the Assembly concurred that the draft did ‘not contain certain of the most elementary rights’,³²⁶ and called on the Council and the Commission to include the right to self-determination as well as economic, social and cultural rights in the draft Covenant,³²⁷ viewing all rights as ‘interconnected and interdependent’.³²⁸ The ‘interconnected and interdependent’ formula was to become the UN mantra in its elusive endeavour to conjure up a semblance of coherence from radically

³²² General Assembly, Official Record Third Committee 290th Meeting (A/C.3/SR.290) 20 October 1950, 117.

³²³ Brucken, *A Most Uncertain Crusade*, 165.

³²⁴ General Assembly, Official Record Third Committee 291st Meeting (A/C.3/SR.291) 20 October 1950, p. 125

³²⁵ General Assembly, Official Record Third Committee 290th Meeting (A/C.3/SR.290) 20 October 1950, p. 122.

³²⁶ General Assembly Resolution 421 (v) 4 December 1950, Section B(a).

³²⁷ General Assembly Resolution 421 (v) 4 December 1950, F(8).

³²⁸ General Assembly Resolution 421 (v) 4 December 1950, Section E.

different visions of human rights, fuelling its full range of activities in the field of human rights, including the institutionalisation of international monitoring of human rights.

This move went completely against what the United States had been striving for throughout the drafting process, further polarising the debate about not only the rights to be included in the Covenant, but also whether the same method of implementation should apply to them as well. Reflecting a deepening rift, social and economic rights came to be seen as ‘programme rights’ to be implemented through a ‘system of periodic reports’, contrasting with civil and political rights which were generally seen as ‘legal rights’ to be implemented by a ‘good offices committee’.³²⁹ The general sense was that the committee-procedure should apply to civil rights only; a system of periodic reporting could be established for economic and social rights, although that could be considered as an additional mechanism for civil rights as well.³³⁰ Surprisingly in line with the position of the United States, India introduced a resolution asking the Council to reconsider the decision to include all rights in one Covenant, given that different rights required different methods of implementation.³³¹ The resolution was not carried, but it did offer additional ammunition to for the United States and its allies to keep social and economic rights out of the Covenant. Ultimately, the latter managed to engineer support for a resolution in which the Assembly requested the drafting of two separate covenants, one for economic and social rights and the other for civil and political rights, relying on the difference in the method of their implementation as a primary

³²⁹ General Assembly, Draft International Covenants on Human Rights. Annotation Prepared by the Secretary-General (A/2929) 1 July 1955, p. 24.

³³⁰ General Assembly, Draft International Covenants on Human Rights. Annotation Prepared by the Secretary-General (A/2929) 1 July 1955, p. 29.

³³¹ General Assembly Resolution (E/CN.4/619/Rev.1) 14 May 1951.

justification.³³² This was to prove a momentous decision with far-reaching consequences for the further development of human rights and the means of implementing them.

But whilst the Soviet Union pushed hard for the recognition of social and economic rights, which was to give birth to a second Covenant, it vehemently opposed the implementation procedures that were proposed. It considered the implementation of both the Declaration and the Covenant as ‘a matter which solely concerns the domestic jurisdiction of the State, and accordingly sees no need for any international agreements on the subject’.³³³ This because implementation at the international level violated domestic jurisdiction and could undermine the sovereignty and independence of states. Regardless of whether it came in the form of a ‘good offices committee’ or a ‘system of periodic reports’, or any other institution, it would conflict with ‘the whole system of international public law regulating relations between states’ and once instituted, it could transform citizen-state disputes into ‘an international dispute, thereby substantially enlarging the area of international differences, friction and incidents, unnecessarily burdening and aggravating international relations and undermining the foundations of peace’.³³⁴ The twist is remarkable. The protection of human rights was not a condition for peace, which is the rationale underpinning the whole UN human rights programme—it could put it in jeopardy, instead.

The Soviet objection to international implementation was categorical, including for the economic and social rights which they favoured, underscoring the belief that ‘states should be

³³² General Assembly Resolution 543 (VI) 5 February 1952, OP 1.

³³³ Commission on Human Rights, Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation (E/CN.4/353) 29 December 1949.

³³⁴ General Assembly, Draft International Covenants on Human Rights. Annotation Prepared by the Secretary-General (A/2929) 1 July 1955, p. 30.

under no obligation to submit periodic reports' and any action taken by the Commission, Council or even the Assembly to evaluate national measures for the realisation of socio-economic rights.³³⁵ By contrast, the majority view was that these measures 'would be purely a voluntary act on the part of the ratifying and acceding states' and 'in complete harmony with the spirit of the Charter'.³³⁶ The Soviet Union persisted and tabled a resolution asking the Assembly to recognise that 'implementation of the covenant fell entirely within the domestic jurisdiction of States' at the same time as it demanded the recognition of a myriad of social and economic rights, including, most importantly, the right of peoples and nations to national self-determination.³³⁷ Several of these rights that the Soviet Union and its allies proposed made it into the Covenant, including, most notably, the rights to self-determination.³³⁸ However, their opposition towards all forms of international implementation did not bear fruit, as the Assembly rejected that proposal by a roll-call vote of 32 to 5, with 14 abstentions.³³⁹ The struggle between two competing visions about the content and the implementation of the Covenants were only to become fiercer over the following decade.

3.2.4.3. The dues of the universal

Resistance became stronger as the drafting process moved forward, going beyond the Soviet Union and including the United States and the United Kingdom. In contrast to her soaring rhetoric, Roosevelt strove at every step to eliminate and emasculate any measures that could

³³⁵ General Assembly, Draft International Covenants on Human Rights. Annotation Prepared by the Secretary-General (A/2929) 1 July 1955, p. 30.

³³⁶ General Assembly, Draft International Covenants on Human Rights. Annotation Prepared by the Secretary-General (A/2929) 1 July 1955, p. 31.

³³⁷ General Assembly, USSR Draft Resolution (A/C.3/L.77/Rev.1) 2 November 1950

³³⁸ General Assembly Resolution 545 (VI) 5 February 1952, OP 1.

³³⁹ General Assembly, Report of the Third Committee (A/1559) 29 November 1950, p. 20.

be considered as an interference into the sovereignty of the United States and insisted on recognising exclusively rights that were already existing in US laws. Her interventions sought to mould the rights contained in the Covenants in a way that they would not contradict or disrupt the segregation laws in southern United States. Nor could she accept any economic and social rights, as they could interfere with free trade; like her Soviet counterpart, she vigorously fought against any type of implementation measures.³⁴⁰ Like her Soviet counterpart, her main objective had been the suppression of the right to individual petition, which is a position that the US State Department continued to pursue after her departure in 1952. A memorandum of 9 February 1953 contains recommendations to the Secretary of State John Foster Dull to:

‘[o]ppose the inclusion of provisions in the Covenants to authorize the proposed Human Rights Committee to receive or consider complaints or petitions from organizations or individuals concerning alleged violations of the Covenants. If such provisions are included, the United States should urge that they be set forth in a separate protocol or protocols’.³⁴¹

But what particularly remarkable is that none of the core policy goals of the United States could be secured. Roosevelt was unable to insert safeguards for Jim Crow laws; she could prevent neither the inclusion of economic and social rights nor the provision of implementation mechanisms and especially the possibility of individual petitions.³⁴² Every one of these setbacks represented major victories not only for the growing role and number of

³⁴⁰ Brucken, *A Most Uncertain Crusade*, 133–35.

³⁴¹ Quoted in Roland Burke, *Decolonization and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 2010), 169.

³⁴² Brucken, *A Most Uncertain Crusade*, 249;251.

Third World countries, but also for the installation of a permanent system of international monitoring of human rights. These unexpected developments generated consternation amongst reactionary forces in the United States, launched a wholesale attack on the UN portraying it as a communist conspiracy for the installation of a world government. Ultra-nationalist Senators John Bricker and Frank Holman very nearly canvassed the required votes to amend the US constitution to restrict the internal working of human rights agreements and outlaw any type of external interference.³⁴³ Confronted with growing dissatisfaction from reactionary forces and abject failure to achieve its core policy goals at the UN, in 1953 the United States withdrew from the drafting process of the Covenants, vowing never to ratify them.³⁴⁴

The United Kingdom did not fare much better. The recognition of the right to peoples to self-determination caused the United Kingdom to reverse their initial plan. In 1951, British diplomats at the UN received instruction from the Home Office to ‘prolong the international discussions, to raise legal and practical difficulties and to delay the conclusions of the covenant for as long as possible’.³⁴⁵ In 1953, responding to an increasingly hostile environment, the newly appointed Secretary General Dag Hammarskjöld told John Humphrey that ‘[t]here is a flying speed below which an airplane will not remain in the air. I want you to keep the program at that speed and no greater’.³⁴⁶

These sudden turns reflected the heightened tension and growing confrontation among the capitalist and communist countries that seemed to bring to a halt the drafting process. Given

³⁴³ Brucken, 221.

³⁴⁴ Brucken, 238.

³⁴⁵ Quoted in Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009), 46.

³⁴⁶ Simmons, 46.

the protracted nature and acrimonious discussions on every article of the Covenants, the Commission was not able to complete until April 1954.³⁴⁷ It took another twelve years before the Assembly could adopt them. The expansion of the UN membership with newly independent countries created a new force that moved the process forward even as they had to engage for the first time with the draft Covenants.³⁴⁸ But what was most remarkable was the Soviet U-turn: in their attempt to act as the champion of the Third World, the Soviet Union came to embrace the Covenants, which they had resisted from the outset. With the retreat of the United States, as Humphrey argues, ‘it was in the logic of the Cold War [...] that the Soviet Union should attempt to fill the vacuum and become a champion of the covenants’.³⁴⁹ The Soviet volte-face combined with the determination of the newly independent countries proved strong enough to tame American and British hostility to salvage the aspiration for the supranational implementation of the rights contained in the Declaration.

That pursuit led to the establishment of a permanent system of monitoring that has ‘expanded at a rate which is without precedent in the field of international organization’, Alston asserts.³⁵⁰ Despite the protracted negotiations on the Covenants, the Assembly was able to unanimously adopt a Racial Convention in 1965.³⁵¹ That opened the way to finally adopt the Economic and Social Covenant and a Civil and Political Covenant in 1966.³⁵² In 1979, the General Assembly adopted a Women’s Discrimination Convention.³⁵³ In 1984, it adopted the

³⁴⁷ Commission on Human Rights, Report of the 10th session (E/CN.4/705) April 1954.

³⁴⁸ Cassese, *I Diritti Umani Oggi*, 42.

³⁴⁹ Humphrey, *Human Rights and the United Nations*, 41.

³⁵⁰ Alston, ‘Appraising the United Nations Human Rights Regime’, 10.

³⁵¹ General Assembly Resolution 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination Resolution, 21 December 1965.

³⁵² General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights, 16 December 1966.

³⁵³ General Assembly Resolution 34/180, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979.

Torture Convention.³⁵⁴ That was followed with a Child’s Convention in 1989,³⁵⁵ a Migrant Workers’ Convention in 1990,³⁵⁶ an Enforced Disappearance Convention in 2006³⁵⁷ and finally a Disabilities Convention in 2007.³⁵⁸ That states have produced two general and seven specific human rights treaties, most of them supplemented with optional protocols, further specifying and expanding the recognition of human rights contained in the Universal Declaration is remarkable. But what made it even more remarkable was that they also agreed to provide for implementation mechanisms attached to each treaty. More specifically, these agreements provide for a permanent monitoring system, consisting of ten separate supervising bodies:

Table 2. Overview of Treaty Bodies

Treaty Body	Adoption	Operation
Committee on the Elimination of Racial Discrimination (CERD)	1965	1970
Human Rights Committee (CCPR)	1966	1977
Committee on Economic, Social and Cultural Rights (CESCR)	1966	1987
Committee on the Elimination of Discrimination against Women (CEDAW)	1979	1982
Committee against Torture (CAT)	1984	1988
Committee on the Rights of the Child (CRC)	1989	1991
Committee on Migrant Workers (CMW)	1990	2004
The Subcommittee on Prevention of Torture (SPT)	2002	2002
Committee on the Rights of Persons with Disabilities (CRPD)	2006	2009
Committee on Enforced Disappearances (CED)	2006	2011

³⁵⁴ General Assembly resolution 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 10 December 1984.

³⁵⁵ General Assembly Resolution 44/25, Convention on the Rights of the Child, 20 November 1989.

³⁵⁶ General Assembly Resolution 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990.

³⁵⁷ General Assembly Resolution 61/177, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006.

³⁵⁸ General Assembly Resolution 61/106, Convention on the Rights of Persons with Disabilities, 24 January 2007.

As never before, these specialist bodies have been endowed with the power to permanently oversee the implementation measures that states take to achieve compliance with treaty obligations. The system rests on an obligation of states to report regularly on measures they have taken to realise their treaty obligations. The specialist bodies offer authoritative interpretation of the treaties but do not have the power to issue binding decisions.³⁵⁹ Taken together, they represent an unprecedented development towards the affirmation of individual rights universally. Its rapid growth has contributed to the consolidation of its methods of work and some innovation, such as the institution of general comments,³⁶⁰ even as its basic institutional design remains unaltered. States continue to obstruct its functioning, neglecting their reporting obligations or refusing to cooperate in good faith, and resisting basic reform to make the system more coherent and effective.

But resistance betrays the potential of the system even in its diminished form: it provides a channel with the potential of harnessing the force of the universal, which stands in opposition to the interests of the overwhelming majority of states, if not all. That the system exists at all is an event in itself. It may not have brought forth a ‘new sovereignty’ in the Schmidtian sense, but it is a step in that direction. Its existence reflects an instance of self-subversion of states, especially the most vocal detractors of them, such as the United States, Soviet Union and the United Kingdom; ironically these are those who relaunched the human rights enterprise to counter Hitler. They could not erase the traces of recognition that they had left behind by employing the universal when it has suited them. It is something that even the most

³⁵⁹ James Crawford, ‘The UN Human Rights Treaty System: A System in Crisis?’, in *The Future of UN Human Rights Treaty Monitoring*, ed. Philip Alston and James Crawford (Cambridge: Cambridge University Press, 2000), 2.

³⁶⁰ Crawford, 3.

powerful states cannot deny, even if they seek to undermine and emasculate it. But whilst offering an alternative reading of the universal that denies the recognition of universal human rights or the principle of international implementation may not be within the reach of states, they nevertheless have demonstrated their ability to engineer significant degrees of freedom on the manner in which they implement them, without forfeiting the appearance of consistency. It is where the fierce and persistent resistance of the Soviet Union and the United States have severely debilitated the system, as discussed in following section.

3.3. Toleration

Structural demands of the zone of recognition may have forced states to proclaim human rights and establish a monitoring system to implement them, but that by itself does not guarantee that states can and will follow through in practice. In fact, states invariably qualify the obligations they assume in a way that allows them to evade their substantive implications: they might honour obligations in form, but violate their spirit, as Zoltán Búzás shows.³⁶¹ The general tendency to shift from the restrictive realm of recognition to a more permissive realm of toleration, reflects attempts to maintain the appearance of consistency whilst mitigating its constraints. The impulse to migrate from recognition to toleration can be traced back to the decision to split three-ways—into a declaration, convention and implementation—the ‘international bill of rights’.

What made their unification unrealistic was not time or organisation but rather the declared refusal of the overwhelming majority of states to commit to all of them and at once and

³⁶¹ Zoltán I. Búzás, ‘Evading International Law: How Agents Comply with the Letter of the Law but Violate Its Purpose’, *European Journal of International Relations* 23, no. 4 (1 December 2017): 857–83.

without reservations. The Universal Declaration can invoke the image of the shared vision of the framers, pointing to a common aspiration. But the universalisation process need not imply monism or synthesis. The elevation of a particular rights to the universal altar is the admission of rights that cannot be rejected from a universal perspective. Toleration allows states to reframe and qualify rights that in principle no-one can derogate from. The inner tensions in the Declaration find clearer expression in the general Covenants and specific treaties explicating and expanding the catalogue of rights contained in it.

These treaties incorporate a wide diversity of particular views that seek to steer the universalisation process in very different and conflicting directions. The discussions about the content of the Covenants are an illustration of that. The battle for the inclusion or not of civil, political, social, economic, cultural rights or the right to self-determination in one text, reveal the deep divisions among states about the scope and character of universal rights. The split of the convention into two Covenants is an illustration of why such divisions cannot be bridged. It is not that the Assembly did not try. They determined that they could not afford to leave social and economic rights out of the Covenant on the ground that ‘when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man’; they asked for their inclusion in the Covenant ‘in accordance with the spirit of the Universal Declaration’.³⁶² Pursuing a unitary approach, the Assembly declared that ‘the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent’.³⁶³ For a

³⁶² General Assembly Resolution 421 (v) 4 December 1950, Section E.

³⁶³ General Assembly Resolution 421 (v) 4 December 1950, Section E.

division of rights into categories would institute a hierarchy of values, which would run counter to the universalisation process.³⁶⁴

But the centrifugal forces could not be tamed. States may have shared the same purpose of promoting rights, but disagreed profoundly about their nature, framing some rights as absolute versus relative, justiciable and immediately implementable versus non-justiciable and progressively implemented, justifying or limiting the role of the state.³⁶⁵ Extreme positions favouring only one Covenant on civil political rights asserted that socio-economic rights ‘should not be embodied in a legal instrument at all’, let alone in the same one.³⁶⁶ In splitting rights in order to cope with such diversity of views, the Assembly acknowledged that different states can move at different speeds and in different trajectories, even if it tried to emphasise ‘the unity of the aim in view’.³⁶⁷

The split cannot be understood without appreciating the broader tensions between the United States and the Soviet Union with their antithetical visions and strive ‘to change the world in order to prove the universal applicability of their ideologies’, as Odd Arne Westad shows.³⁶⁸ With the United States fighting in the name of ‘liberty’ and the Soviet Union in the name of ‘justice’,³⁶⁹ the ideological struggle was a struggle about the universal: about the one vision of human rights that should ultimately prevail across the globe. The rise of the Global South

³⁶⁴ General Assembly, Draft International Covenants on Human Rights. Annotation Prepared by the Secretary-General (A/2929) 1 July 1955, p. 23.

³⁶⁵ General Assembly, Draft International Covenants on Human Rights. Annotation Prepared by the Secretary-General (A/2929) 1 July 1955, p. 23.

³⁶⁶ General Assembly, Draft International Covenants on Human Rights. Annotation Prepared by the Secretary-General (A/2929) 1 July 1955, p. 23.

³⁶⁷ General Assembly Resolution 543 (VI) 5 February 1952, OP 1.

³⁶⁸ Odd Arne Westad, *The Global Cold War: Third World Interventions and the Making of Our Times* (Cambridge: Cambridge University Press, 2005), 4.

³⁶⁹ Westad, Chapters 1 and 2.

and their attempt to create a New International Economic Order further intensified the divergence about the normative and economic order. In the face of such irreconcilable demands, toleration presents itself as a necessity.

3.3.1. The curious design of the Treaty Bodies

In practice, toleration captures the incessant efforts made by states to qualify and dilute the provisions of the human rights treaties and provisions for their implementation. States calibrate adherence to specific treaties by carefully electing the set of rights and level of supervision they commit to, except for few elements they cannot derogate from. Techniques widely recognised in international law, such as reservations, understandings and declarations, allow states to evade, sometimes in blatant ways, the subnational implications of the obligations they solemnly assume. These fit within the broader attempts by states to avoid or mitigate exposure of inconsistency with universal obligations whilst conjuring up the appearance of consistency; this might also explain why democratic countries insert more reservations than non-democratic ones, as their comparative openness renders them more vulnerable to exposure of inconsistency.³⁷⁰

The same centrifugal tendency operates in the institutional design of the specialist bodies. It is true that in their basic form, they reveal elements of proposals made by countries in favour of international supervision, as shown on **Table 3**. The fierce resistance of the Soviet Union and the United States have severely debilitated the system. Crucially, they have severed the natural link between the definition of rights and their application, by dividing them into two separate decisions: one to join a specific treaty and another to accept the jurisdiction of

³⁷⁰ Eric Neumayer, 'Qualified Ratification: Explaining Reservations to International Human Rights Treaties', *The Journal of Legal Studies* 36, no. 2 (1 June 2007): 397–429.

monitoring body provided within the treaty. This sharp and deliberate separation is a systematic effort by states to contain the potential of monitoring bodies. Even then, states have ways of emasculating the monitoring procedures. The optional character of the crucial features of the monitoring system, as the British proposal had outlined, is a clear indicator of the power of governments over the individual.

Even if the urge to escape the constraints of consistency emanating from the Treaty Bodies is common among all states, they have endowed the various Treaty Bodies with different levels and kinds of scrutiny –involving the powers of the specialist bodies to consider inter-state complaints, individual complaints, conduct independent inquiries and visits on the ground, and refer cases to the International Court of Justice. With regard to the degree to which they challenge state control over scrutiny, however, it is possible to distinguish these features on whether they require state or nonstate initiative to be activated. The implication is clear: the more they depend on state initiative, the less disruptive they to control of states over the external scrutiny of human rights practices.

Table 3. The design of Treaty Bodies

Treaty/Optional protocol				<i>State activation</i>		<i>Non-state activation</i>			
	In Force /In Operation	Parties	Committee	Inter-state complaints	ICJ	Visits	Inquiries	Individual Petitions	
Racial Convention	1969/1970	181	CERD	Art 11	Art 22			Art 14	
Economic and Social Covenant	1976/1987	168	CESCR						
Optional protocol	2013	24		Art 10			Art 11	Art 1	
Civil and Political Covenant	1976/1977	172	HRC	Art 41					
First Optional protocol	1976	116						Art 1	
Women's Discrimination Covenant	1981/1981	189	CEDAW		Art 29		Art 8	Art 2	
Optional protocol	2000	112		Art 1				Art 2	
Torture Convention	1987/1988	166	CAT	Art 21	Art 30		Art 20	Art 22	
Optional protocol	2006	89	SPT			Art 4			
Child's Convention	1990/1991	196	CRC						
Third Optional protocol	2014	44		Art 12			Art 13	Art 5	
Migrant Workers' Convention	2003/2004	54	CMW	Art 76	Art 92			Art 77*	
Disabilities Convention	2008/2009	178	CRPD						
Optional protocol	2008	95					Art 8	Art 2	
Enforced Disappearance Convention	2010/2011	60	CED	Art 32	Art 42	Art 33	Art 33	Art 31	
Source: United Nations Treaty Collection. Status as at 7 June 2019			(*Active once it reaches 10 declarations under Art 77)						

3.3.1.1. State activation

Interstate-complaints and ICJ-referrals are obviously designed to ensure full control by states over whether and when specialist bodies can be activated to scrutinise specific cases of non-compliance. First applied to the Racial Convention, inter-state complaint was mandatory for state parties, but turned out to be a small miscalculation. States learned from this experience and made even this rudimentary mechanism optional to subsequent treaties, subject to additional declarations by states or relegated to an optional protocol. This change shows a studied drive away from whatever constraining effect such a procedure could have had, but also the capacity of states to learn and adapt –the opposite of what path dependency would predict. The United States insisted on having state-to-state complaints in order to give the semblance of theoretical accountability whilst maintaining full control over the new system. States have had this option but have never used it even as they have confronted one-another with other means.

As no cases exist, the phenomenon cannot be investigated. Yet various scholars have identified the non-use of this procedure as a striking phenomenon, pointing to the potential of damaging diplomatic relations among states but also to the cumbersome nature of the procedure as reasons for its inactivity.³⁷¹ What we can say is that states have not used this

³⁷¹ Nigel Rodley, 'UN Treaty Bodies and the Human Rights Council', in *UN Human Rights Treaty Bodies: Law and Legitimacy*, ed. Helen Keller and Geir Ulfstein (Cambridge: Cambridge University Press, 2012), 334; Thomas Buergenthal, 'The UN Human Rights Committee', in *Max Planck Yearbook of United Nations Law*, vol. 5 (London: Kluwer Law International, 2001), 364–67; Javaid Rehman, *International Human Rights Law* (Essex: Pearson Education, 2010), 120; Alston, 'Appraising the United Nations Human Rights Regime', 11; 15; Nigel Rodley, 'The Role and Impact of Treaty Bodies', in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 633.

option to institutionalise the practice of addressing violations of human rights by other states, avoiding thus to assume ‘the global responsibility’ to intervene when states violate international human rights obligations.³⁷² Instead, they have elected to intervene in *ad hoc* and selective basis. Fear of setting a precedent, and ultimately their accumulation through likely retaliatory deployments, can be considered as a deterrent to the use of such option, as that ultimately would weaken the grip of states over the monitoring process singly and collectively.

The same can be said for ICJ-referrals. Recognition of the jurisdiction of ICJ is conditional upon states not attaching reservations against it upon ratification of the respective treaties. The ICJ advisory opinion has been envisaged as a last-resort option when and if diplomatic mediation efforts among states fail, but it was mainly supported by the United States in order to counter the Australian proposal for a world Court. To effectively undermine it, Brucken finds, the United States had to offer a ‘credible but far more toothless alternative’, which has little significance for the United States anyways, as it recognises the jurisdiction of the ICJ on a case-by-case basis.³⁷³ Both these procedures entail a type of oversight which exists on paper but it is unlikely to be effectively exercised.

3.3.1.2. Nonstate activation

To the extent that a challenge to state control over the process increases the chance of independent scrutiny, the inclusion of provisions to conduct inquiries as well as *in situ* regular visits by expert bodies goes in that direction—they have the potential of seriously

³⁷² Menno T. Kamminga, *Inter-State Accountability for Violations of Human Rights* (Philadelphia: University of Pennsylvania Press, 1992).

³⁷³ Brucken, *A Most Uncertain Crusade*, 140.

compromising state sovereignty, despite being optional. Whilst that potential exists, it exists in an extremely limited form, as state consent and cooperation are required at every stage of the monitoring process. The proceedings are kept confidential, where states are asked to respond to their findings behind closed doors. The reports can be made public if and when the state concerned requests it. Only in the case of torture is there a possibility for experts to conduct regular visits, in this case by the Subcommittee on Prevention of Torture.

The Subcommittee is allowed unlimited access to places of detention, which includes private meetings and interviews with detainees, yet their findings and recommendations remain confidential, and usually the final reports can be published if the state concerned requests it. Only if the state under examination fails to respond to the requests of the Subcommittee, can the latter make public statements and publish its findings without state consent. These procedures do create the conditions for exchanges between experts and state officials which ultimately points to the institution of some level of account-giving, whereby states are forced to at least justify their policies and cooperate sufficiently for the proceedings not to be made public. But confidentiality makes it hard, if not impossible, to assess the adequacy of state responses, escaping consistency constrains that would come from exposure of inconsistency. Nevertheless, it is striking that states allow for such first-hand independent inquiry, given the widespread and systematic character of the practice of torture. Falling back on the logic of consistency, and explanation could be that, given the secretive and rather invisible character of torture, reliance on self-reporting makes scrutiny of prohibition of torture highly questionable if not lacking in credibility. The possibility of regular visits, even if highly circumscribed, creates the semblance of independent scrutiny of a deviant practice that is widely rejected.

Yet relinquishing state power to individuals to sidestep the state to appeal to specialist bodies is far more intrusive and therefore puzzling. It contrasts starkly with the positions of the Soviet Union, and the United States, who sought to limit their remit to state-to-state complaints. Individual petitions represent a significant potential for the very reasons that states, especially the United States and the Soviet Union, objected to and sought to eliminate as a possibility. In contrast to state-to-state complaints, the right to individual petition has been incorporated in all core human rights treaties, except for the Migrant Workers' Convention which it has not as yet received the ten requisite declarations to activate it. It is a procedure that is widely and effectively used by individuals and NGOs acting in the name of aggrieved individuals. Individual petitions differ radically with the state-to-state complaints because the main interest of individuals is to seek redress for the damage inflicted upon them, whereas states place political expediency before human rights concerns.³⁷⁴ It is a powerful tool to both expose violations and to deter states from committing violations. It is for these reasons that individual complaints represent 'the most serious interference in state sovereignty among the activities of treaty bodies'.³⁷⁵

It therefore strikes as a paradox that the procedure that is most disruptive to state sovereignty, and therefore most resented by them, is simultaneously the most common feature of all Treaty Bodies. It also raises the question of why states would forgo the use of an inters-state procedure which they can control, and allow a mechanism that in principle must operate beyond their control, which is why they rested it from the outset. The logic of consistency helps elucidate the puzzle. Irrespective of state motivations and intentions, the whole system

³⁷⁴ Geir Ulfstein, 'Individual Complaints', in *UN Human Rights Treaty Bodies: Law and Legitimacy*, ed. Helen Keller and Geir Ulfstein (Cambridge: Cambridge University Press, 2012), 74.

³⁷⁵ Ulfstein, 75.

is justified in the name of protecting individual rights. Recognising individual rights but then denying individuals to complain about the violation of those rights is too blatant a contradiction that could defeat the justifications for recognising individual rights in the first place.

It would thus create a glaring inconsistency that is nearly impossible to deny without losing the appearance of consistency. Hence, states had to recognise at least in principle the right of individuals to petition the UN, even if that is disruptive and undesired. This is an example of how the logic of consistency subverts the intentions and interest of states in a powerful way. The fact that states cannot formally deny the right of individual petition allows for the creation of a space for individuals and non-state actors to challenge state sovereignty with systematicity, albeit it in a controlled manner. It does not follow that, because states cannot formally eliminate this possibility, they cannot contain the potentially destabilising effect of individual complaints by controlling the entire process of their administration. The specialist bodies meet in closed sessions and only in exceptional occasions can the proceedings be made public. Initially, no role whatsoever was given to NGOs although in recent years they have acquired a level of significance, mainly by issuing shadow reports to rival those submitted by states. It is more the idea than the practice of individual petitions that has served as the most powerful element for the further development of universal scrutiny.

3.3.2. National implementation

The unspoken assumption underpinning all these monitoring procedures is the primacy of the national level over the international level in the implementation of human rights. That is a fundamental given that remains unchallenged. The basic relation between the state and its

citizens is essentially a matter of domestic jurisdiction, as Louis Henkin notes.³⁷⁶ What the implementation system set out to do was to offer ‘some kind of supranational supervision of this relationship between the state and its citizens’, Humphrey specifies.³⁷⁷ Its capacity to contribute towards the effective actualisation of human rights rests on two contingent factors that Norberto Bobbio identified in the late 1960s: specialist organs that are extremely authoritative on the one hand and extremely reasonable states on the other.³⁷⁸ This is a high bar for either to meet. It is a lack of both these elements that spearheaded the entire human rights system, without being able to offer an adequate alternative. For as Bobbio points out:

‘[...] it is precisely in these cases that it is more likely that there will be insufficient or even no protection for those human rights which the international body is supposed to safeguard. Contempt for human rights within a country and a lack of respect for the international bodies outside go together’.³⁷⁹

That fundamental paradox has not been resolved. The capacity of domestic groups to claim international rights and use international bodies domestically is critical to their success, as Beth Simmons shows.³⁸⁰ Despite the obvious flaws of this approach, it is hard if not impossible to dethrone the primacy of the national level in principle. Beyond the general aversion of states to international, independent scrutiny, there are good democratic reasons to keep it that way. In reality, this means that the Treaty Bodies can be activated only in extreme circumstances –grave and systematic violations that pose a threat to international peace and

³⁷⁶ Louis Henkin, ‘The Universal Declaration and the U. S. Constitution’, *PS: Political Science and Politics* 31, no. 3 (September 1998): 512.

³⁷⁷ Humphrey, *Human Rights and the United Nations*, 46.

³⁷⁸ Bobbio, *The Age of Rights*, 23.

³⁷⁹ Bobbio, 24.

³⁸⁰ Simmons, *Mobilizing for Human Rights*.

stability, rather because they are reprehensible in and of themselves. The design is strictly circumscribed and skewed in favour of states, even as the declared rationale of the system is to protect individuals from the state.

What can be gleaned from the variation in the institutional design of the Treaty Bodies is that the move from recognition to toleration is a move to evade the constraints of consistency: what persists is what states cannot deny without appearing inconsistent. In contrast to the zone of recognition, where states have to deliver measures of consistency, in the zone of toleration they have more room for manoeuvring to qualify the rights and means of supervising them. It concerns the recognition of the idea of implementation but then coupled with incessant attempts to evade its substantive implications. It is harder to evade an idea than its application. Evading an idea would constitute an obvious instance of inconsistency, but evading its application is much harder to bring to light as an instance of inconsistency, so much that states can evade without forfeiting the appearance of consistency.

To a large extent, then, states determine themselves on what grounds and how they wish to be scrutinised. This high degree of latitude stems from clearly non-random, deliberate institutional choices, as Barbara Koremenos would predict; but contrary to what her functionalist approach to the design of international law suggests, it is highly questionable whether such a design amounts to an effective response to a collaboration problem.³⁸¹ The logic of consistency offers a more plausible explanation: that which states cannot deny in relation to the universal is that which makes international scrutiny possible. From the perspective of consistency, the Treaty Bodies are the collateral effect of states seeking to

³⁸¹ Barbara Koremenos, *The Continent of International Law: Explaining Agreement Design* (Cambridge: Cambridge University Press, 2016), 2.

avoid inconsistency rather than designing the most effective mechanism to scrutinize the observance of human rights.

4. Negation

The strong pressure to migrate from the zone of recognition in order to escape the constraints of consistency threatened the foundations of the human rights norms and institutions that states had just recognised. These strong centrifugal forces threatened the principle of racial equality, the universality of human rights and the existence of international scrutiny, but they failed in all three cases because their proponents could be transport them to the zone of negation. Despite incessant efforts by states to undue the substantive implications of what they have solemnly committed to in the zone of recognition, and their drive to qualify and emasculate their obligations in the zone of toleration, there is a point beyond which they cannot cross, unless they are ready to forfeit the benefits of appearing consistent with the norms they have publicly assumed. That is the point when the struggle entered the zone of negation. Whatever inconsistency political actors might be able to point to from whatever angle, they are unlikely to make a dent. The closeness with the universal determines the admissibility of claims: the more particular they are, the less likely it is that they will be compelling.

4. 1. Affirmation of racial equality

The UN Charter recognised the universality of human rights as a general principle for the first time, but it did not determine what that entailed. Violators could no longer deny the principle of the universality of human rights, but they could interpret away even the most glaring violations. The South African leader, Jan Smuts, did not acknowledge the glaring

contradiction between the human rights principles he had inserted in the Preamble of the Charter, and the reality of the apartheid regime he presided over in South Africa. When India raised the treatment of Indians in South Africa at the first session of the Assembly held in January 1946,³⁸² Jan Smuts repelled it with the argument that human rights had not be defined as yet and, therefore, states were under no obligation to abide by them.³⁸³ Yet Jan Smuts would face the social opprobrium of the entire Assembly, which unexpectedly adopted the Indian proposal, putting the spotlight on South Africa and placing the issue of racial discrimination on the global agenda ever since. Especially after the defeat of Nazi Germany, it had become increasingly difficult for other countries to defend racist policies: it was no longer acceptable to openly defend and justify policies based on racial inequality.

That did not mean that the South Africans did not try, however. Concerned with the fate of the ‘progressive races’, George Heaton Nicholls argued that racial equality would entail a ‘reversion to barbarism’.³⁸⁴ But as the Nazi regime had inflicted lasting damage to racism as an ideology, Jan Smuts gradually shifted attention away from race when countering the demands of Indians for equal treatment in South Africa.³⁸⁵ The installation of the apartheid state was yet to come, but that became the last race regime. The recognition of racial equality brought about major change within the United States, its efforts to engineer safeguards for racial segregation in the Covenants ultimately failed. Systematic discrimination of people because of their race, ethnicity or religion are obvious reminders that racism is rife in its most

³⁸² Lorna Lloyd, “‘A Most Auspicious Beginning’”: The 1946 United Nations General Assembly and the Question of the Treatment of Indians in South Africa’, *Review of International Studies* 16, no. 2 (1990): 131.

³⁸³ Vineet Thakur, ‘The “Hardy Annual”’: A History of India’s First UN Resolution’, *India Review* 16, no. 4 (2 October 2017): 69.

³⁸⁴ Vineet Thakur, *Jan Smuts and the Indian Question* (Pietermaritzburg, South Africa: University Of KwaZulu-Natal Press, 2018), 75.

³⁸⁵ Thakur, 58.

virulent forms. The prohibition of racial inequality has forced states to enhance their techniques to evade its force, as Zoltán Búzás demonstrates.³⁸⁶ Yet it is no longer defensible as a legitimate principle of government. Race is no longer a legitimate criterium to exclude or deprive people of their rights. Denying racial equality is unacceptable.

The Indian initiative had ramifications beyond South Africa. It set a critical precedent, which as a British diplomat feared, would have ‘enormous repercussions’ and ‘infinite possibilities’. For ‘[o]nce such interventions began, it would be difficult to set limits’, he feared.³⁸⁷ He was right. He correctly estimated the force of consistency in reanimating traces of recognition into precedents and push political action towards the universal they invoke, but without a concrete definition of what universal human rights were, abusers had too much leeway for human rights to acquire international relevance.

4. 2. Affirmation of universality

The Universal Declaration set a limit to the range of violations abusers could commit without being denounced as violations. The basic set of rights contained in the Declaration apply to everyone and no one can legitimately deny them. To the extent they do, they are simply violating the universal body of rights, they are not providing an interpretation or alternative to it. Yet it is not the rights contained in the Declaration that make it so powerful, although that is obviously important. What is uniquely powerful about the Universal Declaration is that it establishes ‘the universal’ as an entirely new institution in world society that stands above all other institutions. This is the institution of shared or *universal* universalism. It institutes a

³⁸⁶ Zoltán I. Búzás, ‘Is the Good News About Law Compliance Good News About Norm Compliance? The Case of Racial Equality’, *International Organization* 72, no. 2 (2018): 351–85.

³⁸⁷ Lloyd, “‘A Most Auspicious Beginning’”, 132.

universal *agora* wherein agents can expand or limit the reach of the shared universal, operating above and beyond all other forms of politics. That is revolutionary change in the normative structure of world society.

Not able to attack the Universal Declaration directly, states have tried to neutralise its substantive implications in its complementary treaties meant to explicate and expand the scope and meaning of human rights contained in them. The most flagrant attacks aimed at the foundations of the Covenants. What caused particular controversy were the so-called ‘federal-state’ clause and the ‘colonial clause’, that if endorsed, would have effectively neutralised the force of the Covenants, the concrete articulation of the ‘international bill of human rights’. Unsurprisingly, it was the United States that first introduced a federal-state clause,³⁸⁸ to then transplant it into the draft Convention.³⁸⁹ The clause aimed at limiting the scope of potential accession to the Covenants by the United States only to federal matters, keeping its constitutive states beyond its purview. Roosevelt claimed that this clause was a condition for federal states to adhere to the Covenants, who was joined by Canada and Australia who also supported the measure.³⁹⁰ For federal countries with a dualist legal system, this clause had some plausibility.

But that was decidedly not how others received it. Many saw Roosevelt’s proposal as an escape clause to preserve racial segregation in the southern states. Representing a federal state himself, Vlahovic (Yugoslavia) argued that it was ‘dangerous to adopt a clause which

³⁸⁸ Commission on Human Rights, Proposal For A Human Rights Convention Submitted by the Representative Of The United States (E/CN.4/37) 26 November 1947.

³⁸⁹ Commission on Human Rights, Report of The Working Party on An International Convention on Human Rights (E/CN.4/56) 11 December 1947, Article 22.

³⁹⁰ General Assembly, Official Record Third Committee 292nd Meeting (A/C.3/SR.292) 25 October 1950, 134-135.

established a disparity of obligations between signatory States and did not define the scope of those obligations’, submitting instead that federal states should join the Covenants only if they can guarantee application throughout the territory.³⁹¹ His position received support from Cassin (France) and Begtrup (Denmark) who objected to the measure because it ‘appeared to favour federal states over unitary states.’³⁹² Questioning the democratic veneer of the US proposal, Chun Chang (China) argued that ‘if [a federal government] maintained that such questions were the responsibility of its constituent parts (...) it might be asked why in those circumstances the responsible parts were not represented on the same footing as the federal government itself’.³⁹³ Ultimately the Assembly categorically rejected the US proposal, with Article 50 of the Civil-Political Covenant stipulating in no ambiguous terms that its provisions ‘shall extend to all parts of federal States without any limitations or exception’. But this is not an accident or random outcome but what the logic of consistency would predict.

In conjunction with the federal-clause, colonial powers such as Britain, France and Belgium insisted on inserting a territorial, or colonial clause. The idea was that Covenants would apply to colonial or overseas territories only if the colonial power ‘has acceded on behalf and in respect of such colony or territory’.³⁹⁴ The Orwellian twist of the provision was further reinforced as it added that colonial powers would seek the consent of the colonial subjects before doing so. It was a clause that was required to account for the different ‘stages of

³⁹¹ General Assembly, Official Record Third Committee 292nd Meeting (A/C.3/SR.292) 25 October 1950, 137.

³⁹² General Assembly, Official Record Third Committee 292nd Meeting (A/C.3/SR.292) 25 October 1950, 138.

³⁹³ General Assembly, Official Record Third Committee 292nd Meeting (A/C.3/SR.292) 25 October 1950, 138.

³⁹⁴ Commission on Human Rights, Report Of The Working Party On An International Convention On Human Rights (E/CN.4/56) 11 December 1947, Article 23.

civilisation' amongst people and protect the 'less civilised' from sudden exposure to unfamiliar principles of human rights, the Belgian representative Soudan boldly stated. As the rights contained in the Covenants 'presupposed a high degree of civilization', Soudan expressed concern that automatic and unqualified application would be 'incompatible with the ideas of peoples who had not yet reached a high degree of development'. It was therefore crucial to adopt a differentiated approach because '[b]y imposing those rules on them at once, one ran the risk of destroying the very basis of their society. It would be an attempt to lead them abruptly to the point that the civilized nations of today had only reached after a lengthy period of development'.³⁹⁵ That would be a tragic mistake because it would entail 'failing in the high mission' that states had resolved by signing the UN Charter, which according to Soudan implied that 'the aspirations of peoples should be respected and that they should only be led towards civilization in a progressive manner which was adapted to their varying degrees of development and to the special conditions of each country'.³⁹⁶

Soudan positioned himself as guardian of diversity at the same time as Belgium entrenched its colonial rule and paternalism over the Congolese people,³⁹⁷ but the particularistic grounds he deployed to evade universal obligations is a common strategy that the Soviet Union relied on,³⁹⁸ and would only gain in importance as the universal became more demanding. Not only did this attempt fail, completely. But the Covenants recognised a right to self-determination and requested colonial powers to facilitate the realisation of that right: the opposite of what

³⁹⁵ General Assembly, Official Record Third Committee 292nd Meeting (A/C.3/SR.292) 25 October 1950, 133.

³⁹⁶ General Assembly, Official Record Third Committee 292nd Meeting (A/C.3/SR.292) 25 October 1950, 133.

³⁹⁷ David van Reybrouck, *Congo: een geschiedenis* (Amsterdam: De Bezige Bij, 2010).

³⁹⁸ Commission on Human Rights, Summary Record of the 5th Meeting (E/CN.4/AC.1/SR.5) 12 June 1947, p. 4-5.

the colonial clause intended to achieve. The clause was too blatant a contradiction to pass the consistency test.

4. 3. Affirmation of international scrutiny

The overwhelming majority of states, not least the United States and the Soviet Union have offered persistent and strong resistance to the very idea of international scrutiny of national human rights practices. They have produced an institution that is extremely circumscribed and limited in its capacity to scrutinise national practices. Even in its diminished form, the Treaty Bodies remain under constant challenge from states that seek to limit their resources, delay their reports, creating enormous backlogs and resulting in less frequent examinations by the committees that rely on increasingly outdated information, which then result in findings and recommendations that are of little or no use to domestic groups who could otherwise rely on in their struggle for human rights. Nevertheless, whilst states have relied heavily on opt outs and reservations, no state has opted out from the Treaty Bodies altogether.

States can question the application or effectiveness of oversight, but no state is powerful enough to question the norm of oversight as such. They can twist and strangle the system in myriad ways, but they cannot prevent the system from being used and applied in ways that goes against their interests in time. The mere existence of the system has the potential to subvert the exclusive control of states of the treatment of their own citizens. Its existence entails that states, no matter how powerful, justify themselves to an international body for the treatment of their own citizens in their own domestic jurisdiction. They can resist, they can object, they can denounce, but they cannot deny the existence of the monitoring platform and the norm of being scrutinized.

The idea of permanent and independent oversight of the observance of human rights can no longer be denied. It follows from the autonomy of the universal vis-à-vis states. These are elements that the struggle over inconsistency with the universal has elevated beyond and above normal politics. It is a concrete manifestation of the autonomous force of the universal: states cannot get rid of external scrutiny without negating the universal.

Chapter IV: The Special Procedures

‘Do we not owe the Growth of Wine,
To the dry Shabby crooked Vine?’
—Mandeville, *The Grumbling Hive*³⁹⁹

The United States and the Soviet Union sought to neutralise all practical effects of the Treaty Bodies, but they could not suppress the implications that necessarily flow from the recognition of universal rights and the idea of international scrutiny of national human rights practices. Nor could they suppress the rise of a far more powerful institution in 1967, the Special Procedures, reversing persistent objection to universal scrutiny in fact. The emergence of the Special Procedures as a majoritarian institution subverted not only the sophisticated evasions that states had secured under the Treaty Bodies, but they also exposed states to a new form of majoritarian scrutiny in relation to human rights standards they had not explicitly consented to. Whether they supported or opposed the new institution, all states subjected themselves under the gaze of the universal, without defence or recourse to the inevitable exposure of inconsistency of any human rights practice in relation to the universal spirit they purport to embody. This is extraordinary normative and institutional change, but not what the change makers manifestly fought for.

One can be forgiven for assuming that the new institution might owe its unappealing name to customary bureaucratic imagination of UN officialdom, but the reason why it is called ‘Special Procedures’ is not simply because it represented a radical exception to customary practice. What is far more plausible is that it is called ‘Special Procedures’ because its proponents intended it as a single-use institution—it had to wither away as if it had never

³⁹⁹ Mandeville, *The Fable of the Bees*, 36.

existed. The new institution had to combine two irreconcilable aims: recognise massive breaches of the universal and offer a remedy without leaving traces that could constrain its erstwhile proponents in the future. Its proponents were desperately seeking to impress on everyone that the institution they brought to life could apply to *sui generis* cases only. They had brazenly manipulated the universal by harnessing its force to scrutinise extremely limited cases that supported their political agenda. But in so doing they planted the seeds for their self-subversion, and ultimately fell under its purview, illustrating vividly the transition from the travesty to the triumph of universalism.

The creation of the Special Procedures set a vital precedent that not only could not be erased but became instead another platform for accelerated universalisation scrutiny. Enormous resistance to its expansion gathered a storm of discontent so strong that it brought down the Commission in 2006, on the ground that it had *become* politicised, at a time when the Commission had reached the broadest level of scrutiny in its sixty years of existence, showing the least level of ‘bias’.⁴⁰⁰ But they could not unsettle the Special Procedures even as that was the primary objective of the push for reforms. On the contrary. The assault on the Special Procedures only served to constitutionalise their role, consolidating it as the most effective institution in responding to the most egregious violations of human rights anywhere. This is not because of the intention or power of any of the political actors involved but because of the universal horizon that they generate and operate within.

The chapter reconstructs the remarkable trajectory of this transformative change, tracing the movement of consistency in relation to the universal and the resulting four zones of exposure

⁴⁰⁰ James H. Lebovic and Erik Voeten, ‘The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR’, *International Studies Quarterly* 50, no. 4 (2006): 861–88.

of inconsistency that determine the rise and development of the Special Procedures. It begins with a consideration of the polarization caused by the decision to prevent the Commission from addressing complaints of aggrieved individuals, after having just recognised their standing and legitimate demands for redress. It then considers the circumstances leading to the restoration of the right of the Commission to address systematic violations of human rights, laying the foundations for the Special Procedures. The rival forces in this battle were the same as the forces vying for global supremacy, the Soviet Union and the United States, where the Soviet Union managed to achieve what it failed to achieve elsewhere: defeat the United States and the capitalist bloc who defended the *status quo*.

The chapter then considers the movement of centrifugal forces seeking to evade the constraints of consistency emanating from the Special Procedures. These forces engineered significant degrees of freedom from the Special Procedures, but in so doing they inevitably universalised its purview that the principles they relied on to justify evasion entailed. The concluding section considers the concerted attempts by a powerful group of states, including China and Russia, to kill the Special Procedures in the name of preserving the universal, and the ultimate survival of the Special Procedures resulting from the same universal horizon from which its detractors tried to eliminate them.

4. 1. Polarization

Facing the moral abyss opened by World War Two, the establishment of the Commission in 1947 conjured up high aspirations. That after a destructive war the world community had found unity of purpose in establishing an ‘international mechanism to defend the human rights in the world’, represented a new and ‘great thing in the history of humanity’, declared Henri Laugier, Assistant Secretary-General, in his opening remarks in the first meeting of the

preparatory or ‘nuclear Commission’ on 29 April 1946.⁴⁰¹ Yet the act of creation would mark just the beginning of a ‘very great enterprise’, ‘the seed out of which great and beautiful harvests must come’.⁴⁰² The first and major undertaking of the Commission had to be the proclamation of human rights, which was to become the main preoccupation of the Commission for over two decades. At least as important, Laugier stressed, was ‘the difficult but essential problem to define the violations of human rights within a nation’ and ‘the establishment of a machinery of observation which will find and denounce the violations of the rights of man all over the world’.⁴⁰³ This was an improbable mission. The Commission was expected to succeed where all previous efforts had failed, reflecting the high expectations and level of responsibility for the new organ.

But high aspirations began to fade as soon as the nuclear Commission began its work on defining the institutional features of the Commission, in particular in relation to vital questions of whether the Commission had to consist of independent experts or national representatives, and whether its powers had to be limited to setting human rights standards only or also include supervision of their observation by states.⁴⁰⁴ Speaking to the first question, the chairwoman, Eleanor Roosevelt, impelled her colleagues not to lose sight of the overarching purpose of the new institution, adding that ‘we wouldn’t be here unless our governments had acquiesced that they wanted us here’.⁴⁰⁵ Whilst it was natural to expect that

⁴⁰¹ Commission of Human Rights, Summary Record of Meetings, 1st meeting (E/HR/6), 29 April 1946, p. 1

⁴⁰² Commission of Human Rights, Summary Record of Meetings, 1st meeting (E/HR/6), 29 April 1946, p. 2

⁴⁰³ Commission of Human Rights, Summary Record of the 1st meeting (E/HR/6) 29 April 1946, p. 3

⁴⁰⁴ Commission of Human Rights, Summary Record of Meetings, 3rd meeting (E/HR/9) 30 April 1946, p.1-3.

⁴⁰⁵ Commission of Human Rights, Summary Record of Meetings 4th meeting (E/HR/10), 2 May 1946, p. 1.

the members of the Commission would be vested with the ‘responsibility to represent what our governments believe is right’, their responsibilities did not end there, Roosevelt said.⁴⁰⁶ For, she continues: ‘(...) to the peoples of the world, we here have a very grave responsibility, because they look upon us, regardless of the governments that we spring from, as their representatives, the representatives of the peoples of the world’.⁴⁰⁷

In emphasising the collegial spirit of the new body, Roosevelt sought to reconcile a Commission that is universal in mission with a membership that is particular in character, consisting of states defending particular views and interests. The central question became whether its members could ‘consider the welfare of all of the people all over the world’?⁴⁰⁸ In the eyes of Nikolai Kriukov (Soviet Union), the selection of members who ‘might not be closely linked with his government’ was difficult, but nonetheless he recognised that, in any case, they must be experts in the field and ‘impartial in their attitudes towards the problems’.⁴⁰⁹ These differences aside, the nuclear Commission recommended to the Economic and Social Council that the membership of the Commission should consist of non-governmental representatives, of ‘highly qualified persons’.⁴¹⁰

The Council, however, did not follow this proposal. Instead, it decided that the Commission shall consist of eighteen representatives from the UN membership elected by the Council,

⁴⁰⁶ Commission of Human Rights, Summary Record of Meetings 4th meeting (E/HR/10), 2 May 1946, p. 1.

⁴⁰⁷ Commission of Human Rights, Summary Record of Meetings 4th meeting (E/HR/10), 2 May 1946, p. 1.

⁴⁰⁸ Commission of Human Rights, Summary Record of Meetings, 3rd meeting (E/HR/9) 30 April 1946, p.1.

⁴⁰⁹ Commission of Human Rights, Summary Record of Meetings, 3rd meeting (E/HR/9) 30 April 1946, p.1.

⁴¹⁰ Commission of Human Rights, Summary Record of Meetings, 6th meeting (E/HR/11) 6 May 1946, p. 2; Commission on Human Rights. Report of the Commission on Human Rights to the Second Session of the Economic and Social Council (E/38/Rve.1) 21 May 1946, p. 8.

although governments were free to appoint experts as their representatives.⁴¹¹ Furthermore, the Council authorised the Commission to deal with ‘any other matter concerning human rights’,⁴¹² enlarging its original mandate enshrined in Article 68 of the UN Charter. With its basic institutional design set, the full Commission could finally start the real work, but the unresolvable tension between the universal character of its mission and the particularistic interests of its members, would determine the orientation and scope of its activities. When the Commission convened for the first time on 27 January 1947, Laugier made use of the occasion to stress once again the enormous significance of the Commission in repairing the moral decay wrought by the war. Its monumental task consisted in nothing less than in: ‘(...) following up in the field of peace the fight which free humanity had waged in the field of war, defending against all offensive attacks the rights and dignity of man, and establishing, upon the principles of the United Nations Charter a powerful international recognition of rights’.⁴¹³

Yet Laugier had no illusions about the enormity of the challenges that lay ahead of the Commission, in particular with regard to the second question: whether its powers could reach beyond defining standards. The most urgent tasks for the Commission was defining its approach to the thousands of petitions from aggrieved individuals and groups from across the globe that the UN had been receiving from its inception. Laugier did not have a firm view on whether the Charter recognised the right of appeal or not, but nevertheless he thought that ‘it was important to acknowledge that the right was alive in the hearts and minds of men’ and that these appeals ‘established a direct link between the United Nations and men in quest of

⁴¹¹ Economic and Social Council resolution 9 (II) (21 June 1946) OP 2(a).

⁴¹² Economic and Social Council resolution 9 (II) (21 June 1946) OP 1(e).

⁴¹³ Commission on Human Rights, Summary Record of the 1st Meeting (E/CN.4/SR.1) 27 January 1947, p. 1-2.

justice'. It was incumbent upon the Commission to define 'its means of action and its peaceful weapons for the defence of Justice'.⁴¹⁴ This way the Commission could build on the early achievements of the Assembly, with the recognition of genocide as an international crime, and the adoption of a resolution on Indians in South Africa, which, according to him, had set 'a precedent of fundamental significance in the field of international action'.⁴¹⁵

It did not take long before the question of whether the right of appeal existed became the defining issue for the Commission. The question was placed on the agenda of the Commission on its second meeting when Hansa Mehta (India) inquired about the appeals received by the Commission and requested to see them, stressing that they 'would be of great interests to all members'.⁴¹⁶ The Secretariat had already compiled a list of complaints, but there was no procedure in place on how to handle them. Roosevelt argued against a detailed examination of their content but did not foreclose the possibility of having the Commission study the list of communications and decide which complaints merited closer examination and what course of action to take.⁴¹⁷ The Commission authorized the Secretariat to circulate a confidential list of communications, on a motion by Romulo (Philippines), without defining a response. To do so, two distinct duties had to be clarified, Roosevelt reasoned: the duty towards those who authored the communications, and the duty towards the Commission 'which had to decide the best possible way of using the communications received'.⁴¹⁸ She

⁴¹⁴ Commission on Human Rights, Summary Record of the 1st Meeting (E/CN.4/SR.1) 27 January 1947, p. 2-3.

⁴¹⁵ Commission on Human Rights, Summary Record of the 1st Meeting (E/CN.4/SR.1) 27 January 1947, p. 2.

⁴¹⁶ Commission on Human Rights, Summary Record of the 2nd Meeting (E/CN.4/SR.2) 27 January 1947, p. 6.

⁴¹⁷ Commission on Human Rights, Summary Record of the 2nd Meeting (E/CN.4/SR.2) 27 January 1947, p. 7.

⁴¹⁸ Commission on Human Rights, Summary Record of the 3rd Meeting (E/CN.4/SR.3) 28 January 1947, p. 5.

proposed setting up a sub-committee to examine and formulate recommendations on how to proceed,⁴¹⁹ but Romulo wished to go further, leading him to table a proposal to set up a sub-committee to study ‘all questions involved’ in petitions instead, including the handling of grievances of the petitioners, so that they ‘feel they were not writing for nothing’.⁴²⁰ He received support from Ebeid (Egypt) who raised the crucial question of what the Commission could do, concretely, to remedy the violations raised in the complaints it received.⁴²¹

4.1.1. Self-abdication

Acknowledging the significance of these questions, Roosevelt moved that the Commission ‘had no power to conduct an enquiry, or to put its decisions into force’;⁴²² all it could do was make recommendations and transfer complaints to the Council for further consideration. She could count on the support of Hodgson (Australia), who maintained that examining complaints did not fall within the purview of the Commission, as it was not a court of appeal. He was adamant that ‘the public must not be allowed to think that the Commission was a tribunal’.⁴²³ Lebeau (Belgium) reinforced this line, suggesting that the Commission should neither examine nor create expectations that it could redress grievances contained in petitions.⁴²⁴ Romulo disagreed, arguing that even as the Commission was not designed as a court of appeal, the public regarded it as such, as an embodiment of ‘the world

⁴¹⁹ Commission on Human Rights, Summary Record of the 3rd Meeting (E/CN.4/SR.3) 28 January 1947, p. 5.

⁴²⁰ Commission on Human Rights, Summary Record of the 4th Meeting (E/CN.4/SR.4) 28 Jan 1947, p. 2-3.

⁴²¹ Commission on Human Rights, Summary Record of the 4th Meeting (E/CN.4/SR.4) 28 Jan 1947, p. 3.

⁴²² Commission on Human Rights, Summary Record of the 4th Meeting (E/CN.4/SR.4) 28 Jan 1947, p. 3.

⁴²³ Commission on Human Rights, Summary Record of the 4th Meeting (E/CN.4/SR.4) 28 Jan 1947, p. 7.

⁴²⁴ Commission on Human Rights, Summary Record of the 4th Meeting (E/CN.4/SR.4) 28 Jan 1947, p. 4.

conscience'.⁴²⁵ He requested for a vote by roll call on his proposal, which was carried by five votes to three, with three abstentions.⁴²⁶ The voting reflected the contours of division in the discussion that proceeded it, revealing what Zuijdwijk framed as a sharp split within the Commission, between its 'activist' and 'passivist' members.⁴²⁷ In less than ten days the Sub-Committee, composed of Charles Dukes (United Kingdom, Chairman), Charles Malik (Lebanon, Rapporteur) and the representative of Uruguay, came with its report that was to formalise the split at the heart of the Commission, and define its functioning and activities for over two decades.⁴²⁸

The 'passivist' side gained the upper hand and dislodged the Commission from the orientation charted by Laugier at its inception. In a drastic turn that went completely against the high aspirations of the Commission, the Sub-Committee determined that '[t]he Commission has no power to take any action in regard to any complaints regarding human rights'.⁴²⁹ It proposed instead a perfunctory procedure consisting of two basic steps. In a first phase, the Chair or Vice-Chair with one or two members of the Commission would meet briefly before each of its annual sessions to make the full Commission aware of communications deemed relevant to its work.⁴³⁰ In a second phase, the Secretariat would prepare a confidential lists of complaints or 'communications' before each session of the

⁴²⁵ Commission on Human Rights, Summary Record of the 4th Meeting (E/CN.4/SR.4) 28 Jan 1947, p. 4.

⁴²⁶ Commission on Human Rights, Summary Record of the 4th Meeting (E/CN.4/SR.4) 28 Jan 1947, p. 8. (Votes for: India, Lebanon, Philippines, United States, Uruguay; Votes against: Australia, USSR, United Kingdom; Abstentions: China, Egypt, Iran; Absent: Byelorussia, Chile, France, Panama, Ukraine, Yugoslavia).

⁴²⁷ Zuijdwijk, *Petitioning the United Nations*, 3.

⁴²⁸ Commission on Human Rights, Report of the Sub-Committee on the Handling of Communications (E/CN.4/14/Rev2) 6 February 1947

⁴²⁹ Commission on Human Rights, Report of the Sub-Committee on the Handling of Communications (E/CN.4/14/Rev2) 6 February 1947, OP 3.

⁴³⁰ Commission on Human Rights, Report of the Sub-Committee on the Handling of Communications (E/CN.4/14/Rev2) 6 February 1947, OP 4.

Commission. The confidential list of communications would then be circulated among the Commission's members, who could consult the original copies of the complaints at the Secretariat if so requested; subsequently, the Secretariat would inform the authors 'that their communications will be brought to the attention of the Commission'.⁴³¹ This arrangement obtained the endorsement of the Council,⁴³² formalising a procedure for dealing with appeals without providing any redress to aggrieved individuals – a procedure that, John Humphrey, the person who had had to prepare the confidential list, described as 'probably the most elaborate wastepaper basket ever invented'.⁴³³

It was a procedure that decreed the self-abdication of the Commissions' responsibilities to pursue the heart of the mission for which it was set up. What is striking in the discussions leading to this procedure is that virtually all delegates exhume a deep sense of trepidation in how to address the appeals of aggrieved individuals. No sooner had the Sub-Committee put the report for adoption, that Tepliakov (USSR) demanded the removal of all provisions, save the paragraph stipulating that the Commission had no powers act; even a perfunctory procedure was a bridge too far for the Soviet Union. But Tepliakov was not alone – he could count on the full support of Lebeau (Belgium). A more differentiated opposition came from Chang (China), who could live with the second phase of the procedure, but on principle, he could not support the first phase, proclaiming that it was premature for the Commission to handle appeals officially.⁴³⁴ In contrast, Mehta (India) endorsed the report on its entirety,

⁴³¹ Commission on Human Rights, Report of the Sub-Committee on the Handling of Communications (E/CN.4/14/Rev2) 6 February 1947, OP 5.

⁴³² Economic and Social Council Resolution 75 (V) (E/CN.4/27) 23 October 1947

⁴³³ Humphrey, *Human Rights and the United Nations*, 28.

⁴³⁴ Commission on Human Rights, Summary Record of the 20th Meeting (E/CN.4/SR.20) 7 February 1947, p. 2.

accepting both phases of the procedure.⁴³⁵ That Mehta could settle for such a mechanism contrasts sharply with her otherwise activist posture, not least for putting the question of appeals on Commissions' agenda, as well the discrimination of Indians in South Africa, resulting from the 1946 Asiatic Land Tenure Act which had severely limited their basic rights.⁴³⁶

Cassin (France) occupied a slightly dissenting position by proposing an amendment to the effect that the Commission should make the Council aware of 'the serious gap which results from the absence of this power', anticipating that the Council could instruct the Commission on how to bridge that gap.⁴³⁷ This proposal was swiftly opposed by Roosevelt, insisting that 'no mention of this gap should be made' in the Sub-Committee's report; instead, a 'verbal' explanation of the situation had to suffice. But even such a minor amendment was not acceptable to Hodgson (Australia), which Cassin withdrew upon Roosevelt's request.⁴³⁸ Her insistence on removing the amendment points to her attempts to cover up a massive contradiction at the heart of the Commission. Surprisingly, she found an ally in Malik (Lebanon), who stressed the need of preserving at least the first phase of the procedure, which enabled the Commission to receive petitions – 'otherwise it might appear that it was not doing its job'.⁴³⁹ This was music to the ears of Roosevelt, who then added that the

⁴³⁵ Commission on Human Rights, Summary Record of the 20th Meeting (E/CN.4/SR.20) 7 February 1947, p. 3.

⁴³⁶ Commission on Human Rights, Summary Record of the 2nd Meeting (E/CN.4/SR.2) 27 January 1947, p. 3-4.

⁴³⁷ Commission on Human Rights, Summary Record of the 2nd Meeting (E/CN.4/SR.2) 27 January 1947, p. 3.

⁴³⁸ Commission on Human Rights, Summary Record of the 2nd Meeting (E/CN.4/SR.2) 27 January 1947, p. 4.

⁴³⁹ Commission on Human Rights, Summary Record of the 2nd Meeting (E/CN.4/SR.2) 27 January 1947, p. 4.

Commission ‘would fail in its duty if it did not take notice of communications’.⁴⁴⁰ This is staggering. So much had they curtailed the Commission’s powers that ‘taking notice’ of the grievances of the petitioners had become a standard of its success.

Malik and Roosevelt are rather explicit about their central worry: the importance of keeping the appearance of an active Commission whilst depriving it of any powers to act. That is, conjure up the appearance of consistency with the core mission of the Commission, whilst depriving it of any form of concrete action. That is why Roosevelt could not tolerate Cassin’s amendment that recognised the yawning gap. The unconcealed Soviet proposal to delete the procedure in its entirety would expose the Commission completely for abdicating its responsibilities –it therefore had to be defeated.⁴⁴¹ The same fate had to follow a proposal by Lebeau (Belgium) who did not even want the Commission to respond to the authors of the appeals, in order to avoid that they ‘would expect some action to be taken’.⁴⁴² Having successfully neutralised all attempts to include the right to petition in the draft Universal Declaration, Roosevelt worked tirelessly in the Commission, Sub-Commission and the Council to canvass the requisite support to prevent the Commission from acquiring any powers to act on petitions.⁴⁴³

⁴⁴⁰ Commission on Human Rights, Summary Record of the 2nd Meeting (E/CN.4/SR.2) 27 January 1947, p. 4.

⁴⁴¹ Commission on Human Rights, Summary Record of the 2nd Meeting (E/CN.4/SR.2) 27 January 1947, p. 4.

⁴⁴² Commission on Human Rights, Summary Record of the 2nd Meeting (E/CN.4/SR.2) 27 January 1947, p. 5.

⁴⁴³ Brucken, *A Most Uncertain Crusade*, 93; 111.

4.1.2. Self-subversion

Nonetheless, Roosevelt could not control opposition from outside the Commission, which questioned the rationale and wisdom of the self-denying rule she had helped bring about. To the legal scholar Hersch Lauterpacht, the Council's decision amounted to an abdication of the power and obligations vested upon the Commission and the Council by the Charter.⁴⁴⁴ Not receiving petitions would amount to a failure perhaps in the most crucial dimension of the purpose of the United Nations in its entirety.⁴⁴⁵ Far from being far-fetched, Lauterpacht's view was vindicated by the Secretary General.⁴⁴⁶ In fact the Secretary General, Trygve Lie, used Lauterpacht's analysis as one of the sources to question the self-denying rule and put forward reforms to remedy the situation.⁴⁴⁷ The central justification of his unprecedented intervention was the gap that the rule created between the aspiration and practice of the UN as a whole.

The 'blank statement' stipulating the self-denying rule, Lie asserted, 'is bound to lower the prestige and authority not only of the Commission on Human Rights but of the United Nations in the opinion of the general public'.⁴⁴⁸ It went counter to what the UN had led people believe –that its main purpose was the advancement of universal respect for human rights. Significantly, Lie underlined that his concerns and proposals came in spite of the parallel track of the Commission's work in drafting the Covenants and the measures for their

⁴⁴⁴ Zuijdwijk, *Petitioning the United Nations*, 6; Philip Alston, 'The Commission on Human Rights', in *The United Nations and Human Rights. A Critical Appraisal*, ed. Philip Alston (Oxford: Oxford University Press, 1996), 140.

⁴⁴⁵ Alston, 'The Commission on Human Rights', 140.

⁴⁴⁶ Zuijdwijk, *Petitioning the United Nations*, 6.

⁴⁴⁷ Economic and Social Council, Secretary General Report by the Secretary-General on the present situation with regard to communications concerning human rights (E/CN.4/165) 2 May 1949, p. 7.

⁴⁴⁸ Economic and Social Council, Secretary General Report by the Secretary-General on the present situation with regard to communications concerning human rights (E/CN.4/165) 2 May 1949, p. 5.

implementation, which, in any case, would apply only to state parties.⁴⁴⁹ This is an important point, because the main argument seeking to rationalise the self-denying rule was that the Commission had to first define what human rights were before taking appropriate measures to implement them. It was a view that was held also by Cassin, surprisingly. Yet, after the adoption of the Universal Declaration in 1948 and the avowal of the United States never to ratify the Covenants, putting into question the likelihood of an effective implementation system being established any time soon, that argument lost its credibility.⁴⁵⁰

In effect, the self-denying rule reflected an unholy alliance among countries with diverse orientations but united in their resolve to prevent setting a precedent that could turn against them.⁴⁵¹ The Soviet Union had consistently opposed any measure that could potentially infringe upon their sovereignty –they objected even to the mere formality of the Commission taking note of the list of communications before each of its annual sessions.⁴⁵² Similarly, the main goal of United States was to prevent the UN from acquiring powers that could expose the racial segregation in the country. When W.E.B. Du Bois went before the UN with a damning appeal, detailing the widespread and systematic discrimination of black people,⁴⁵³ the Truman administration deployed Roosevelt to leverage her international fame to prevent the Sub-Commission from receiving it.⁴⁵⁴ Du Bois tried again, this time before the Assembly, right after it had adopted the Universal Declaration in 1948, but once again he was met the

⁴⁴⁹ Economic and Social Council, Secretary General Report by the Secretary-General on the present situation with regard to communications concerning human rights (E/CN.4/165) 2 May 1949, p. 2.

⁴⁵⁰ Alston, 'The Commission on Human Rights', 142.

⁴⁵¹ Alston, 142.

⁴⁵² Humphrey, *Human Rights and the United Nations*, 28.

⁴⁵³ National Association for the Advanced of the Coloured People, *An Appeal to the World! A Statement of the Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress*, 1947.

⁴⁵⁴ Brucken, *A Most Uncertain Crusade*, 115–16.

insurmountable resistance by Roosevelt, who argued that ‘no good could come from such a discussion’, fearing that the grievances contained in the appeal would provide more ammunition for the Soviet propaganda.⁴⁵⁵

However, quashing the right of appeal was not just a response to Du Bois or cold war politics, but as Emma Mackinnon points out, ‘a broader move to define human rights in a manner that disavowed the politics of rights that the petition represented’.⁴⁵⁶ Similar fears of exposure informed the reluctance of colonial powers such as the United Kingdom, Belgium, France and Portugal. So, in the eyes of Charvet and Kaczynska-Nay, ‘an unholy alliance between the US racists, the European colonialists and the Stalinist terrorists defeated all attempts to get an effective precedent established’.⁴⁵⁷ But the fear of setting a precedent in considering appeals, permeated the positions of even those who had occasionally taken more activists stances, such as Mehta, Chang and Malik. Attempts to reverse this policy from within the Commission came mainly from the representatives of the Philippines, Egypt and India. Despite their persistent efforts, they could offer only limited resistance and obtained minor concessions –leaving the core of the procedure intact.⁴⁵⁸

What increased the salience of the opposition to the self-defying rule, ironically, was the inability of the United States and the Soviet Union to resist the temptation of deploying human rights to attack one another in their race for global primacy. Initially, the US

⁴⁵⁵ Brucken, 124.

⁴⁵⁶ Emma Stone Mackinnon, ‘Declaration as Disavowal: The Politics of Race and Empire in the Universal Declaration of Human Rights’, *Political Theory* 47, no. 1 (1 February 2019): 66.

⁴⁵⁷ John Charvet and Elisa Kaczynska-Nay, *The Liberal Project and Human Rights: The Theory and Practice of a New World Order* (Cambridge: Cambridge University Press, 2008), 227.

⁴⁵⁸ Zuijdwijk, *Petitioning the United Nations*, 9–13.

government was extremely cautious. Having succeeded in emasculating all attempts to ensure the prospect of effective implementation in the drafting of the Universal Declaration, the US foreign policy establishment was extremely concerned with setting a precedent that could have domestic repercussions, as Brucken expounds in detail.⁴⁵⁹ In their attempt to avoid giving the Soviet Union a pretext to expose the systematic discrimination and lynching of black people, the Stated Department resisted pressure from Congress and powerful religious groups to bring before the Assembly the case of the imprisonment of the Croatian archbishop Aloysius Stepinac in 1946, which epitomised lack of religious freedom and persecution in Eastern Europe.⁴⁶⁰ The Stated Department was acutely aware of the fact that raising such a case ‘would leave the United States vulnerable to similar charges against it by other states’.⁴⁶¹ To that end, it embraced an overly restrictive interpretation of Article 2 (7) of the Charter, arguing that the UN could not pass judgment on the manner in which sovereign states treat their subjects.

At the same time, the United States sought to confront the Soviet Union, especially as they compared their human rights record favourably to that of the capitalist bloc. When the Soviet Union decided in 1947 to deny the right to leave the country to Soviet nationals married to foreigners, affecting three hundred and fifty Soviet wives and sixty-five Soviet husbands of American citizenship, the State Department re-evaluated its position.⁴⁶² In its desire to confront the Soviet Union, it now defended a view whereby the Council and the Assembly could condemn its members for violating the human rights provisions of Charter.⁴⁶³ In response, the Soviet Union raised the racial practice of prohibiting mixed marriages in some

⁴⁵⁹ Brucken, *A Most Uncertain Crusade*, 105–12.

⁴⁶⁰ Brucken, 106.

⁴⁶¹ Brucken, 112.

⁴⁶² Brucken, 124.

⁴⁶³ Brucken, 124.

thirty US states, giving a taste of what was to follow. The Council adopted a resolution condemning the Soviet decision, but it also deplored impediments to mixed marriages wherever they occur. This resolution was significant because it marked a major shift in US attitude towards the UN's role in examining domestic practices, but, evidently, 'it was not a precedent Washington sought to build upon in the future'.⁴⁶⁴

Yet the United States would soon find itself in the impossible position of wanting to attack the Soviet Union but without setting a precedent. In pursuit of a broader policy of containment, US officials such as Eleanor Roosevelt and the Secretary of State George Marshall launched a coordinated campaign with the aim of discrediting the Soviet Union and forcing them on the defensive.⁴⁶⁵ Mindful not to set a precedent for UN action on violations of religious freedom in Eastern Europe, the Truman administration initially made recourse to the International Court of Justice instead, charging Hungary, Romania and Bulgaria for having violated WWII peace treaties. But when the Court ruled against the United States, the administration decided to reverse past reluctance and deploy in full the Assembly to expose violations of human rights in the Soviet Union. The governments of Eastern Bloc 'should be made to feel the full weight of the condemnation of all free peoples which their actions provoke', declared Dean Acheson, then Secretary of State.⁴⁶⁶

Exposing violations in the Eastern Europe became a strategy of deflecting the growing opposition to the US systematic efforts to undermine the drafting of the Covenants, especially after they proposed the infamous 'Action Plan'—clearly a manoeuvre to derail UN efforts to establish firm human rights obligations and means to protect them, and expose the flaws of

⁴⁶⁴ Brucken, 125.

⁴⁶⁵ Brucken, 125–27.

⁴⁶⁶ Brucken, 159.

US adversaries instead.⁴⁶⁷ The Eisenhower administration amplified this shift by setting up an inter-agency board to engage in a full-blown psychological warfare to expose violations behind the ‘Iron Curtain’. Suddenly, the UN, in particular the Assembly, regained strategic importance in the psychological war as it could serve as ‘the biggest single propaganda platform in the world’.⁴⁶⁸ Even as this warfare was essentially a strategy to deflect lack of US commitment and its distance to the emerging human rights standards, it marked a major reversal in US policy toward human rights. By launching this propaganda offensive, Brucken neatly points out, ‘President Eisenhower had returned U.S. human rights policy to its World War II–era rhetoric that demonized America’s enemies and celebrated the nation’s political and civic ideals but eschewed any commitment to achieving specific standard-setting goals’.⁴⁶⁹ That was a period of extreme polarization.

In deploying human rights to pursue their broader geopolitical interests in a context of intensifying competition, the United States and Soviet Union pushed open a door they had closed. Through their actions, they put into question the denial of the UN to address violations of human rights within specific countries. This is far from the high aspiration that the Commission had evoked at its inception. But it is also not the Commission that could hold onto the self-denying rule. It remained still an open dispute, but at least it was a dispute about two competing options for the Commission’s course of action. An active role for the Commission was in dispute as much as its self-abdication of responsibility to deal with appeals. In none of the important stages can this be seen as an unintended or accidental outcome. The main protagonists show that they were sufficiently aware of the repercussions of either course of action. Their actions did not produce any meaningful action in any

⁴⁶⁷ Brucken, 241; Alston, ‘The Commission on Human Rights’, 182.

⁴⁶⁸ Brucken, *A Most Uncertain Crusade*, 242.

⁴⁶⁹ Brucken, 152.

direction. But leaving all options open also meant that under the right circumstances the Commission could regain the power to act, a remarkable development that will be analysed in the next section.

4.2. Recognition

Even as the two superpowers were united in their resolve to undermine the Commission's ability to act, the strategic deployment of the UN to expose the human rights violations of each camp, ultimately boiled down to assessing international behaviour and domestic practices according to human rights principles. The ideological warfare amounted to a struggle for the universal, given that it involved exposing the inconsistencies of adversarial actions in relation to the universal. Each deployment of human rights to discredit each-other's behaviour created cracks in the defences they had erected to the UN's power to address violations of human rights, leaving traces that countries interested in the empowering of the Commission could reanimate into precedents. They gave a helping hand to representatives of the Philippines, India, Lebanon and Egypt in their persistent attempts to reverse Commission's self-abdication. But even as they succeeded in keeping up the pressure on and destabilising the self-denying role, until the late 1950s it was the 'passivist' camp that carried the day.⁴⁷⁰ It would be the intensification of the bipolar competition that would create the conditions for 'activist' countries to crack the denial of Commission's power to act.

Violations of human rights became ammunition in the struggle between the United State and the Soviet Union to expand their appeal and discredit their adversaries whenever the occasion presented itself. Breaking with its principled opposition to external interference, the Soviet

⁴⁷⁰ Zuijdwijk, *Petitioning the United Nations*, 9–14.

Union asked the Security Council to put on its agenda the ‘unceasing terrorism and mass executions’ ruled by military tribunals in the aftermath of the civil war in Greece, a ‘monarcho-fascist regime’ backed by the United Kingdom and the United States.⁴⁷¹ The Soviet Union did so for ‘noble and humane considerations’ heeding the calls of numerous letters ‘written in tears and blood’, but was seen as pure propaganda by allies of the United States such as Cuba, and rejected on the ground that the Security Council did not have jurisdiction over such internal matters, and argument made forcefully by the British representative Gladwyn Jebb. The Soviet proposal was defeated by a resounding majority of nine votes to two, securing the support of Yugoslavia only,⁴⁷² but nevertheless it indicated the willingness of the Soviets to take risks in empowering the UN in order to counter its adversaries.

Khrushchev ignites the universal

It was the installation of Nikita Khrushchev as the Soviet leader, following Stalin’s death, that brought about a major shift in the Soviet policy toward the UN. Khrushchev viewed the UN as a key platform in pursuit of his vision of ‘peaceful competition’ with the capitalist West in the newly decolonised states.⁴⁷³ On 23 September 1960, Khrushchev proposed a new agenda for the fifteenth session of the Assembly, together with a draft resolution on a ‘Declaration on the Granting of Independence to Colonial countries and Peoples’.⁴⁷⁴ The fourteen-pages long text that Khrushchev submitted, more than a draft resolution, was an

⁴⁷¹ Jared Genser and Bruno Stagno Ugarte, *The United Nations Security Council in the Age of Human Rights* (Cambridge: Cambridge University Press, 2014), 8.

⁴⁷² Security Council, Official Record of the 493rd meeting (S/PV.493) 31 August 1950, p 30.

⁴⁷³ Westad, *The Global Cold War*, 66–72.

⁴⁷⁴ General Assembly, Agenda Item proposed by the USSR: Declaration on the Granting of Independence to Colonial countries and Peoples (A/4501) 23 September 1960; General Assembly, Draft resolution submitted by Khrushchev, Chairman of the Council of Ministers of the USSR: Declaration on the Granting of Independence to Colonial countries and Peoples (A/4502) 23 September 1960.

indictment of colonial rule and colonial powers, castigating them for their untold crimes over the centuries. Praising the onset of decolonisation as one of the most significant developments of the time, he resolved that: ‘[t]he very course of historical development now poses the question of complete and final elimination of the colonial regime in all its forms and manifestations, not some time in the distant future, but immediately and unconditionally!’.⁴⁷⁵

However, on 28 November 1960, the Assembly adopted an alternative proposal submitted by twenty-seven Asian and African, by eighty-nine votes to none, with nine abstentions, after rejecting the Soviet proposal by thirty-five votes to thirty-two, with thirty abstentions.⁴⁷⁶ In that resolution, the Assembly declared colonialism ‘a denial of fundamental human rights’ and called on colonial rulers to transfer all powers to the people under their subjugation. The transfer of authority had to take place in accordance to the principles established in the Charter and the Universal Declaration but also on the basis of non-interference and ‘respect for the sovereignty rights of all people’—betraying the deep contradiction in the justification underpinning these unprecedented demands.⁴⁷⁷ But the Soviet Union persisted on its new course of action and, a year later, based on its proposal, the Assembly decided to establish a

⁴⁷⁵ General Assembly, Draft resolution submitted by Khrushchev, Chairman of the Council of Ministers of the USSR: Declaration on the Granting of Independence to Colonial countries and Peoples (A/4502) 23 September 1960, p.13.

⁴⁷⁶ General Assembly resolution 1514 (XV). Declaration on the granting of independence to colonial countries and peoples, 14 December 1960; General Assembly, Official Record of the 947th meeting (A/PV.947) 14 December 1960, p 1272-1274. Abstentions: Portugal, Spain, South Africa, United Kingdom, United States, Australia, Belgium, Dominican Republic, and France.

⁴⁷⁷ General Assembly resolution 1514 (XV). Declaration on the granting of independence to colonial countries and peoples, 14 December 1960, OP 1- 7;

Special Committee to implement the Declaration (the Decolonisation Committee), vested with the power to examine individual appeals, until then an anathema for the Soviet Union.⁴⁷⁸

By 1963, the Decolonisation Committee was able to document in detail the failure to implement the Declaration, specifying numerous and systematic violations of human rights, in over twenty countries and had set up a Sub-Committee to handle individual petitions.⁴⁷⁹ Two years later, the Committee produced a massive report describing the practice and scale of grave and systematic violations of basic rights, especially in South Africa, Southern Rhodesia, and South West Africa –all of which practiced Apartheid to preserve white minority rule. The Committee went so far as to claim that the South African prime minister, Hendrik Verwoerd, the architect of apartheid, together with his cronies ‘were even engaging in experiments with poison gas and atomic weapons with the idea of waging a war of extermination against the African peoples, all in order to maintain the supremacy of the white race in that part of the African continent’.⁴⁸⁰ Anticipating the power that the publishing of this report could have in mobilising world public opinion against Apartheid, the Committee drew the attention of the Commission to the evidence contained in appeals it had received concerning violations of human rights in territories under Portuguese rule, in South West Africa and in Southern Rhodesia.⁴⁸¹

⁴⁷⁸ General Assembly resolution 1654 (XVI). The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples, 27 November 1961.

⁴⁷⁹ General Assembly, Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (A/5446/REV.1) 25 October 1963.

⁴⁸⁰ General Assembly, Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (A/6000/REV.1) 15 November 1965, paragraph 146.

⁴⁸¹ General Assembly, Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (A/6000/REV.1) 15 November 1965, paragraph 463.

‘in all countries’

Given the Commission’s inability to act, it was the Council that responded with a resolution requesting the Commission ‘to consider as a matter of importance and urgency the question of violations of human rights [...] including policies of racial discrimination and segregation and of *apartheid* in all countries’.⁴⁸² This way, the Council set in motion the restoration of Commission’s powers. But equally important was the framing of the request in terms of ‘in all countries’ as Zuidwijk and Alston rightly underscore.⁴⁸³ This is so because the impetus of Committee’s plea for action as well as the initial draft resolution submitted by the Soviet Union (together with Algeria, Cameron and Tanzania), aimed at violations of human rights in territories under colonial rule only.⁴⁸⁴ The United States and its allies seized the opportunity created by the blatantly one-sided Soviet resolution to expand its scope to apply universally. That this universal correction came from the same countries that the Decolonisation Committee castigated for delaying and sabotaging its work, including for their continued support to and close cooperation with the Apartheid regime, did not seem to undercut the power of the universal.⁴⁸⁵ The Soviet Union and the United States occupied opposite positions on the matter, but their appeal to the universal pushed them towards creating a precedent that reflects the universal justifications they professed, rather than their base intentions.

⁴⁸² Economic and Social Council Resolution 1102 (XL) 4 March 1966, OP 1.

⁴⁸³ Zuidwijk, *Petitioning the United Nations*, 15–16; Alston, ‘The Commission on Human Rights’, 156.

⁴⁸⁴ Zuidwijk, *Petitioning the United Nations*, 15.

⁴⁸⁵ General Assembly, Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (A/6000/REV.1) 15 November 1965, paragraphs 158; 449; 452; 454; 458.

The sharp divisions between the United States and the Soviet Union intensified. Whilst the Commission unanimously condemned racial discrimination and apartheid ‘in all countries’, it was sharply divided on what the mandate of the Council’s resolution actually meant.⁴⁸⁶ The Soviet Union sought to delimit the Commission’s mandate to grave violations of human rights, especially those classified as ‘crimes against humanity’, in dependent territories.⁴⁸⁷ The United States and its allies pushed on the opposite direction. Despite having prevented the Commission from taking any action at all, now they felt emboldened to ‘redress the balance’ which was lacking in the Soviet proposal. It would be ‘wrong to forget’, they maintained, that the ‘Commission’s overall-competence derived directly from the Charter and was of a universal character’ –thus indirectly acknowledging that the Commission had the power to act all along, as Miko Lempinen shows;⁴⁸⁸ having blocked it for two decades was in violation of the Charter. Nevertheless, they had come to believe that the delimitation of Commission’s work to ‘a specific category of countries’ only was an ‘artificial restriction’ that could not be justified.⁴⁸⁹ Even as the question of apartheid deserved special emphasis, the language of ‘in all countries’ became necessary not to lose sight of the ‘universal nature of the Commission’s work’.⁴⁹⁰

Several representatives supporting the Soviet line read the attempts by the United States to expand the Commission’s work to include all countries as a way of ‘ignor[ing] the extreme

⁴⁸⁶ Commission on Human Rights, Report of the 22nd session (E/CN.4/916) 1966, paragraph 173.

⁴⁸⁷ Commission on Human Rights, Report of the 22nd session (E/CN.4/916) 1966, paragraph 174.

⁴⁸⁸ Miko Lempinen, *The United Nations Commission on Human Rights and the Different Treatment of Governments: An Inseparable Part of Promoting and Encouraging Respect for Human Rights?* (Åbo: Åbo Akademi University Press, 2005), 44–46.

⁴⁸⁹ Commission on Human Rights, Report of the 22nd session (E/CN.4/916) 1966, paragraph 175.

⁴⁹⁰ Commission on Human Rights, Report of the 22nd session (E/CN.4/916) 1966, paragraph 176.

urgency of the question [of apartheid]' and of shielding colonialists that the Decolonisation Committee had accused of massive violations; it represented a travesty of universalism 'to shelter the colonialists and racists under the general term 'all countries'. Besides, the 'in all countries'-framing would symbolise 'unfounded charges against all States', a dangerous accusation that could ultimately undermine the Commission's authority to address any violations anywhere. By contrast, those defending the US proposal argued that 'it mattered little where violations of human rights occurred'; what mattered more was that 'all violations should be condemned, and all violations deserved the attention of the Commission'.⁴⁹¹

The significance of the debate about 'in all countries' cannot be clearer. Once Khrushchev set the precedent of utilising universal rights to expose specific violations, its opponents appealed to the same universal norms to remove artificial restrictions from the point of view of the universal, thus subverting the Soviet intentions, generating a shared outcome that is closer to the universal frame within which they formed their competing views, rather than the intentions of those projecting them.

Towards a constitutional moment

The Commission's swift response to the Council's call embodied the universal logic of 'in all countries', in spite of continued attempts by the Soviet Union and its allies to restrict it. It decided to consider in its subsequent session 'the question of the Commission's tasks and functions and its role in relation to violations of human rights in all countries' and informed the Council that to do that in an effective manner 'it will be necessary for the Commission to consider fully the means by which it may be more fully informed of violations of human

⁴⁹¹ Commission on Human Rights, Report of the 22nd session (E/CN.4/916) 5 April 1966, paragraph 182-184.

rights with a view to devising recommendations for measures to halt them'.⁴⁹² What is striking is that all provisions of universal character were unanimously adopted; all provisions referring to particular violations, such as racial discrimination and apartheid or calls for immediate and unconditional end of colonial rule in all its manifestations, were put to a vote due to objections from colonial states, especially the United Kingdom, which, being a close ally of the apartheid regime, voted against the resolution.⁴⁹³ Within a few months, the Council endorsed the Commission's request and asked the Assembly to act on it.⁴⁹⁴ The Assembly gave the fiat to both the Council and the Commission 'to give urgent consideration to ways and means of improving the capacity of the United Nations to put a stop to violations of human rights *wherever they may occur*'.⁴⁹⁵ It was a ground-breaking resolution that not only confirmed the powers of the Commission but also formalised its universal reach by removing all restrictions to violations it could consider.

The measures that the Commission took in 1967 to implement the Assembly's authorisation would reverse the denial of its powers and reaffirm its broad authority in dealing with all human rights anywhere. Crucially, the Commission expanded its agenda with a permanent item on the '[q]uestion of violations of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories'.⁴⁹⁶ It empowered its Sub-Commission to collect all available information and bring to its attention

⁴⁹² Commission on Human Rights Resolution 2 (XXII) 25 March 1966, Section B. The resolution passed by 12 votes to 1, with 8 abstention. Against: United Kingdom; Abstaining: Austria, France, Israel, Italy, Netherlands, New Zealand, Sweden, United States of America.

⁴⁹³ Commission on Human Rights, Report of the 22nd session (E/CN.4/916) 5 April 1966, paragraph 192-220.

⁴⁹⁴ Economic and Social Council Resolution 1164 (XLI) 5 August 1966.

⁴⁹⁵ General Assembly Resolution 2144 (XXI) 26 October 1966, OP 12. [Emphasis added]

⁴⁹⁶ Commission on Human Rights Resolution 8 (XXIII) 16 March 1967, OP 1.

‘any violation of human rights and fundamental freedoms, in any country, including policies of racial discrimination, segregation and apartheid, with particular reference to colonial and other dependent territories’.⁴⁹⁷ Note that the universal language of ‘in all countries’ and ‘in every country’ is squeezed in-between a long phrase that aims at addressing solely the violations committed by South Africa. Its mere mentioning, however, will prove sufficient to ignite the logic of the universal and subsequently expand scrutiny beyond original intention.

Still, there was disagreement about whether the newly gained powers were sufficient for the Commission to fulfil its tasks. Thereby the Commission requested the Council to grant the power ‘to examine information relevant to gross violations of human rights and fundamental freedoms, such as apartheid in all its forms and manifestations’ and ‘to make a thorough study and investigation of situations which reveal a consistent pattern of violations of human rights’.⁴⁹⁸ It further asked the Council to confirm its power ‘to recommend and adopt general and specific measures to deal with violation of human rights’.⁴⁹⁹ The Council responded positively by confirming and codifying the Commission’s powers in the now famed *public 1235 procedure*, empowering the Commission and its Sub-Commission to address human rights everywhere and finally act on the petitions of aggrieved individuals.⁵⁰⁰ This was a constitutional moment for the Commission which laid the ground for the creation and development of a new, alternative monitoring institution –the ‘Special Procedures’.

But the Council went further. To cope with the selective application of the 1235 procedure, in 1970 it adopted the *confidential 1503 procedure*, authorising the Sub-Commission to

⁴⁹⁷ Commission on Human Rights Resolution 8 (XXIII) 16 March 1967, OP 2 and 6.

⁴⁹⁸ Commission on Human Rights Resolution 8 (XXIII) 16 March 1967, OP 4-5.

⁴⁹⁹ Commission on Human Rights Resolution 9 (XXIII) 16 March 1967, OP 1.

⁵⁰⁰ Economic and Social Council Resolution 1235 (XLII) 6 June 1967.

examine appeals ‘which appear to reveal a consistent pattern of gross and reliability attested violations of human rights and fundamental freedoms’.⁵⁰¹ The operation of this procedure will be discussed in the next section, but it suffices to mention here that, with the 1235 procedure and 1503 procedure, the Commission had now attained the constitutional basis to address human rights wherever they occur, both privately and in public –thus reversing the denial of powers in 1947. This could happen thanks to the universal arguments that competing visions sought to embody, rather than the intentions of agents defending them.

4.2.1. From *sui generis*...

South Africa

To set a crucial precedent in the development of the Special Procedures, however, the Commission did not wait for the Council’s authorization. At the same time as it asked the Council to confirm and expand its powers in 1967, it decided to establish an ‘Ad Hoc Working Group of Experts’ to investigate violations of human rights in South Africa, vested with the power to receive individual appeals, and the power to propose adequate measures as regards individual cases. In effect, the Commission was nearly two decades late in addressing the matter. South Africa had been on the agenda of the Assembly from its very first session in 1946;⁵⁰² its scrutiny only intensified in the intervening years, most notably with the establishment of the Decolonisation Committee, unifying this way the struggle against colonialism with the struggle against racism. Importantly, the Assembly had also adopted the Racial Discrimination Convention in 1965, which specifically addressed the question of Apartheid. Even the Security Council overcame its initial reluctance to deal with human

⁵⁰¹ Economic and Social Council Resolution 1503 (XLVII) 27 May 1970, OP 1.

⁵⁰² General Assembly Resolution 44 (I) 8 December 1946.

rights after the Sharpeville Massacre of 21 March 1960, where the South African police deliberately killed sixty-nine demonstrators, seriously injuring nearly two hundred of them.

Deploring the police action, the Council called on the apartheid regime to take measures that foster ‘racial harmony based on equality’ and to ‘abandon its policies of apartheid and racial discrimination’,⁵⁰³ even as, due to British and French influence, the resolution did not carry binding force.⁵⁰⁴ The Council remained seized on the matter, and in 1963 adopted two resolutions, considering Apartheid to be in ‘violation of the provision of the Universal Declaration’, setting a precedent in invoking the Declaration for the first time in its fifteen years of existence, Genser and Ugarte observe.⁵⁰⁵ In another unprecedented move, the Council authorised the creation of what became the ‘Group of Experts on South Africa’, endowed with the power ‘to examine methods of resolving the present situation in South Africa through full, peaceful and orderly application of human rights and fundamental freedoms of all inhabitants of the territory as a whole, regardless of race, colour or creed and to consider what part the United Nations might play in the achievement of that end’.⁵⁰⁶

And yet, for the United States the Commission could not take such an action. Holding on to its traditional line, the United States submitted an amendment seeking to limit the power of Commission to solely making recommendations to the Council, rather than taking action on its own.⁵⁰⁷ This position contrasted sharply with its earlier investment in expanding the Commission’s purview to cover all countries to counter the Soviet proposal that focused on

⁵⁰³ Security Council Resolution 134 (1960) 1 April 1960. Adopted with nine votes to none, with two abstentions (United Kingdom and France)

⁵⁰⁴ Genser and Ugarte, *The United Nations Security Council in the Age of Human Rights*, 9.

⁵⁰⁵ Genser and Ugarte, 11.

⁵⁰⁶ Security Council Resolution 182 (1963) 4 December 1963, OP 6.

⁵⁰⁷ Commission on Human Rights, Report of the 23rd session (E/CN.4/940) 23 March 1967, paragraph 203.

South Africa only. However, the United States was not alone, as the rejection of its proposal, by twelve votes to nine, with ten abstentions, may indicate.⁵⁰⁸ Another challenge to the precedent-setting move of the Commission came from Tanzania, which sought to have the Working Group composed of ‘nine governmental experts on the basis of equitable geographical distribution’.⁵⁰⁹ This proposal indicated a desire to have the Commission create a new institution to tackle racism without relinquishing full control over it, but was also rejected with an even larger margin, by seventeen-votes to three, with eleven abstentions.⁵¹⁰ Had the US proposal not been defeated, the Commission could not have created the Working Group on South Africa, but without defeating the Tanzanian proposal, it would have hardly made much of a difference. Indeed, the power of the Working Group on South Africa and others that would be created in its aftermath derives from their perceived distance and independence from governments. That is, their approximation to the universal values they are supposed to serve.

Being itself an intergovernmental body *par excellence*, the Commission explicitly rejected governmental and geographic considerations in favour of universal criteria –competence, independence and impartiality. With this move, the Commission admitted its partiality at the same time as it recognised the need to overcome it by bringing into being a new entity that was to act independently of it –as the most effective strategy of pursuing a purely political goal of exposing the crimes of a white-minority regime in Africa; harnessing the force of the universal would allow them to penetrate as deep as possible into the country to reveal the

⁵⁰⁸ Commission on Human Rights, Report of the 23rd session (E/CN.4/940) 23 March 1967, paragraph 247-248.

⁵⁰⁹ Commission on Human Rights, Report of the 23rd session (E/CN.4/940) 23 March 1967, paragraph 199.

⁵¹⁰ Commission on Human Rights, Report of the 23rd session (E/CN.4/940) 23 March 1967, paragraph 246.

depth and scale of its crimes. Given the supposed impartiality of the Working Group on South Africa, the South African government ‘would have no valid reason to refuse to appear before the body in question or cooperate with it’, a number of representatives argued.⁵¹¹ Not surprisingly, it was the presumption of impartiality that the apartheid regime attacked as a way of defending itself, even as in doing so it indirectly acknowledged and reinforced the importance of impartiality as such, albeit of a ‘purer’ form. In any event, with its staggering incompetence and prejudiced method of establishing facts before investigating them, the Working Group exuded neither independence nor impartiality, not exactly the kind of example to follow in future investigations, making it easier for South Africa to dismiss its findings.⁵¹²

It could also not escape to the South African representative that ‘although the item under discussion had been drawn broadly to give it a universal scope and concern with human rights everywhere, almost all of the remarks delivered had been directed against his country’.⁵¹³ What he is doing here is appeal to a higher level of universalism in order to dismiss grave concerns about the violation of basic universal norms—illustrating the perversity of universalism. He pursued further his universalist line of defence, arguing that the UN should address human rights in sovereign countries ‘only on the basis of a comparative analysis of conditions and problems in all Member States’.⁵¹⁴ Otherwise, to intervene without a comparative frame was ‘contrary to both the letter and the spirit of the

⁵¹¹ Commission on Human Rights, Report of the 23rd session (E/CN.4/940) 23 March 1967, paragraph 226.

⁵¹² Alston, ‘The Commission on Human Rights’, 165.

⁵¹³ Commission on Human Rights, Report of the 23rd session (E/CN.4/940) 23 March 1967, paragraph 277.

⁵¹⁴ Commission on Human Rights, Report of the 23rd session (E/CN.4/940) 23 March 1967, paragraph 277.

Charter'.⁵¹⁵ He thus appeals to scientific universalism to relativize the crimes of the regime by implying equality of guilt. For, comparatively, apartheid was in fact a 'policy of separate development', which involved 'differentiation but did not imply any belief in any inherent superiority of one group over another'; it was aimed at 'vertical parallelism between equals'.⁵¹⁶ In a broader context, then, the apartheid regime would simply be in line with the universal principles invoked by its adversaries.

Yet such a rhetorical intervention could not succeed and was instantly repelled by representatives in favour of establishing the Working Group. What the South African diplomat had described as a 'system of equality' represented 'the most indisputable example of racial discrimination and was based on the monstrous hypothesis of the absolute superiority of one race over others'.⁵¹⁷ To another delegate, the intervention of the South African representative 'had revealed the existence of an intellectual and moral universe to which [he] had no access' –that is how outrageously isolated the South African views was considered within the Commission.⁵¹⁸ Apartheid could not be compared with other violations as it was 'a case of gross violation which had shocked the conscience of mankind'; in effect, the South African government had 'condemned itself by its arguments in favour of apartheid'.⁵¹⁹ Hence it was about time for the Commission to act irrespective of the regime's willingness to cooperate. The establishment of the Working Group would express the

⁵¹⁵ Commission on Human Rights, Report of the 23rd session (E/CN.4/940) 23 March 1967, paragraph 277.

⁵¹⁶ Commission on Human Rights, Report of the 23rd session (E/CN.4/940) 23 March 1967, paragraph 277.

⁵¹⁷ Commission on Human Rights, Report of the 23rd session (E/CN.4/940) 23 March 1967, paragraph 210.

⁵¹⁸ Commission on Human Rights, Report of the 23rd session (E/CN.4/940) 23 March 1967, paragraph 230.

⁵¹⁹ Commission on Human Rights, Report of the 23rd session (E/CN.4/940) 23 March 1967, paragraph 277.

Commission's desire 'to ascertain the truth with complete impartiality' and the regime's refusal to cooperate with it 'would further mobilise world public opinion and expose the inhuman practices of that Government'.⁵²⁰ That level of pressure would render refusal to cooperate untannable. What is emphasised here is the involuntary character of the Special Procedures which, in addition to its universal aura, is the critical and distinctive feature of the new institution that had just come into being.

It is hard to overstate the significance of this precedent for the subsequent development of the Special Procedures, or the human rights system in general. The importance of the new organ was recognised by South Africa itself when it stated that 'it would be an unprecedented occurrence for such an investigating body to be allowed to enter South African territory'.⁵²¹ The establishment of the Working Group, Alston emphasises, 'set a vital precedent in terms of a formal investigation by the Commission of the human rights situation in specific countries'.⁵²² Over the years, its limited mandate 'evolved into a mandate of general dimensions and global implications'.⁵²³ It is the result of the process that is driven by universal horizon that governments adopt to assess each other's positions, making the universal ever-more central, even if that is not their intention. The United States and their close allies were at best reluctant to allow for such a development, and certainly not at the

⁵²⁰ Commission on Human Rights, Report of the 23rd session (E/CN.4/940) 23 March 1967, paragraph 231.

⁵²¹ Commission on Human Rights, Report of the 23rd session (E/CN.4/940) 23 March 1967, paragraph 229.

⁵²² Alston, 'The Commission on Human Rights', 156.

⁵²³ Theo Van Boven, 'United Nations Strategies to Combat Racism and Racial Discrimination: A Sobering but Not Hopeless Balance-Sheet', in *The Role of the Nation-State in the 21st Century*, ed. M. Castermans, F. Van Hoof, and J. Smith (Leiden: Brill, 1998), 258.

forefront;⁵²⁴ conversely, the Soviet Union and its satellite states ‘were happy to encourage attention to what were assumed to be quintessentially Western sins’, Alston observes.⁵²⁵

The new majority of African and Asian countries, showed their determination ‘to make racism a major concern and to develop whatever procedures might be necessary in order to combat it [...] even though there was a significant ‘risk’ that the scope or reach of the procedure might eventually be extended to address problems other than racism’.⁵²⁶ The problem of apartheid became so central in the strategic interventions of various states that concrete action became inevitable as they continuously elevated the universal as the standard to assess each other’s behaviour. The gist of this seemingly paradoxical outcome is captured by Theo van Boven, the High Commissioner for Human Rights *ante litteram*, who describes the significance of the Working Group with the following words:

‘[i]t is of course true that [...] many States found it convenient to reject in strong terms the doctrine, the policy and the practice of Apartheid because they point the finger to the other, but at the same time one should not underestimate the catalytic impulses which were unleashed by the movement of solidarity in support of the suppressed people in Southern Africa and which operated as a sort of ‘ice breaker’ to open up new avenues of tackling more effectively gross and systematic violations of human rights’.⁵²⁷

⁵²⁴ Van Boven, 258.

⁵²⁵ Alston, ‘The Commission on Human Rights’, 143.

⁵²⁶ Alston, 143.

⁵²⁷ Van Boven, ‘United Nations Strategies to Combat Racism and Racial Discrimination: A Sobering but Not Hopeless Balance-Sheet’, 256.

The ‘ice-breaker effect’ that van Boven talks about will become more tangible in the following pages, but what is important to note here is that it originates from the universal horizon that the relevant actors adopted. Similarly, Moses Moskowitz had seen the struggle against apartheid as the lifeline of human rights, in that it;

‘supplied the quickening impulse which kept the broader issues of human rights alive in the forum of the UN. It encouraged gestures in different directions and occasionally served as a spurt to rage on other fronts and helped unlock restraints on public discussion of human rights situations in other parts of the world’.⁵²⁸

Numerical majority, as is so often stated, is obviously relevant, but then only to the extent that it articulates and magnifies the discrepancy between apartheid and the universal, and the need to rectify it. After all, the Security Council played a pioneering role even as the majority clearly favoured South Africa, and the United Kingdom and the United States could always put a veto on all relevant decisions. As will later be demonstrated, the universal can reverse and undermine numerical majority, if it is revealed to conflict with its logic. This of course does not mean that the architects of the Special Procedures aimed at setting such a precedent, or, even less, at creating an institution that would take on a life of its own. But that is (almost) irrelevant as long as they continue invoking the universal that brought it into life.

Israel

Having established what became the first mandate of the Special Procedures, the newly independent countries dreaded the consequences of the precedent they had set. They could see all along how the ‘ice-breaker effect’ of the apartheid Working Group could extend well

⁵²⁸ Moses Moskowitz, *International Concern with Human Rights* (Leiden: Sijthoff, 1974), 67.

beyond the struggle against racism and could engulf them as well. Yet their self-proclaimed champion, the Soviet Union, did not follow them on this point. In fact, the Soviet Union found itself closer to the position of the United States than to that of the newly independent countries when it came to the consolidation and further expansion of Special Procedures. The Soviet Union was too confident in its power to feel vulnerable to the precedents it would set in violating its otherwise persistent objection to external interference, as it took a leading role in the struggle against apartheid.⁵²⁹ In fact, the Soviet Union had no qualms in going beyond South Africa by attacking Greece and especially the United States.

The Soviet representative denounced the US invasion of Viet-Nam, for ‘using weapons of mass destruction, bombing civilian population centres on a very large scale, and causing destitution and starvation by destroying the vegetation in many areas’, and for killing ‘an enormous number of innocent civilians’ every year.⁵³⁰ In response, the US representative denied that his country was ‘guiltily of any violations of human rights’ and praised instead the US forces for ‘displaying a high-minded conduct in their struggle to stop aggression’.⁵³¹ It then retorted by exposing the detention and show trials of writers in the Soviet Union, only to be brushed off by the Soviet delegate as slanderous allegations; in his eyes, ‘these attacks were aimed at diverting attention from the serious and well-documented situations where gross violations of human rights were being committed by the United States of America, Greece and Israel’.⁵³²

⁵²⁹ Moskowitz, 67.

⁵³⁰ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 163.

⁵³¹ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 166.

⁵³² Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 167-168.

It was in this context that the Soviet representative Platon Morozov, who also represented the Soviet Union in the Security Council and later went on to become a Judge of the ICJ, made a powerful case for the Commission to take action on violations of human rights committed by Israel during and after the Six-Day War with its neighbours in June 1967. In his words:

‘Israel’s rulers –representing a people which had suffered so much from racism in the Second World War– were now themselves trampling on the Universal Declaration [...]. Those violations of the Declaration must be condemned by the Commission. The Commission could not honour its terms of reference if it remained aloof in the face of gross violations of human rights and of the principles of the Charter, but must express its indignation. His Government had never considered United Nations activities in connexion with the Universal Declaration [...] to be theoretical. During the drafting of the Universal Declaration [...] his delegation had urged that States should assume certain legal obligations to uphold its principles until there was a binding legal instrument to ensure their enforcement. It now appealed to all States to ensure that the Declaration did not remain a dead letter and that the Commission’s obligations were honoured in deed as well as in word’.⁵³³

Here Morozov presents the disregard of Israel for both its own tragic history and the principles of the Universal Declaration that came in part as a reaction to that tragedy, as a test case for the capacity of the Commission to deliver on the noble mission that it has been entrusted with; failing to act on the grave violations committed by Israel would constitute a failure of the Commission to ensure the requisite consistency between its words and deeds to maintain its legitimacy. The link he makes between the Commission’s credibility and action

⁵³³ Quoted in: Zuijdwijk, *Petitioning the United Nations*, 22.

against Israel is so strong that inaction does not seem an option. What is also clear is that the activist image of the Soviet Union that Morozov projects flatly contradicts the Soviet persistent objections to any aspect of the UN that could entail interference into domestic affairs, whether it concerned the drafting of the Universal Declaration and the Covenants or the restitution of the Commission's powers—that is, until it swapped horses to championing the cause of decolonisation and the struggle against racism.

There is also no sign of concern about the risk of exposure of gross, widespread and systematic violations of human rights and atrocities of which the Soviet Union and socialist states were guilty of. His rhetorical construction was so outrageously dissimilar and distant to what the Soviet Union stood for and had done, that it is only natural to expect that such a pronouncement would be received with derision. That Zuijdwijk reproduces his intervention only to dismiss it as 'just an inconsequential statement *pour besoin de la cause*' might not come as a surprise.⁵³⁴ And yet he mistakes the grotesque hypocrisy of the Soviet statement for lack of significance. Whatever one could think of Soviet Union's moral standing or the strategic reasons for raising the issue, Morozov could still appeal to the universal to expose Israeli violations and put pressure on the Commission to generate consistency with it; whatever his intentions, he managed to place Israel on the Commission's agenda.

Despite their fear of setting yet another precedent which they resented, Asian and African countries could not resist the temptation of joining the attack on Israel. They accused Israel of having committed 'gross violations of the human rights of the civilian population', in particular by leaving 'a large number of persons without water in the desert', causing them to die; that Israel had 'arbitrarily seized, looted and destroyed civilian property in the occupied

⁵³⁴ Zuijdwijk, 23.

territories’; that it had left Arab inhabitants without food and had subjected them ‘to very harsh treatment including arbitrary arrest and detention’; they had already faced ‘discrimination in many forms and were in fact second-class citizens’. With these measures, Israel had forced a ‘very large number of inhabitants’ to ‘leave their homes and property and to seek refuge elsewhere’; they also decried Israel’s failure to implement the measures imposed by the Security Council on the matter.⁵³⁵

Israel firmly denied all allegations that it had committed ‘any violations of human rights’ of Arab inhabitants living within Israel, or in the territories it had freshly occupied, which included East Jerusalem, West Bank, Gaza Strip, the Sinai Peninsula and the Golan Heights. It was only that it had to take ‘security measures’ in order to respond to the ‘continuous aggressive policies’ of its neighbours. Israel was fully cooperating with the UN to achieve ‘a just solution of the refugee problem and a peaceful settlement of the whole Middle East problem’. Those were all totally ‘unfounded charges’ that ‘only served to heighten tension at a time when restraint was essential’, stated the Israeli representative.⁵³⁶ The Israeli response did not prevent India, Pakistan and Yugoslavia from tabling a resolution on the matter.⁵³⁷ But it was a mild resolution that was adopted unanimously.⁵³⁸ It merely ‘affirms the right of inhabitants displaced or deported since the outbreak of hostilities in the Middle East to return to their country and that the Government concerned has the obligation to take the necessary measures in order to facilitate the return of those inhabitants to their own country without

⁵³⁵ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 161.

⁵³⁶ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 162.

⁵³⁷ Commission on Human Rights Resolution 6 (XXIV) 27 February 1968.

⁵³⁸ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 209.

delay'.⁵³⁹ Interestingly, in addition to the Universal Declaration, the resolution refers to the Geneva Conventions as well, entering in the territory of the Council and the Assembly. Whilst many welcomed the resolution as a means to stress the 'urgent need for ensuring respect of the civilian victims' and allowing them to return home, others welcomed it purely for the precedent it set, that is, as 'an attempt to affirm the competence of the Commission to concern itself with concrete problems concerning human rights even in time of war or in relation with any war'.⁵⁴⁰

Israel strongly objected to this move, arguing that this was a matter for the Council and the Assembly—the Commission's involvement was *ultra vires*. Besides, it had adopted an 'one-sided' resolution with 'political overtones', hardly 'purely humanitarian in character'.⁵⁴¹ In spite of the objection expressed, the language of the Israeli representative betrays an implicit acknowledgement of at least some humanitarian considerations on the part of the resolution's proponents, but then it raises the bar so high for any action to be justified on humanitarian grounds. Nevertheless, it is this high bar that the proponents purported to have reached in 'categorically den[ying] that the proposal was one-sided'; what they had supported was 'a purely humanitarian resolution' aimed at accelerating 'the solution of human rights problems' in the hope of facilitating 'the settlement of the whole Middle East question', rather than harming it, as the Israel representative had asserted.⁵⁴² Both sides were reaching for the universal, continuously elevating its value whilst rendering the behaviour of both sides ever more objectionable. The violations of human rights resulting from Israeli occupation of

⁵³⁹ Commission on Human Rights Resolution 6 (XXIV) 27 February 1968, OP 2.

⁵⁴⁰ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 201.

⁵⁴¹ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 202.

⁵⁴² Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 202-203.

Palestinian and other Arab lands would only gain in salience and become a major preoccupation for the Commission for years to come.

As the gravity and scale of Israel violations gained greater visibility, the determination on the part of many Asian and African representatives to intensify scrutiny by the Commission became more palpable, despite their general aversion to the expansion of the Commission's purview. They charged Israel for 'persisting in flagrant, extensive and systematic violations of human rights in the occupied territories';⁵⁴³ Israel systematically prevented over half a million inhabitants and refugees from returning to their homes; they charged that Israel continued to demolish homes of people 'in systematic fashion and that entire villages had been razed to the ground';⁵⁴⁴ they pointed to deportation of intellectuals and 'frequent acts of brutality, pillage and depredation' as well as the physical and moral prosecution of Arab people in general; Israel bombarded refugees camps, not sparing children nor old people, and detained prisoners of war in inhuman and degrading conditions.⁵⁴⁵

Beyond the Universal Declaration, Israel was also in violation of *ius cogens* norms and other obligations imposed by the laws of war contained in the Geneva Conventions, several delegates charged.⁵⁴⁶ Others drew parallels between apartheid and the 'colonial and discriminatory policy applied in Israel in the occupied territories', arguing that this policy

⁵⁴³ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 200.

⁵⁴⁴ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 203.

⁵⁴⁵ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 203.

⁵⁴⁶ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 204.

‘should be condemned by the same token’;⁵⁴⁷ the Commission had therefore the duty to adopt ‘a precise text recommending specific measures, as it had done in the case of apartheid.’⁵⁴⁸ In making the case for action against Israel, these countries were in fact not only acknowledging but also expanding the precedent they had set by mobilising the Commission against South Africa; every step they took in mobilizing the Commission against Israel was a step against their refusal to recognise the precedent they had set; the universal principles they invoked to generate action against Israel would only consolidate the new practice they wished it did not exist.

Since there was a peace process in place, some delegates stated, the occupation could not be compared with apartheid, given that, in contrast to South Africa, there were genuine hopes that peace negotiations would succeed.⁵⁴⁹ They also pointed to the worsening of the condition of Jewish minorities in some Arab countries since the war of 1967, who suffered different forms of oppression, including arbitrary arrests and torture – measures intended to force them into exile. In Iraq, for example, several people, amongst whom Jewish people, had been executed and their bodies put in public display, because they were suspected of spying for Israel.⁵⁵⁰ Arab representatives countered that Jews had never been mistreated in Arab countries, and that discrimination did not exist in any form in their countries;⁵⁵¹ the representative of Iraq retorted by stating that many countries applied the capital punishment

⁵⁴⁷ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 205.

⁵⁴⁸ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 213.

⁵⁴⁹ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 205.

⁵⁵⁰ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 209.

⁵⁵¹ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 206.

for espionage, and that ‘international law did not prescribe any particular manner in which death sentences should be carried out’; otherwise, they would not have to take such drastic measures ‘if Israel ceased to maintain an espionage network in the area’.⁵⁵² Another representative questioned the charges raised against Israel, arguing that occupation ‘was intended to ensure the welfare of the people and the respect for the freedoms, within the limits solely of the exigencies of maintaining law and order’; besides, several Israel measures were aimed at the ‘development and modernization of agriculture and the revival of trade’, whilst freedom of expression and movement were ‘fully maintained’.⁵⁵³

After having charged Israel with having committed gross and systematic violations of human rights, war crimes and crimes against humanity, several representatives argued that there was limited information available to substantiate those charges. A draft resolution submitted by India, Mauritania, Pakistan and Yugoslavia would remedy this situation.⁵⁵⁴ Its main thrust was to reiterate the call on Israel to implement resolutions adopted by the General Assembly and the Security Council following the war of 1967, especially in relation to Israel’s refusal to comply with the Geneva Convention of 1949. But they also proposed additional measures of their own, setting another crucial precedent. The initial draft envisaged the enlargement of the mandate of the existing ‘Ad Hoc Working Group on South Africa’, but later they amended the text calling instead for the creation of a ‘special Working Group of Experts’.⁵⁵⁵

⁵⁵² Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 209.

⁵⁵³ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 209.

⁵⁵⁴ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 192.

⁵⁵⁵ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 292-193.

Several representatives objected to the proposal. Whilst acknowledging the right of return, as enshrined in Article 13 of the Universal Declaration, some argued that the resolution ‘lacked objectivity’, it prejudged the outcome of negotiations to restore peace, and that the Commission did not have the power to launch an investigation without authorisation by a higher organ. Furthermore, the Commission did not have the requisite information ‘to reach an informed and fully impartial decision on the allegations’ against Israel.⁵⁵⁶ They also pointed out that the mandate of the proposed ‘Working Group of Experts’ would contradict with a similar body established earlier by the General Assembly. Others objected to the new organ because of a need to avoid ‘the proliferation of new bodies’, especially in view of their financial resources they would require.⁵⁵⁷ These objections are typically levelled by the United States and its allies to prevent the expansion of UN activities in areas that go against their interests, as will become clearer later in the chapter. More categorical were the objections from Israel. Its representative stated that Israel ‘did not recognise the competence of the proposed *ad hoc* Working Group of Experts to investigate the application of the Geneva convention of 1949’, and therefore the Israeli government would not abide by the resolution.⁵⁵⁸

In spite of these objections, the Commission pressed ahead and adopted the draft resolution by thirteen votes to one, with sixteen abstentions.⁵⁵⁹ Only Israel voted against the resolution, suggesting that resistance to the measures contained in it were not as strong as the declared

⁵⁵⁶ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 216;218.

⁵⁵⁷ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 218.

⁵⁵⁸ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 220.

⁵⁵⁹ Commission on Human Rights, Report of the 25th session (E/CN.4/1007) 21 March 1969, paragraph 224.

objections implied, especially as all Western countries that raised those objections decided to abstain. Consolidating its ground-breaking precedent on South Africa and setting a new one, the Commission decided to establish a new ‘special Working Group of Experts’ composed of the members of ‘Working Group on South Africa’, thus establishing a direct connection between the two situations. The Working Group was charged with the task of investigating the ‘allegations concerning Israel’s violations of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949’, expanding significantly the Commission’s purview. In pursuit of this task, the Working Group could receive appeals and hold hearings with witnesses.⁵⁶⁰ Yet the resolution set another precedent—it decided to include violations of human rights in the occupied territories as a ‘separate item of priority’ on the Commission’s agenda for the upcoming session;⁵⁶¹ that item would be added each subsequent session until it became a permanent agenda item. This marked an unprecedented concentration of scrutiny on the violations of one single country, in addition to the standard agenda items where all countries can be scrutinised, and has served as a lightning rod of charges of selective action against Israel.

This measure also illustrates the inevitable failure of Asian and African countries to take strategic action whilst avoiding setting precedents that go against their interests. In fact, they ended up consolidating a new practice, rather than reversing it, setting another precedent in the direction that the justification for the first precedent lead to, clearly subverting their intention of avoiding to setting any precedent at all. This held for Israel too, which voted in favour of creating the Working Group on South Africa only to become itself a target of the institution it helped create, and later would help consolidate, at its own expense. What was at

⁵⁶⁰ Commission on Human Rights Resolution 6 (XXV) 4 March 1969, OP 4.

⁵⁶¹ Commission on Human Rights Resolution 6 (XXV) 4 March 1969, OP 5.

least as powerful as the push for the creation of the Working Group was the determination of its proponents not to set a precedent—and yet it became an inevitability, thanks to the universal justification of their political action.

4.2.2. ...to *erga omnes* purview

Chile

With the creation of two mandates of Special Procedures, their proponents had set in motion the process of universalisation of a radically new practice they could not admit it existed. That did not mean that they did not try to prevent it from happening. In fact, the *sui generis* arguments they relied on were strong enough to prevent action in several cases of obvious violations over the course of several years. But their failure to resist the temptation of intervening in Chile would make that universalisation process irreversible despite persistent protestations. Chile became the next target of the Special Procedures following the military *coup d'état* that had taken place in Chile on 11 September 1973, where a right-wing Junta lead by General Augusto Pinochet replaced the democratically elected socialist government of President Salvador Allende—a culmination of long-standing involvement of the United States in its attempt to destroy the socialist government in pursuit of its containment policy in Latin America. The Soviet Union and its socialist allies presented the *coup d'état* as a challenge to their ideological aspiration and expressed strong indignation; they demanded immediate action, also as a way of exposing the role of the United States in engineering the *coup d'état*. Chile would take central stage in the Commissions' agenda, where allegations of gross violations of human rights perpetuated by the Junta, outraged several representatives with its summary executions, disappearances, torture and prosecution of persons suspected of left-wing views and where former government members faced charges *ex post facto* of

‘crimes against the State’.⁵⁶² The scale of violations was revealed by a report of the International Commission of Jurists which was published after the Commission’s session, confirming its concerns but painting a far direr picture.⁵⁶³

After seizing power ‘to re-establish order and the constitutional law’, the Junta first dissolved and then suspended Parliament, the Constitutional Court, and the constitution operated only ‘to the extent that the present situation in the country allows for the better accomplishment of the objectives which it has set itself’.⁵⁶⁴ It then declared a state of siege over the whole country, qualifying later that it had to be interpreted as a ‘state or time of war’ –all measures that were necessary ‘to deal with subversive forces’, which operated undercover and had been armed by Allende with illegal weapons. This allowed the Junta to enact military tribunals to apply war-time penalties, following war-time legal procedures.⁵⁶⁵ As a corollary, the Junta suspended civil rights and fundamental freedoms, all political parties and all political activities; left-wing parties were forbidden as were left-wing views. Little or no freedom of expression was allowed; academic freedom was abolished, universities were placed under military control, which also meant the shut-down of sociology departments, and due to the subversive nature of their teaching, the decrees they had previously awarded were retrospectively annulled; the right to work was abolished and all public employees were placed on temporary contracts.⁵⁶⁶ By the end of 1973, 18.000 people were held in custody;

⁵⁶² Commission on Human Rights, Report of the 30th session (E/CN.4/1154) 4 February – 8 March 1974, OP 94.

⁵⁶³ International Commission of Jurists, Final Report of Mission to Chile to study the Legal System and the Protection of Human Rights, April 1974.

⁵⁶⁴ International Commission of Jurists, Final Report of Mission to Chile to study the Legal System and the Protection of Human Rights, April 1974, p. 6.

⁵⁶⁵ International Commission of Jurists, Final Report of Mission to Chile to study the Legal System and the Protection of Human Rights, April 1974, p. 8-10.

⁵⁶⁶ International Commission of Jurists, Final Report of Mission to Chile to study the Legal System and the Protection of Human Rights, April 1974, p. 10-11.

they reached 60.000 by March 1974; all were arrested on suspicion of possessing illegal arms or holding ‘left-wing views’, including members of the deposed government, party leaders, trade union leaders, student leaders, journalists, artists, and intellectuals.⁵⁶⁷ Over sixty persons held in custody were executed without trial,⁵⁶⁸ and over eight hundred persons disappeared without trace.⁵⁶⁹

Surprisingly, the Chilean representative did not deny the charges with the zeal that had characterised South African and Israeli representatives, but instead sought to rationalise the measures his government had taken in order to cope with an emergency situation resulting from its attempt to ‘put an end to foreign intervention’.⁵⁷⁰ Evidently, he was here not referring to American involvement in engineering the *coup d’état*, but rather to the Soviet support to the previous Allende government, as this becomes clear when stating that Chile was ‘the victim of world-wide campaign of defamation instigated by foreign Powers which had sought to dominate the country prior to the change of Government’.⁵⁷¹ He denied that his government ‘ordered or accepted any form of torture’ and emphasised that the suspensions of rights would be phased out once the emergency was over; he exhorted the Commission to ‘uphold its uniquely humanitarian role’ which in this case, according to him, meant not adopting ‘a political stance’ against Chile.⁵⁷²

⁵⁶⁷ International Commission of Jurists, Final Report of Mission to Chile to study the Legal System and the Protection of Human Rights, April 1974, p. 19.

⁵⁶⁸ International Commission of Jurists, Final Report of Mission to Chile to study the Legal System and the Protection of Human Rights, April 1974, p 21.

⁵⁶⁹ Iain Guest, *Behind the Disappearances: Argentina’s Dirty War Against Human Rights and the United Nations* (Philadelphia: University of Pennsylvania Press, 1990), 131.

⁵⁷⁰ Commission on Human Rights, Report of the 30th session (E/CN.4/1154) 4 February – 8 March 1974, paragraph 95.

⁵⁷¹ Commission on Human Rights, Report of the 30th session (E/CN.4/1154) 4 February – 8 March 1974, paragraph 95.

⁵⁷² Commission on Human Rights, Report of the 30th session (E/CN.4/1154) 4 February – 8 March 1974, paragraph 95.

His call found a hearing. Whilst some representatives advocated for ‘immediate action by the Commission [...] to restore respect for human rights in Chile’, others cautioned against ‘drastic condemnation’, calling instead for attention on saving lives and the right to asylum. Amidst conflicting views about the right course of action, the idea of initiating ‘an impartial and objective investigation’ by the Commission was also aired.⁵⁷³ The Commission was not capable of going beyond sending a telegram to the Junta, expressing its deep concerns over the reported ‘gross and massive violations of human rights’.⁵⁷⁴ Projecting consistency with the universal in order to form a basis for addressing violations in Chile, the telegram states that the ‘Commission on Human Rights, which has consistently deplored all violations of human rights, calls upon your Government for the immediate cessation of any kind of violations of human rights’, appealing to release and allow to leave the country several prominent figures in the country.⁵⁷⁵

Five months later, the Sub-Commission observed a further deterioration of human rights, especially in the practice of torture, and therefore felt compelled to take ‘affirmative and immediate action’ on the problem. It created a working group of five persons to study the question and how to approach it.⁵⁷⁶ In addition, it adopted a joint resolution, sponsored by several experts, including Antonio Cassese as well as the Soviet and US experts.⁵⁷⁷ The

⁵⁷³ Commission on Human Rights, Report of the 30th session (E/CN.4/1154) 4 February – 8 March 1974, paragraph 96.

⁵⁷⁴ Commission on Human Rights, Report of the 30th session (E/CN.4/1154) 4 February – 8 March 1974, paragraph 97; Chapter XIX, Section B, decision 1.

⁵⁷⁵ Commission on Human Rights, Report of the 30th session (E/CN.4/1154) 4 February – 8 March 1974, Chapter XIX, Section B, decision 1.

⁵⁷⁶ Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the 27th session (E/CN.4/1160) 18 October 1974, paragraph 32.

⁵⁷⁷ Sub-Commission on Prevention of Discrimination and Protection of Minorities, Report of the 27th session (E/CN.4/1160) 18 October 1974, paragraph 33-34.

resolution deplored the gross violations and made an urgent appeal to the Junta to ‘restore and safeguard basic human rights and fundamental freedoms’.⁵⁷⁸ It also called on the Commission to study the reported violations in its next session in 1975.⁵⁷⁹ The initial response of the representative of Chile was fierce, stating that ‘the biased and discriminatory obsession with Chile shown by the Sub-Commission must be regarded as extraordinary’.⁵⁸⁰ It was biased because it did not consider the conditions that forced his government to take certain measures, and discriminatory because the Sub-Commission ‘makes no mention of countries which have massively and systematically, as a normal and institutionalised practice, violated all human rights with impunity for decades past’.⁵⁸¹

This was a concealed attack on the Soviet Union which sought to mobilise the UN and world public opinion against the Junta, when he expresses his doubts that the Sub-Commission ‘could have allowed itself to be influenced by the political militancy of the “expert” Mr. Smirnov or the moralising exhortations of the representative of Amnesty International’.⁵⁸² Contrary to what Smirnov had insinuated, the attitude of the military regime was ‘purely and simply one of justice, divorced from any spirit of revenge or unjustified intention to persecute people’.⁵⁸³ He also stressed the exemplary openness and cooperation that the Junta had shown, as Chile had ‘nothing to hide’, ‘[u]nlike such countries as the Soviet Union and Cuba,

⁵⁷⁸ Sub-Commission Prevention of Discrimination and Protection of Minorities Resolution 8 (XXVII) 20 August 1974, OP 1.

⁵⁷⁹ Sub-Commission Prevention of Discrimination and Protection of Minorities Resolution 8 (XXVII) 20 August 1974, OP 2.

⁵⁸⁰ Commission on Human Rights, Letter From Charge d’affaires of the Permanent Mission of Chile to the UN (E/CN.4/1158) 21 August 1974, p. 1.

⁵⁸¹ Commission on Human Rights, Letter From Charge d’affaires of the Permanent Mission of Chile to the UN (E/CN.4/1158) 21 August 1974, p. 1.

⁵⁸² Commission on Human Rights, Letter From Charge d’affaires of the Permanent Mission of Chile to the UN (E/CN.4/1158) 21 August 1974, p. 1.

⁵⁸³ Commission on Human Rights, Letter From Charge d’affaires of the Permanent Mission of Chile to the UN (E/CN.4/1158) 21 August 1974, p. 2.

which conceal from foreign eyes behind an iron curtain the violations of human rights that are daily perpetrated there'.⁵⁸⁴ He sought to exonerate the Junta from any wrongdoing by exposing the bias in the Sub-Commission's action and pointing to the egregious and systematic violations within the Soviet Union, which had been waging a blistering campaign against the Junta.

The toppling of the Allende government presented an ideological problem for the Soviet Union, for it had served as an example of how communism could be achieved through constitutional means, contrasting with Mao's ideology which held that communism could only be achieved through revolution. To save themselves from embarrassment, not least in China's eyes, they had to do something about it. It is with 'profound concern over the intensification of terror, torture and violations of human rights in Chile' that the Soviet head of delegation to its thirty-first session implored the Commission to act in a telegram dated 24 February 1975.⁵⁸⁵ It demands 'the immediate liberty' of several prominent figures, including Luis Corvalan, the leader of the Communist Party who was given the 'Lenin Peace Prize' following his imprisonment. 'We share the sentiments of world public opinion', the telegram infers, 'which expects that [the Commission] will condemn terror and repression in Chile and will adopt effective and urgent measures aimed at ending the violations of human rights and crimes against the Chilean people'.⁵⁸⁶

⁵⁸⁴ Commission on Human Rights, Letter From Charge d'affaires of the Permanent Mission of Chile to the UN (E/CN.4/1158) 21 August 1974, p. 2.

⁵⁸⁵ Commission on Human Rights, Letter from the Representative of the Soviet Union (E/CN.4/1177) 27 February 1975, p. 3.

⁵⁸⁶ Commission on Human Rights, Letter from the Representative of the Soviet Union (E/CN.4/1177) 27 February 1975, p. 3.

This concern reflected the views of thirty-five countries and fourteen ‘NGOs’ that had convened in Bagdad in 24-26 February 1975, and an ‘International Commission of Enquiry into the Crimes of the Military Junta in Chile’, which held its third session in Mexico City on 12-21 February 1975 –all measures illustrating the Soviet attempts to galvanise global support against the military Junta, and condemning the United States for its intervention in Chile.⁵⁸⁷ On 1 November 1974, the London *Times* published ‘An open letter from Prague’ by the Society of Czechoslovak Lawyers, which despite having kept silent over systematic violations in their country, expressed outrage at the ‘intensified illegal terror directed at all progressive forces in Chile’, exhorting that ‘[a]ll progressive people in the world should do everything in their power to provide Chilean revolutionaries and democrats with full material and moral aid in their just struggle for a democratic society and for socialism’.⁵⁸⁸ These are all elements that point indeed to an orchestrated defamation campaign against the Junta that then Chilean representative denounced.

By the time the Commission convened in February 1975, nearly all representatives who spoke urged the Commission to take urgent action in order ‘to secure the release of persons held without trial, the ending of inhuman treatment meted out to detainees and prisoners and the restoration of full respect for human rights in Chile’.⁵⁸⁹ Rather than condemning the Junta on the basis of existing reports, written or oral, some representatives argued that the Commission ‘should recommend appropriate measures only on the basis of first-hand and

⁵⁸⁷ Commission on Human Rights, Letter from the representative of Byelorussian Soviet Socialist Republic (E/CN.4/1176) 27 February 1975, p. 7.

⁵⁸⁸ International Commission of Jurists, Review of Human Rights in the World, Nr 13, December 1974, p. 9.

⁵⁸⁹ Commission on Human Rights, Report of the 31st session (E/CN.4/1179) 3 February – 7 March 1975, paragraph 97.

well-founded information obtained through an impartial and objective study of its own'.⁵⁹⁰

The idea of a Working Group similar to those established on South Africa and Israel began to circulate, initiated by Theo van Boven, then serving as member of the Sub-Commission, according to Ian Guest.⁵⁹¹ What was surprising in this regard, and in contrast to the response of Israel and South Africa, is that Chile decided to cooperate.

Emphasising that the reported allegations were 'either grossly exaggerated or untrue', the Chilean representative announced before the Commission that the Junta 'would welcome and lend every assistance to an impartial and unprejudiced fact-finding mission to Chile which would seek the truth of the situation' in the country.⁵⁹² This way the Chileans set another valuable precedent, at their own expense, and made it harder for those who resisted the push for the creation of yet another Special Procedure; the Soviet Union was keen to condemn the Junta but stop short of creating another mechanism that could serve as another precedent for further strengthening UN monitoring; the Western countries were also 'disgusted and angered' at the repression of Pinochet,⁵⁹³ who portrayed himself as a fighter of Judean-Christian civilisation and as being an integral part of the West. Yet, having mobilised the UN against Chile, the Soviet Union could not stop such a move – what is more, Western states used the initial urge of the Soviet Union to take action against Chile as an anchor to create a new mandate for the Special Procedures. This is how the logic of consistency reanimates traces into precedents.

⁵⁹⁰ Commission on Human Rights, Report of the 31st session (E/CN.4/1179) 3 February – 7 March 1975, paragraph 100.

⁵⁹¹ Guest, *Behind the Disappearances*, 97.

⁵⁹² Commission on Human Rights, Report of the 31st session (E/CN.4/1179) 3 February – 7 March 1975, paragraph 102.

⁵⁹³ Guest, *Behind the Disappearances*, 97.

It was the United Kingdom, sponsored by the Netherlands and Nicaragua, that tabled a draft resolution asking for the establishment of a ‘three-man working group’ to conduct an inquiry into the situation in Chile; they latter submitted a revised text envisaging an *ad hoc* working group that would consist of five members.⁵⁹⁴ In parallel, the Soviet Union submitted its own draft resolution, condemning Chile for its violations and urging them to implement UN resolutions ‘without further delay’, but without suggesting any concrete measure— illustrating their intention to generate a fog of propaganda without any tangible action that could leave traces of recognition.⁵⁹⁵ It fell on Senegal to submit an alternative proposal seeking to reflect common ground among the two proposals following ‘intensive informal consultations’, which was adopted without a vote.⁵⁹⁶ The Soviet representative explained that his country had joined the consensus ‘because it was especially important that the Commission should act unanimously’, putting an emphasising on the role of the Working Group in urging the Junta ‘to take all necessary steps to restore and safeguard basic human rights and fundamental freedoms’.⁵⁹⁷ According to Guest it was the detention and torture of trade unionists that made the Soviet Union to ‘abruptly change its mind’,⁵⁹⁸ yet the need to show consistency with prior public pronouncement and action, including the active role in creating two Special Procedures, seems more plausible as an explanation.

⁵⁹⁴ Commission on Human Rights, Report of the 31st session (E/CN.4/1179) 3 February – 7 March 1975, paragraph 103.

⁵⁹⁵ Commission on Human Rights, Report of the 31st session (E/CN.4/1179) 3 February – 7 March 1975, paragraph 104.

⁵⁹⁶ Commission on Human Rights, Report of the 31st session (E/CN.4/1179) 3 February – 7 March 1975, paragraph 105-107.

⁵⁹⁷ Commission on Human Rights, Report of the 31st session (E/CN.4/1179) 3 February – 7 March 1975, paragraph 108.

⁵⁹⁸ Guest, *Behind the Disappearances*, 97.

In the end, the Commission decided to establish an ‘Ad Hoc Working Group’ consisting of five members of the Commission, to serve in a personal capacity.⁵⁹⁹ In an attempt to appease countries objecting to setting another precedent, the Working Group would cease to exist once it conducted its inquiries and reported to the Commission, the Secretary General and the Assembly the following year.⁶⁰⁰ This implied judging in advance what would be required for a case to be investigated before it was investigated, but nevertheless another precedent was set. As with the case of Israel, the Commission decided to consider Chile as ‘a matter of high priority’ in the agenda of its forthcoming session.⁶⁰¹ Moderates had convinced Pinochet to allow the Working Group conduct *in situ* investigations, giving them unlimited access to the whole territory, on the condition that no representative from Eastern Europe could be part of it, and after reserving the right to comment on its reports before publishing.⁶⁰² Once in the country, the Chilean government went to great lengths to cooperate in order to get a positive review, including by providing for fancy visits and first-class flights.

But the Working Group decided not to follow the official itinerary and met with relatives of the disappeared.⁶⁰³ It produced a massive and critical report;⁶⁰⁴ it was a comprehensive report, weighing in on issues from health and child welfare to labour legalisation and unemployment as a way of exposing Pinochet’s neoliberal policies, thereby ‘stretching human rights to the limit’, Ian Guest points out.⁶⁰⁵ ‘The Chileans were torn between pride at having been the first country to admit a UN human rights inquiry’, Guest argues, ‘and bitter fury at the tone and

⁵⁹⁹ Commission on Human Rights Resolution 8 (XXXI) 27 February 1975, OP 1.

⁶⁰⁰ Commission on Human Rights Resolution 8 (XXXI) 27 February 1975, OP 3.

⁶⁰¹ Commission on Human Rights Resolution 8 (XXXI) 27 February 1975, OP 6.

⁶⁰² Zuijdwijk, *Petitioning the United Nations*, 306; Guest, *Behind the Disappearances*, 129–30.

⁶⁰³ Guest, *Behind the Disappearances*, 131.

⁶⁰⁴ Ad Hoc Working Group on the Situation of the Human Rights in Chile (A/33/331) 25 October 1978.

⁶⁰⁵ Guest, *Behind the Disappearances*, 133.

scope of the report'.⁶⁰⁶ The Working Group had 'stretched the definition of human rights to incredible limits', the Chilean authorities protested; they were being punished instead of being rewarded for their unprecedented cooperation. Worse still, the following year the Working Group was abolished only to be replaced with three new inquiries.⁶⁰⁷

Whatever the intentions of the proponents of creating a Working Group on Chile, or for Chile to grant them unlimited access, they had set another 'vital precedent' as the case of Chile had nothing to do with either colonialism or racism—the two *sui generis* grounds that had previously been invoked to justify UN action.⁶⁰⁸ The *coup d'état* did not pose a threat to international peace nor was it a sufficient ground to warrant international condemnation – hence humanitarian concerns appeared as the prime reason for the Commission to act.⁶⁰⁹ This is crucial because, as Alston points out, the principle had been established for the Commission to conduct inquiries 'in virtually any situation, provided only that political will could be mustered'.⁶¹⁰ Despite resistance from the originators of action, 'the assumption that no precedent was being set was not an especially credible one',⁶¹¹ Alston maintains, once Chile was put on the spotlight alongside Israel and South Africa. With every new mandate established the universal language of 'in all countries' obtained material expression. The universal horizon within which the different actors argued about Chile pushed them toward the institutionalisation of a practice that none of them was willing to admit. But what was crucially important in the case of Chile is that it lowered the bar for the Commission to act,

⁶⁰⁶ Guest, 133.

⁶⁰⁷ Guest, 133.

⁶⁰⁸ Alston, 'The Commission on Human Rights', 158.

⁶⁰⁹ Zijdwijk, *Petitioning the United Nations*, 304.

⁶¹⁰ Alston, 'The Commission on Human Rights', 158.

⁶¹¹ Alston, 158.

making it a threatening precedent for many countries, not least in Latin America, plagued by wave of *coups* in the 1970s.

Argentina

For the country bordering Chile to the East, Argentina, avoiding the fate of Chile for how it became ‘institutionalised’, was to become the main line of defence against attempts by the Commission to shed a light on the appalling crimes that Argentine military committed following the military *coup d’état* lead by General Jorge Rafael Videla in 24 March 1976.⁶¹² Not surprisingly this concern featured prominently in the coordination of the *coup d’état* with the United States, where ‘the future military government’ asked for advice on how to destroy the left-wing insurgency without straining relations with the US Congress. The aim of the ‘military planning group’, the US Ambassador in Argentina Robert Hill noted, was to ‘avoid or minimize the sort of problems the Chilean and Uruguayan [governments] are having with the US over human rights issues’.⁶¹³ It was of vital importance to come up with an effective strategy because ‘the future military government’ had plans for ‘an all-out war on terrorists’ where ‘some executions would therefore probably be necessary’, Hill writes.⁶¹⁴ However, he found it encouraging that ‘the Argentine Military are aware of the problem and are already focusing on the ways to avoid letting human rights issues become an irritant in the US-Argentine relations’.⁶¹⁵

⁶¹² Guest, *Behind the Disappearances*, 133;488.

⁶¹³ United States State Department, Cable from Embassy in Buenos Aires to the Secretary of State (1976BUENOS01042) 16 February 1976, p. 1. (<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB104/index.htm>).

⁶¹⁴ United States State Department, Cable from Embassy in Buenos Aires to the Secretary of State (1976BUENOS01042) 16 February 1976, p. 2. (<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB104/index.htm>).

⁶¹⁵ United States State Department, Cable from Embassy in Buenos Aires to the Secretary of State (1976BUENOS01042) 16 February 1976, p. 2. (<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB104/index.htm>).

Upon seizing power, the military Junta launched a brutal clandestine war against left-wing protesters, resorting to kidnappings, summary executions, massacres, systematic torture and the disappearance of approximately 30.000 persons –provoking international outrage. Well over two months into the ‘dirty war’, the US Secretary of State Henry Kissinger, saw the danger of the growing awareness of the despicable crimes that the Junta committed and instructed the Argentine Foreign Minister César Augusto Guzzetti to complete the operation swiftly before it became a major issue for the Congress. ‘If there are things that have to be done’, Kissinger emphasised, ‘you should do them quickly. But you must get back quickly to normal procedures’.⁶¹⁶ Further, Kissinger instructed the Junta to ‘make an international effort to have [its] problems understood’ so as not to ‘come under increasing attack’ if it wanted to avoid meeting the fate of Chile.⁶¹⁷

Four months into the dirty war, Guzzetti reported with excitement to Kissinger that ‘our struggle has had very good results’ and that ‘the danger will have been set aside’ by the end of 1976.⁶¹⁸ Accentuating his earlier advice, ‘[t]he quicker you succeed the better’, remarked Kissinger; but even as ‘the human rights problem’ was becoming a growing concern in the United States, he reassured Guzzetti of his unwavering support for the Junta to do whatever was necessary to achieve their common goal: ‘We want a stable situation. We won't cause you unnecessary difficulties. If you can finish before Congress gets back, the better.

⁶¹⁶ United States Department of State, Memorandum of Conversation (among eight participants, including Kissinger and Guzzetti) Santiago, Chile, 6 June 1976, p. 9. (<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB104/index.htm>).

⁶¹⁷ United States Department of State, Memorandum of Conversation (among eight participants, including Kissinger and Guzzetti) Santiago, Chile, 6 June 1976, p. 9. (<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB104/index.htm>).

⁶¹⁸ United States Department of State, Memorandum of Conversation. Secretary’s Meeting with Argentine Foreign Minister Guzzetti, New York, 7 October 1976, p. 2. (<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB104/index.htm>).

Whatever freedoms you could restore would help'.⁶¹⁹ To Guzzetti, this was a green light to intensify the dirty war with the blessing of the United States. That is what Ambassador Hill reported back to Washington, not without frustration: 'Guzzetti went to US fully expecting to hear some strong, firm, direct warning of his [government's] human rights practices. Rather than that, he has returned in a state of jubilation'.⁶²⁰ As long as this 'conviction lasted', Hill warned, he could not credibly raise any human rights concern with the Junta, not even when it concerned US citizens.

Following Hill's complaining about Kissinger's failure to impress Guzzetti 'with the gravity of the human rights problem as seen from the US',⁶²¹ the Deputy Secretary of State Harry Shlaudeman responded by underplaying what Kissinger had actually said and asserting instead that 'Guzzetti heard only what he wanted to hear'.⁶²² Such a response did nothing to change Hill's assessment of how Guzzetti had understood Kissinger's words. He insisted that '[p]resentation of protest by Department should be most effective way, at this point, of reinforcing message Guzzetti got in Washington'.⁶²³ Nothing of this sort came to pass. The reservations that Hill harboured did not shake the Junta's conviction that it enjoyed the full backing of the United States in conducting its clandestine war, so long as it kept the killing

⁶¹⁹ United States Department of State, Memorandum of Conversation. Secretary's Meeting with Argentine Foreign Minister Guzzetti, New York, 7 October 1976, p. 3-4.

(<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB104/index.htm>).

⁶²⁰ United States State Department, Cable from the US Embassy in Buenos Aires to the Secretary of State, 19 October 1976, p. 3.

(<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB104/index.htm>).

⁶²¹ Ibid.

⁶²² United States State Department, Cable from the Secretary of State to American Embassy in Buenos Aires, October 1976, p. 1.

(<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB104/index.htm>).

⁶²³ United States State Department, Cable from the US Ambassador in Buenos Aires to the Assistant Secretary of State, October 1976.

(<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB104/index.htm>).

under the radar of public opinion or refrained from ‘continu[ing] to kill people to the tune of brass band’.⁶²⁴

In parallel to the intensification of the campaign of kidnappings, torture, killing, and disappearance of activists, trade unionists and persons with left-wing beliefs, in joint collaboration with Chile, Paraguay, Bolivia, Uruguay under the infamous ‘Operation Condor’, the Junta launched an aggressive campaign against international scrutiny of its crimes. In particular, as Guest’s notes in his exhaustive study, the Junta ‘set out to cripple the UN human rights machinery in an effort to muzzle international protest’.⁶²⁵ The Argentine delegation, led by Gabriel Martínez, an extremely able and ‘full-blooded apologist for the Junta’, as Guest describes him,⁶²⁶ launched a coordinated and vicious attack on all those who sought to raise the question of Argentina in the Commission or its Sub-Commission.

By 1977 the Sub-Commission had received hundreds of individual petitions exposing horrendous crimes but none of them could get considered even in the confidential 1503 procedure, thanks in great part to the Soviet Union. The Soviet Union had no qualms in colluding with the right-wing Junta for murdering left-wing guerrillas who were fighting in the name of socialist ideals the Soviets sought to spread across the globe; in August 1977, a few months after the Sub-Commission’s meeting, the Soviets secured a large trade agreement with Argentina; nor did Pakistan, or Somoza’s Nicaragua, a natural ally of the Junta, show any objections for that matter.⁶²⁷ Together they prevented the Sub-Commission from even

⁶²⁴ United States State Department, Telegram from the Embassy in Argentina to the Department of State (1976BUENOS06276) 24 September 1976, p. 3. (<https://nsarchive2.gwu.edu/NSAEBB/NSAEBB104/index.htm>).

⁶²⁵ Guest, *Behind the Disappearances*.

⁶²⁶ Guest, 108.

⁶²⁷ Guest, 119.

mentioning the case of Argentina as a matter of concern, keeping the Junta for another year off the UN radar. Martínez had successfully avoided the ‘institutionalisation of the case of Argentina’ before the UN, he reported back to Buenos Aires.⁶²⁸ The international offensive bore its first fruit.

Yet indignation about the continuing gross violations of human rights of the Junta was gaining in strength within the UN and beyond. In 1978, the Assembly requested the Commission ‘to consider the question of disappeared persons with a view to making appropriate recommendations’, directly addressing Argentina even if it was not mentioned by name.⁶²⁹ The Commission took up the Assembly’s request in its session of 1979, when a draft proposal supported by a group of fifteen Western countries raised the issue of disappearances in general and those in Argentina in particular.⁶³⁰ This group included France and the United Kingdom, but the United States remained conspicuously absent, as a tactical concession to the Argentinians in order to obtain concrete human rights improvements.⁶³¹ Nevertheless, consideration of disappearances had to be postponed to the thirty-sixth session of the Commissions in 1980 ‘following unfruitful attempts to reach a compromise’.⁶³² What had happened was that Argentina had come prepared and secured the requisite support from mainly the Soviet Union and socialist countries to stall any consideration of the question of disappearances.⁶³³ ‘[O]nce more our delegation was able to avoid condemnation and

⁶²⁸ Guest, 118–21.

⁶²⁹ General Assembly Resolution 33 (173) 20 December 1978, OP 2.

⁶³⁰ Commission on Human Rights, Report of the 35th session (E/CN.4/1347) 12 February – 16 March 1979, paragraph 190.

⁶³¹ United States Department of State, Draft Memorandum of Conversation: General Goodpaster's Visit To Argentina: General Political Topics; January 24 (BUENOS00827) 24 January 1980, p. 2. (<https://www.archives.gov/files/argentina/data/docid-33069143.pdf>)

⁶³² Commission on Human Rights, Report of the 35th session (E/CN.4/1347) 12 February – 16 March 1979, paragraph 191.

⁶³³ Guest, *Behind the Disappearances*, 135.

institutionalisation of ‘the case of Argentina’ in the UN’, boasted Martínez in his report to Buenos Aires capital.⁶³⁴ The institutionalisation which Argentina feared is in fact a proxy for the significance of the Commission’s action, especially as regards the creation of new mandates of Special Procedures, entrenching a new practice one precedent at a time.

But what these developments also reveal is a greater willingness on the part of Western countries to mobilize the Commission to address violations of human rights even among their supposed ideological allies, following the growing role of human rights in US foreign policy after Jimmy Carter’s election in 1976. Speaking before the Assembly in March 1977, Carter had appealed to all countries to honour their commitments to human rights with demonstratable measures and to cooperate fully with the Commission and ‘welcome its investigations’. For a ‘[s]trengthened international machinery’, Carter explained, ‘will help us to close the gap between the promise and performance in protecting human rights’. This was an explicit and unprecedented policy change driven by the desire for greater consistency; what he also added was that from then on human rights agreements would be taken ‘just as seriously as commercial or security agreements’. This was an unprecedented recognition of human rights as foreign policy priority, repudiating the line defended by his predecessors.⁶³⁵

But what made Carter unusual is that he actually meant what he said –the pursuit of greater respect for human rights and the increasing of costs for repression became a central goal of the US foreign policy as well as the identification of the United States ‘with a universal cause’ in order to project ‘an idealistic, moral nation actively working toward a better

⁶³⁴ Guest, 137.

⁶³⁵ United States Department of State, Address by President Jimmy Carter to the UN General Assembly, 17 March 1977 (<https://2009-2017.state.gov/p/io/potusunga/207272.htm>)

world'.⁶³⁶ For its human rights policy 'to be effective and credible' the United States would necessarily develop 'warmer and closer' relations with countries that shared its values and 'cooler and more distant' relationships with countries that didn't.⁶³⁷ The United States would attach its support for multinational loans, security assistance and other forms of cooperation to respect for human rights. These measures had to be powerful enough to restore consistency with the noble ideals the United States identified with –to 'reclaim virtue' after the catastrophic destruction, war crimes and crimes against humanity the United States had inflicted upon the Vietnamese people, Barbary Keys demonstrates.⁶³⁸ It was a matter of time before the United States would find itself in a collision course with the military Junta.

Criticism by the United States of the gross violations of human rights in Argentina 'increasingly irritated' the Junta, so much that it sought to strengthen its ties with socialist and Arab countries, and most importantly, the Soviet Union.⁶³⁹ From early on, Videla gave indications that he expected 'some worsening of relations with the US over human rights';⁶⁴⁰ 'He regrets having problems with the US over human rights but sees not alternative to continuing the fight against subversion', a telegram states.⁶⁴¹ But whilst the US human rights policy 'severely strained' its relations with Argentina, it did not immediately yield tangible

⁶³⁶ United States State Department, Memorandum for Zbigniew Brzezinski, National Security Council (5928) 4 October 1978, p. 1. (<https://www.archives.gov/files/argentina/data/docid-33065497.pdf>)

⁶³⁷ Ibid.

⁶³⁸ Barbara J. Keys, *Reclaiming American Virtue: The Human Rights Revolution of the 1970s* (Cambridge, Massachusetts: Harvard University Press, 2014).

⁶³⁹ United States Central Intelligence Agency, The President's Daily Brief (C06481693) 11 March 1977; United States Central Intelligence Agency, The President's Daily Brief, 19 July 1978, p 5-6. (<https://www.dni.gov/files/documents/icotr/Argentina%20-%20Carter%20PDBs.pdf>)

⁶⁴⁰ Ibid.

⁶⁴¹ United States Central Intelligence Agency, The President's Daily Brief (C06481693) 11 March 1977.

improvements.⁶⁴² ‘Notwithstanding our efforts and expectations’, a top US official writes, ‘there has been no improvement in what remains the worst human rights situation in the hemisphere’.⁶⁴³

What also worried the United States was closer ties between Argentina and Soviet Union, especially after it had imposed a grain embargo on the Soviet Union following the invasion of Afghanistan in December 1979. Argentina could undermine the effectiveness of the embargo, given its vast grain reserves, allowing the Junta to exert some pressure on the United States to be more helpful with respect to the Commission.⁶⁴⁴ Carter gave the green light to the State Department to work out a plan in order to ‘negotiate specific human rights improvements in exchange for the US vote not to condemn them’ in the thirty-sixth session of the Commission in 1980.⁶⁴⁵ The problem for the United States was that Argentine’s fear of condemnation had already ‘reinforced the country’s courtship of the Soviet Union and Moscow’s Third World friends’.⁶⁴⁶ But as Argentina sought to avoid at all costs being singled out as human rights pariah, it remained dependent on the goodwill of the United States.

The United States promised to Argentina that they would not press or support public censure in the Commission, in exchange for concrete improvements of human rights and support for

⁶⁴² United States Department of State, Memorandum for Dr Zbigniew Brzezinski, The White House (7731643) 16 December 1977.

⁶⁴³ United States Department of State, Memorandum for Mr Robert Pastor, National Security Council, The White House, 28 February 1979, p. 1.

⁶⁴⁴ Guest, *Behind the Disappearances*, 183.

⁶⁴⁵ United States Department of State, Memorandum for the Secretary of State, The White House, 8 January 1980 (<https://www.archives.gov/files/argentina/data/docid-33069104.pdf>)

⁶⁴⁶ United States Department of State, Cable from Embassy in Buenos Aires to Secretary of State (1980BUENOS00330) January 1980, p. 2. (<https://www.archives.gov/files/argentina/data/docid-33069106.pdf>)

procedures to deal with the question of the disappearances in general. The US plan read as follows:

‘[w]e also shall seek from the Argentines as commitment not to lobby against or offer resistance to the proposed resolution in the [Commission] that the Sub-Commission [...] be given authority to establish a special group of experts to “make contacts with governments and families concerned to assist in locating missing and disappeared persons”. In return for this, we would assure the Argentines that we would not introduce or support resolutions dealing solely with Argentina’.⁶⁴⁷

A series of high-level visits to Buenos Aires sought to impress on the Junta that the United States will approach the Commission’s session ‘with no special rancor toward Argentina and no intention of trying to single out Argentina for special censure’ and that they hoped ‘for a general resolution’ instead.⁶⁴⁸ The United States saw coordination before the 1980 session as ‘an opportunity to seek improvements on human rights’ and a series of top US officials consistently asked Argentinian officials to show concrete improvements ahead of the session. The plan that US diplomats had to impress on the Junta went as follows:

‘[...] the resolution which will be before the Commission mentions no country by name but would establish a universal procedure. The US does not intend to introduce a resolution referring particularly to Argentina in the current session. We also do not

⁶⁴⁷ United States Department of State, Memorandum for Dr Zbigniew Brzezinski, The White House (S/S 8001008), 16 January 1980, p. 3.

(<https://www.archives.gov/files/argentina/data/docid-33069114.pdf>)

⁶⁴⁸ United States Department of State, Draft Memorandum of Conversation: General Goodpaster's Visit to Argentina: General Political Topics; January 24 (BUENOS00827) 24 January 1980, p. 2. (<https://www.archives.gov/files/argentina/data/docid-33069143.pdf>)

wish to support resolutions that might be offered by other countries dealing solely with Argentina. However, we would expect Argentina not to offer resistance or lobby against resolution to establish effective universal procedure and would reverse flexibility to support a resolution on Argentina in the event of Argentine opposition'.⁶⁴⁹

This plan gave assurances to not publicly condemn Argentina in exchange for cooperation under the confidential procedure. But this was a move that Martínez had anticipated in March 1979 already. Having successfully stalled consideration of Argentina for three consecutive years and refused cooperation with the Commission, he now proposed to the Junta to cooperate with the United Nations – as the best strategy of avoiding public censure. Martínez explains the rationale for the new strategy in a telegram he sent to Buenos Aires on 26 March 1979, writing:

‘[f]or obvious reasons I believe it is useful to ensure the confidential passage of the communications and not –this time—to interrupt the denunciations on disappearances. This will have the following result at the 1980 session of the Commission: First, the debate on Argentina will be closed. Second, it will preclude any other action to reopen the issue in a public debate. We should facilitate the passage of some communications in the Sub-Commission’.⁶⁵⁰

⁶⁴⁹ United States Department of State, Cable from the Secretary of State to Embassy in Buenos Aires (STATE008592) 30 January 1980. (<https://www.archives.gov/files/argentina/data/docid-33069110.pdf>)

⁶⁵⁰ Quoted in Guest, *Behind the Disappearances*, 137.

Martínez suggested here to create the semblance of cooperation with the confidential ‘1503 procedure’ in order to avoid public scrutiny under the ‘1235 procedure’, which might involve the creation of new Special Procedures. But Martínez’s U-turn meant also the Sub-Commission could consider complaints not only concerning Argentina, but also six other countries: Chile, Tunisia, Uruguay, Central African Empire, Indonesia and Paraguay. After having voted against consideration of Argentina for three consecutive years, the Soviet Union, together with Pakistan, now decided to abstain –indicating that Martínez had cooped them in his scheme. After all, the main reason for Argentina being receptive to the Soviet Union’s ‘conscious courting’ was ‘a strong desire for Soviet support in international fora on human rights matters’, Zbigniew Brzezinski sustained.⁶⁵¹ The Soviet and Pakistani representatives were absent throughout the session of the Sub-Commission as ‘the last thing they wanted is to appear enthusiastic’, Guest underlines.⁶⁵² Nonetheless, in abstaining for tactical reasons, the Soviet Union willingly contributed to a practice it vehemently resisted, leaving more traces of recognition that could be reanimated by its adversaries to further consolidate the new practice, in spite of the Soviet attempts to disavow the precedent it had just set.

What Martínez sought to achieve with this decision was to argue that once under the confidential review, ‘no individual cases could be discussed in any public debate’.⁶⁵³ It was his preferred strategy to silence consideration of Argentina by the Commission as well, but the circumstances were not auspicious for his strategy to succeed. Heightened East-West tensions following the Soviet invasion of Afghanistan and the growing role of NGOs such as

⁶⁵¹ United States Department of State, Memorandum for the President from Zbigniew Brzezinski (2972) 14 May 1980, p. 7. (<https://www.archives.gov/files/argentina/data/docid-33069208.pdf>)

⁶⁵² Guest, *Behind the Disappearances*, 138.

⁶⁵³ Guest, 139.

Amnesty International and International Commission of Jurists in publicising the scale of Junta's gross violations, rendered the proceedings of the Commission volatile and unpredictable. In addition, there was a growing interest among Western delegations to address the question of disappearances with urgency.

Breaking with the Commission's routine of addressing and condemning South Africa and Israel, France submitted a resolution on disappearances, envisaging the creation of a working group of three experts with the power to investigate the matter in all countries. However, disagreements among Western countries about definitions of the disappeared and the ownership of the resolution, undermined and ultimately marginalised their combined role in moving the matter forward.⁶⁵⁴ Argentina rejected the French draft and submitted its own, aimed at delaying and postponing consideration for another year.⁶⁵⁵ Yet the Argentinian draft could not gain the support of Non-Aligned countries, who now came to consider Argentina as a pariah; unwilling to side with Argentina, they submitted their own resolution. This meant that Western countries had effectively forfeited their initiative and all they could hope to achieve was to try and improve the Non-Aligned draft.

In particular, the US representative Jerome Shestack played a critical role in ensuring that the mandate of the new Working Group would be able to consider individual 'cases', and not just general 'situations'; he found support from the Iraqi representative Muhamad Al-Jabiri, who also had the ability to mobilise and preserve Non-Aligned solidarity against Argentina. At the eleventh hour, the Chair of the Commission, Jordanian representative Waleed Said, who in an unprecedented move managed to secure the right of Amnesty International and other NGOs to

⁶⁵⁴ David Kramer and David Weissbrodt, 'The 1980 U. N. Commission on Human Rights and the Disappeared', *Human Rights Quarterly* 3, no. 1 (1981): 20–22.

⁶⁵⁵ Kramer and Weissbrodt, 23.

‘present’ their information in the debate despite vociferous objections from Argentina, was able to rush the resolution through, leaving no time for delegations to have second thoughts.⁶⁵⁶ The dynamic of the negotiations had generated such an overwhelming pressure to act on Junta’s atrocities that not even Argentina could vote against the resolution;⁶⁵⁷ so much that the final draft of the resolution was adopted without a vote.⁶⁵⁸

However, the consensual adoption of the resolution betrayed deep disagreements over and resentment toward the new Working Group. That the Working Group was set up only for a year and that it would consist of governmental representatives rather than independent experts demonstrates the strong desire to contain the precedent being set. In seeking to deny its importance, a representative asserted that the new procedure ‘could not [...] constitute a precedent’.⁶⁵⁹ The crucial element was the ability of the Working Group to break the established practice and collect information from all available sources and consider individual cases. It is this expansive interpretation that ultimately prevailed, thanks in great part to the efforts of Theo van Boven and Muhamad Al-Jabiri, who gave shape to the new Working Group. The irony, however, is that the freshly appointed Chairman of the Working Group on disappearances, the Iraqi diplomat Al-Jabiri had to immediately resign and after that disappeared himself; apparently, he had been too progressive for the taste of Saddam Hussein.⁶⁶⁰ This is also not what Martínez had tirelessly fought for. He reported back to

⁶⁵⁶ Guest, *Behind the Disappearances*, 197–99; Kramer and Weissbrodt, ‘The 1980 U. N. Commission on Human Rights and the Disappeared’, 24.

⁶⁵⁷ Guest, *Behind the Disappearances*, 202.

⁶⁵⁸ Commission on Human Rights, Report of the 36th Session (E/CN.4/1408) 4 February – 14 March 1980, paragraph 217.

⁶⁵⁹ Commission on Human Rights, Report of the 36th Session (E/CN.4/1408) 4 February – 14 March 1980, paragraph 219.

⁶⁶⁰ Kramer and Weissbrodt, ‘The 1980 U. N. Commission on Human Rights and the Disappeared’, 31.

Buenos Aires blaming defeat on the Non-Aligned, and on the US representative Shestack, writing:

‘[t]he US delegate stood out for his aggressivity and his constant activism in relation to the case of Argentina. Indeed, his activities do not appear consistent with the expressed willingness of the US for closer relations that we have heard at other meetings, and at the bilateral level. Mr Shestack has proved that his government is keen to seek closer relations with us...without sacrificing its approach on human rights towards us in the international organizations’.⁶⁶¹

Martínez corroborates the determination of Carter administration to prioritise human rights in its foreign policy. What was also unprecedented is that the United States managed to push through a resolution condemning the Soviet Union on the grounds that it denied the right to self-determination to the Afghan people, turning the tables on Soviet Union for having championed the right to self-determination and the Commission’s action against South Africa and Israel.⁶⁶² Evoking the typical line of rights-violators, the very country that had invaded Afghanistan asserted that the US resolution constituted ‘a flagrant interference’ in Afghanistan’s internal affairs, and was another manoeuvre ‘intended to distract the attention of the Commission from more important issues on its agenda’; it was an issue ‘artificially stirred up to divert the attention of world public opinion from aggressive actions of the United States’.⁶⁶³ Exposing the glaring inconsistency of the US initiative in relation to previous positions, the Soviet representative pressed that:

⁶⁶¹ Guest, *Behind the Disappearances*, 200.

⁶⁶² Commission on Human Rights Resolution 3 (XXXVI) 14 February 1980.

⁶⁶³ Commission on Human Rights, Report of the 36th Session (E/CN.4/1408) 4 February – 14 March 1980, paragraph 150.

‘[s]ome of the same Powers which had raised that issue [Soviet invasion of Afghanistan] persistently opposed all resolutions demanding the immediate withdrawal of Israeli forces from occupied Arab territories, respect of the right of the Palestinian people to live as a nation as well as of the right to self-determination of the peoples of Zimbabwe, Namibia and South Africa’.⁶⁶⁴

These were easy but nevertheless serious counter-charges for the Soviet Union to make, yet that did stop the United States from intensifying its offensive by placing the treatment of Andrei Sakharov on the Commission’s agenda of its upcoming session.⁶⁶⁵ The Soviet Union managed to block consideration of the initiative by invoking procedural grounds ‘not to take action’ and accompanied that with a Belarusian resolution denouncing the violations of human rights in the United States. These actions intensified charge and counter-charge between the two superpowers, but in so doing they inadvertently expanded the space for human rights to be considered.⁶⁶⁶ Even as they repelled each-other’s attacks with typical exhortations to focus on ‘ever-more important issues elsewhere rather than own violations’ they pushed the Commission into a new territory, subverting their respective resistance to external scrutiny, engulfing others in their way, such as Argentina.

Similarly, what Argentina feared the most was being singled out by the Commission but in its relentless efforts to avoid being singled out it willingly but unwittingly contributed towards

⁶⁶⁴ Commission on Human Rights, Report of the 36th Session (E/CN.4/1408) 4 February – 14 March 1980, paragraph 159.

⁶⁶⁵ Commission on Human Rights, Report of the 36th Session (E/CN.4/1408) 4 February – 14 March 1980, paragraph 265.

⁶⁶⁶ Commission on Human Rights, Report of the 37th Session (E/CN.4/1475) 2 February – 13 March 1981, paragraph 274.

the creation of a new type of Special Procedures: thematic Special Procedures mandates that encompass investigations of specific human rights wherever they occurred, as exemplified by disappearances, and thus not limited to one single country such as South Africa, Israel or Chile. Political consultations between the United States and Argentina on human rights are replete with requests by Argentina not to be singled out but to ‘be dealt with in general terms’.⁶⁶⁷ Despite repeated reassurances from the United States that it would not support actions that singled out Argentina, it remained a brittle balancing act, as this assessment of the negotiations leading to the new Working Group indicates:

‘Argentina feels that is being singled out for public opprobrium and is reacting strongly. The resolution we are supporting would create a group of experts to deal with disappearances anywhere in the world and does not mention Argentina by name. We feel that Argentina made a commitment to General Goodpaster not to oppose such a global resolution on disappearances’.⁶⁶⁸

With Argentina seeking to avoid concentrated scrutiny and the United States accepting their concern in exchange for real improvements, they were both pushing towards a universal mandate on disappearances. Whatever their beliefs, such as a ‘conviction that Argentina did nothing to earn censorship and a genuine desire not to be stamped as a human rights violator’,⁶⁶⁹ Argentina relied on universal principles of non-discrimination and impartiality to

⁶⁶⁷ United States President, White House Situation Room Comment from Embassy in Buenos Aires to the Secretary of State, 15 February 1980, p. 2.

(<https://www.archives.gov/files/argentina/data/docid-33069154.pdf>)

⁶⁶⁸ United States Department of State, Briefing memorandum from Charles William Maynes to Mr Newsom (8003918) 22 February 1980, p. 1.

(<https://www.archives.gov/files/argentina/data/docid-33069157.pdf>)

⁶⁶⁹ United States Department of State, Cable from Embassy in Buenos Aires to Secretary of State (1980BUENOS00330) January 1980, p. 2.

(<https://www.archives.gov/files/argentina/data/docid-33069106.pdf>)

prevent scrutiny of its gross violations of universal principles; all this a time when the Junta was ‘concentrating on international tactics rather than seeking to accelerate human rights improvements at home’.⁶⁷⁰ Nevertheless, those tactics created a demand for a universal mandate.

In their vivid analysis of the negotiations leading to the creation of Argentine mandate, Kramer and Weissbrodt saw in it ‘an exemplary act of negotiation and diplomacy’, concluding that ‘[c]oncern for the effective protection of human rights predominated—if only for a moment—over political considerations’.⁶⁷¹ In setting up a new type of Special Procedures, the resolution contributed indeed to a more effective protection of human rights but that moment was a *pure political moment*, rather than the overcoming of politics; it is the result of the universal horizon where the proponents and opponents made exposure intolerable and the need to address it inevitable. In their combined political efforts, they pushed towards the universalisation of the Special Procedures subverting individual political intentions. It is the subversion of these political intentions that Kramer and Weissbrodt mistake for the suspension of politics by a higher moral call.

The intensification of ideological war between the United States and the Soviet Union created the conditions for the subversion of the long-standing and widespread opposition to the capacity of the Commission to take action on violations of human rights. That struggle opened the way for them but also other countries to articulate their positions on universal grounds, leaving and accumulating traces of recognition that later matured into precedents. The temptation to attack adversaries on grounds of universal principles inevitably led towards

⁶⁷⁰ Ibid.

⁶⁷¹ Kramer and Weissbrodt, ‘The 1980 U. N. Commission on Human Rights and the Disappeared’.

the substantive implications of the universal principles themselves, enabling the principle and practice of universal scrutiny. Finding themselves before a *fait accompli* of their own making, their combined efforts could no longer put into question the *raison d'être* of the new practice they so much resented but concentrated their wrath on its application instead.

Evoking the highest universal standards to stifle scrutiny of gross violations of elementary universal standards or to delegitimise adversarial actions, they vigorously but unwittingly pushed towards the constitutionalisation and universalisation of the Commission's powers exemplified in the establishment and the development of the Special Procedures. Charge and counter-charge of inconsistencies aimed at stifling scrutiny generated demand for greater universalisation of the new institution; they are a proxy for the progress made, moving the Special Procedures from a focus on *sui generis* cases to *erga omnes* application. The Special Procedures acquired a universal mandate to assess the records of states against existing human rights standards, with or without their consent. This clearly breaks with the consent-dependent operation of the Treaty Bodies, exposing all states to universal scrutiny.

4.3. Toleration

Before the proponents of the Working Group on South Africa could celebrate their unprecedented victory, the universal grounds on which they had achieved such a feat came to haunt them; they could not deny the principle of the universal application of the Commission's powers given that they made the case for those powers on universal grounds. That does not mean they had any intention of allowing that universal principle to take hold. They had to accept the universal language of 'in all countries' but, in their eyes, what they had done was an exception not meant for replication. They had relied on the *sui generis* character of apartheid in order to momentarily circumvent Article 2(7) without undermining

it⁶⁷² –in fact they would become increasingly adamant to preserve the norm of non-interference in expression of their newly gained independence. Apartheid had shocked the conscience of mankind and constituted a real threat to internal peace and stability, and therefore they had to act –but certainly not in a way that set a precedent that could be used against them in the future. The *sui generis* nature of their political activism gave countries that felt vulnerably to similar charges some relief, allowing them to expose the failures of their adversaries without fear of immediate retaliation. As Moskowitz notes: ‘[t]he uniqueness of apartheid sits well with those who shun any precedent which some day could be turned against them and explains the attitude of righteous indignation on the part of so many whose indifference to human rights and fundamental freedoms is the rule’.⁶⁷³

But these countries were enraged when the Commission began putting in practice the universal principle that they had just invoked to justify scrutiny of South Africa. In exercise of its newly gained powers, the Commission interpreted its universal mandate of dealing with human rights as including the human rights violations in Greece and Haiti in its 1968 session.⁶⁷⁴ Denying all violations, the Greek representative objected to the characterisation of the emergency situation in his country as a case of gross violations of human rights, charging the Sub-Commission for having overstepped its mandate; invoking Article 2(7), he vowed to oppose any action by the Commission.⁶⁷⁵ Similarly, the Haitian representative denied all allegations of any wrongdoing and clung to the Article 2(7) to oppose any investigation, adding that ‘the attacks against his country were aimed at diverting attention from the most

⁶⁷² Jeroen Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community* (Cambridge: Intersentia, 2006), 49.

⁶⁷³ Moskowitz, *International Concern with Human Rights*, 67.

⁶⁷⁴ Zijdwijk, *Petitioning the United Nations*, 21–22.

⁶⁷⁵ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 160.

serious situations obtaining in southern Africa.⁶⁷⁶ This argument was used also by representatives who opposed any kind of further action, not just against Haiti; raising unfounded allegations against Greece and Haiti without duly reflecting the severity of apartheid ‘could have the damaging effect of diverting attention from the most urgent and important task of taking all necessary steps to combat the inhuman policies of apartheid and racial discrimination in southern Africa’.⁶⁷⁷

Rebuttals of the form of ‘look at worse violations, not ours’ are part of a baseline strategy that offenders rely on to deflect scrutiny—they engage in a sort of competitive devaluation of atrocities, an atrocities anti-Olympics. The question is no longer which actions violate human rights standards, but rather which violations are the worst violations that should be a priority for all. It is thus no longer the absolute value of a violation that counts, but its value relative to other violations. What is essentially a strategy of deflecting scrutiny of grave violations is presented as a moral position to place attention on the most pressing violations—mounting to a travesty of universalism; that the exposure of violations elsewhere helps in relativizing one’s own violations comes a bonus.

Yet resistance to Commission’s scrutiny did not remain at the level of verbal objections. The Tanzanian representative, Waldron-Ramsey, fiercely objected to the universal application of the Commission’s mandate.⁶⁷⁸ He rejected the Sub-Commission’s findings on Greece and Haiti, who felt that it had violated ‘its essential mandate to concentrate on gross violation of

⁶⁷⁶ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 169.

⁶⁷⁷ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 174.

⁶⁷⁸ Zuijdwijk, *Petitioning the United Nations*, 22–23.

human rights in southern Africa'.⁶⁷⁹ He wanted all attention to go to apartheid and nowhere else. In 'all countries' meant solely the scrutiny of 'the flagrant violation of human rights' in South Africa; the mandate of the Sub-Commission was to 'concentrate on the policies of racial discrimination and segregation and of apartheid'.⁶⁸⁰ In sharp contrast, the United States and its allies argued that from 1946 the Council had endowed the Commission with the power to consider 'any other matter concerning human rights' –which is in fact correct, even as these same countries had denied its existence for two decades. They emphasised the universal language of 'in all countries' and violations of human rights 'wherever they may occur' underpinning the reinstated mandate of the Commission to defend its universal purview. From a universal point of view, mentioning of specific examples such as apartheid were 'illustrative and not exhaustive in character'.⁶⁸¹

This divergence was a continuation of the fierce confrontation about the weight of a single comma a year earlier –a confrontation between those who supported 'a jurisdictional formula encompassing "the violations of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of *apartheid* in all countries," and those [...] who prevailed in adding a comma before "in all countries"', a vital point that Carey, a former US member of the Sub-Commission, finds lacking in Zuijdwijk's work.⁶⁸² To confirm this universal view, the United States submitted a resolution with strong universal language, underscoring the Commission's powers 'to consider violations of human rights and

⁶⁷⁹ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 184.

⁶⁸⁰ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 172.

⁶⁸¹ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 175.

⁶⁸² John Carey, 'Review of Petitioning the United Nations: A Study in Human Rights. by Ton J. M. Zuijdwijk', *The American Journal of International Law* 77, no. 4 (1 October 1983): 925.

fundamental freedoms in all countries’, and this ‘in addition to gross violations of human rights resulting from official policies of apartheid and racial discrimination in southern Africa’, and that the Commission may investigate ‘wherever situations exist that may involve a consistent pattern of violations of human rights’; it also confirmed the powers of the Sub-Commission ‘to continue its consideration of all situations which appear to involve consistent patterns of gross violations of human rights, taking advantage of information from all available sources’.⁶⁸³

This radical universal interpretation of the Commission’s powers provoked Waldron-Ramsey to submit an amendment that, if accepted, would have eradicated the universal reach by constricting the mandate of the Commission to situations ‘as exemplified by the policy of apartheid.’⁶⁸⁴ Given the obvious risks involved, the United States withdrew its resolution, removing the immediate threat posed by Tanzania and preserving the fragile compromise secured a year earlier.⁶⁸⁵

4.3.1. Private versus public scrutiny

The reaction of Waldron-Ramsey, and ultimately his failure, illustrated the impossible position of Third World countries in invoking the universal to castigate their adversaries and their elusive quest of avoiding a precedent being set. Their first goal necessitated the establishment of the right to petition but the right to petition inevitably created a precedent that made them vulnerable to similar exposure in the future. Their conflicted position appears in high

⁶⁸³ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 151.

⁶⁸⁴ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 152.

⁶⁸⁵ Commission on Human Rights, Report of the 24th session (E/CN.4/972) 12 March 1968, paragraph 154.

relief after adopting in 1970 of the 1503 complaint procedure, authorising the Sub-Commission to examine complaints ‘which appear to reveal a consistent pattern of gross and reliability attested violations of human rights and fundamental freedoms’.⁶⁸⁶ This decision demonstrated their willingness to go beyond the limited procedures they had included in the Racial Convention in 1965 to fight racial and colonial policies –making themselves increasingly vulnerable to additional non-conventional scrutiny they set up for others.⁶⁸⁷

Their hopeless attempt to reconcile two irreconcilable aims –invoking the universal selectively– resulted in a cumbersome and unwieldy procedure involving first the Sub-Commission and then the Commission before any action could be taken as regards violations contained in the complaints. In a first phase, the Sub-Commission established a Working Group, composed of one member from the five UN electoral caucuses, to classify complaints received from the previous year to ascertain which ones contained ‘clear evidence’ of violations, whether these violations qualified as ‘gross and systematic’, and whether they revealed ‘manifestly political motivations’. It then decided by an affirmative vote as to which complaints could be forwarded to the Sub-Commission, which in turn decided by a simple majority to forward them to the Commission.⁶⁸⁸ In a second phase, the Commission set yet another Working Group to prepare recommendations for the Commission to consider in its annual sessions. At the end of the process, the Commission had several options: a) keep the case under review, b) send an envoy to collect information and report back to the Commission, c) appoint and *ad hoc* committee to conduct a confidential investigation, with the approval of the state concerned, to work towards a ‘friendly solution’, and finally d)

⁶⁸⁶ Economic and Social Council Resolution 1503 (XLVII) 27 May 1970, OP 1.

⁶⁸⁷ Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. (Oxford: Oxford University Press, 2000), 612.

⁶⁸⁸ Alston, ‘The Commission on Human Rights’, 146–48.

transfer the case to the 1235 procedure, permitting public debate and the appointment of Special Rapporteurs to conduct a thorough study of the case and produce recommendations for further action by the Commission and the Council.⁶⁸⁹

The final result was a ‘petition-information system’ and not a procedure that provided redress to aggrieved individuals, Alston rightly points out. Each step represented an opportunity for countries to block the process and strike off complaints. In exchange for tacit acceptance of an already emasculated procedure, the Soviet Union was allowed to reject most of the complaints relevant to the Soviet Union.⁶⁹⁰ Aggrieved individuals were ‘but a piece of evidence whose case might, if accompanied by a sufficient number of related cases, spurt the UN into action of some kind’, Alston observes.⁶⁹¹ The proponents of the confidential procedure were determined to limit its application to colonial powers. The Sub-Commission was loath to act even on cases that passed the Soviet filter, such as Greece, Iran and Portugal, out of fear of setting a precedent; as Alston observes ‘[t]he choice of such a list served to put those who had championed the 1503 procedure, in the hope that it would become a potent tool in the struggle against racism and colonialism, quickly on notice that the procedure could equally well be applied to other offenders’.⁶⁹² What these countries were fearing was the universal application of the procedure which would subvert their intentions.

That fear overrode indignation about cases of massive and harrowing violations of human rights, as illustrated by Uganda. After seizing power via a *coup d’état*, Idi Amin killed between 50,000 to 300,000 of its opponents and expelled one million people from their

⁶⁸⁹ Alston, 146–48.

⁶⁹⁰ Guest, *Behind the Disappearances*, 440.

⁶⁹¹ Alston, ‘The Commission on Human Rights’, 146.

⁶⁹² Alston, 148.

homes and farms between 1971 and 1978.⁶⁹³ Uganda was placed in the 1503 blacklist in 1975, but African countries closed their ranks to prevent the Commission from taking any action, at a time when Idi Amin chaired the Organization of African Unity. Only in 1978 was the Commission able to appoint a special envoy, although he could not be deployed as the Tanzanian troops had already overthrown the Amin regime.⁶⁹⁴ A murderous dictator like Idi Amin managed to manipulate the system for four long years, preventing any type of action in face of massive violations.⁶⁹⁵ The killing and disappearance of thousands of persons in Uruguay, as a result of the wider US-backed ‘Operation Condor’ in Latin America,⁶⁹⁶ could not be placed in the 1503 blacklist before 1978, and only after NGOs had provided evidence in 1977, making it hard to ignore. In 1979 the Secretary General charged the Peruvian diplomat Javier Pérez de Cuéllar, who later became Secretary General, to establish contact with the Uruguayan government to report on the human rights concerns in the country. He wrote a confidential report that reflected the views of the Uruguayan junta, absolving them of any wrongdoing; his leaked report concluded that all prisoners ‘appeared healthy’ and were held ‘under normal detention conditions’, disregarding reports by Red Cross and other NGOs that had reported massive violations and the ‘destruction of the rule of law’.⁶⁹⁷ The Argentina Junta turned the manipulation of the 1503 procedure into an art form, as was discussed in the previous section.

⁶⁹³ Monica Duffy Toft, *Securing the Peace: The Durable Settlement of Civil Wars* (Princeton: Princeton University Press, 2010), 101.

⁶⁹⁴ George Roberts, ‘The Uganda–Tanzania War, the Fall of Idi Amin, and the Failure of African Diplomacy, 1978–1979’, *Journal of Eastern African Studies* 8, no. 4 (2014): 692–709.

⁶⁹⁵ Guest, *Behind the Disappearances*, 440–41; Alston, ‘The Commission on Human Rights’, 149.

⁶⁹⁶ J. Patrice McSherry, *Predatory States: Operation Condor and Covert War in Latin America* (Lanham: Rowman & Littlefield Publishers, 2005).

⁶⁹⁷ Alston, ‘The Commission on Human Rights’, 149–50; Guest, *Behind the Disappearances*, 142–45.

Brazen manipulation of the confidential procedure went so far as to render it ‘useful to violators, by offering them a confidential refuge from public criticism’, Ian Guest warned.⁶⁹⁸ Radically decoupled from its manifest goal, Guest concluded that ‘1503 has become truly dangerous to human rights—and that it offers a useful refuge to repressive regimes’.⁶⁹⁹ Appearance of cooperation with the confidential 1503 procedure became a strategy for abusers to avoid public scrutiny under the public 1235 procedure. Whilst confidentiality can serve as a platform to extract concrete concessions that abusers might not be willing to concede publicly, as Carter’s policy vis-à-vis Argentina demonstrates, it served rather as way of silencing public scrutiny and stifling the 1235 procedure and by extension the Special Procedures. In the early 1980s, Zuijdwijk observed that 1503 ‘has been used to eliminate from the annual public debate those situations that were already before the Commission under the confidential procedure’.⁷⁰⁰ Clapman came to the same conclusion three decades later when noting that the confidential procedure ‘developed in parallel in part as a way of impeding the developing public scrutiny of country situations at the UN’.⁷⁰¹ These elements offer indications of the strategies that states pursue in their effort to avoid consistency constraints of scrutiny, especially the Special Procedures.

Nonetheless, they could not neutralise the universal they had invoked to justify the creation of the confidential procedure. In fact, as Alston astutely observes, they laid the groundwork for the further strengthening of Special Procedures. In violation of the principle of non-interference, the confidential procedure ‘accustomed States to the need to defend themselves

⁶⁹⁸ Guest, *Behind the Disappearances*, 440.

⁶⁹⁹ Guest, 441.

⁷⁰⁰ Zuijdwijk, *Petitioning the United Nations*, 54.

⁷⁰¹ Andrew Clapham, ‘United Nations Charter-Based Protection of Human Rights’, in *International Protection of Human Rights: A Textbook*, ed. Catarina Krause and Martin Scheinin (Åbo: Åbo Akademi University, 2012), 92.

and gave them practice in examining (and prosecuting) the performance of others'.⁷⁰² They effectively constructed in practice what they vehemently rejected in theory and practice. That they had created the procedure just when Western countries showed greater willingness to embrace human rights and address their violations further undermined control over the confidential procedure; Western countries employed it as a platform to expand its purview in line with the universal principles that justified its existence.⁷⁰³ The procedure managed to handle on average 50,000 petitions annually, more than double of the number of petitions the UN received in the 1940s and the 1950s, reaching its peak with 300,000 complaints in 1993. These petitions allowed the Commission to publicly scrutinise 86 states between 1972 and 2005, nearly two third of them in Africa (27) and Asia (27) –the original proponents of the procedure. The remainder were in Latin America (16), Eastern Europe (10) and Western Europe (6).⁷⁰⁴ The 2006 reforms transformed 1503 into a 'victims-oriented' complaint procedure, making it harder for states to evade scrutiny—the opposite of what its originators had tried to achieve.⁷⁰⁵

4.3.2. Geographic versus thematic mandates

Yet instances of scrutiny that survived the strategic use of confidentiality to destroy public scrutiny faced further resistance and efforts to emasculate them to avoid or mitigate the exposure of inconsistency they entailed. Opponents of the Special Procedures emphasised their *sui generis* character to resist their expansion in accordance with the universal justifying

⁷⁰² Alston, 'The Commission on Human Rights', 152.

⁷⁰³ Theresa D Gonzales, 'The Political Sources of Procedural Debates in the United Nations: Structural Impediments to Implementation of Human Rights', *New York University Journal of International Law and Politics* 13 (1981 1980): 427–72.

⁷⁰⁴ Henry J. Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford: Oxford University Press, 2008), 775; Alston, 'The Commission on Human Rights', 146.

⁷⁰⁵ Clapham, 'United Nations Charter-Based Protection of Human Rights', 101.

their existence. It is on this argument that they justified violation of non-interference to attack South Africa and Israel. The expansion of scrutiny to Chile and Argentina weakened that strategy, but nevertheless it retained sufficient power to stifle action on major violations. The ‘sui generis myth’, as Alston notes, derailed scrutiny for several years. Between 1975 and 1979 the Commission received reports of harrowing and horrific violations but none of them could be examined under the public 1235 procedure. The list included Idi Amin’s atrocities in Uganda, Bokassa’s cruelty in Central African Empire, Pol Pot’s genocidal rule in Cambodia, Indonesian repression in East Timor, not to mention the brutality and disappearances caused by the military regimes in Brazil, Chile, Argentina, Uruguay or the systematic repression, forced-labour camps, massive extrajudicial killings and concentration camps in the Soviet Union and other communist regimes such as Albania. The case of Albania is particularly telling as Hoxha’s Stalinist dictatorship had no allies to protect it from scrutiny; having broken with Yugoslavia in 1948, it cut ties with the Soviet Union in 1961, following Khrushchev’s thaw with Yugoslavia and his de-Stalinisation policy, and lost the support China in 1978, following the latter’s embracing of capitalism.⁷⁰⁶ It took four long years before the Commission could extend its reach beyond Chile, thanks in large part to growing publicity of violations of human rights by Amnesty International and other NGOs, and the unprecedented prioritisation of human rights by the Carter administration.⁷⁰⁷

The severe constraint on Commission’s universal mandate gave in. In 1979 the Commission brought Equatorial Guinea under public scrutiny, following failed attempts to address the situation under the confidential procedure since 1977. Equatorial Guinea became the first country to ‘graduate’ from 1503 to 1235, making it also the first country to experience public

⁷⁰⁶ Elidor Mëhilli, *From Stalin to Mao: Albania and the Socialist World* (Ithaca: Cornell University Press, 2017).

⁷⁰⁷ Alston, ‘The Commission on Human Rights’, 159.

scrutiny outside of ‘the unholy trinity’—South Africa, Israel and Chile; the Commission began addressing the violations of human rights in Kampuchea and Nicaragua in the same year.⁷⁰⁸ With the establishment of the Working Group on disappearances in 1980 the Commission had created a new type of scrutiny that could touch all countries, lowering the barrier for scrutiny. The list of countries scrutinised grew rapidly, including El Salvador in 1981, Guatemala and Poland in 1982, Afghanistan and Iran in 1984, Cuba in 1988, Romania in 1989, Albania and Haiti in 1990, and Iraq in 1991.⁷⁰⁹ Each additional case undermined the *sui generis* grounds to resist Special Procedures, opening a path towards their universal application.

Failing to incapacitate or slow down the rapid expansion of the purview of the Special Procedures, resistance shifted towards the expansion of thematic procedures. Countries that objected or fell under the geographic mandates of Special Procedures such as Cuba became fervent advocates of thematic mandates, justified on the universal ground of avoiding selectivity and double standards. This was a thinly disguised strategy to overburden the Commission with general human rights concerns and exhausts its resources to address individual cases and countries, thereby limiting its capacity to put the spotlight on the worst offenders. Other arguments for the expansion of thematic mandates included the need to rebalance the treatment of human rights, correcting the skewed attention on civil and political rights. This strategy contributed to the expansion if not the proliferation of human rights, expanding and consolidating human rights law, but that resulted from the appeal to the universal to justify the move towards thematic mandates to evade scrutiny, rather than a concern in expanding the remit of human rights on the part of the instigators. The growth of

⁷⁰⁸ Alston, 159.

⁷⁰⁹ Alston, 159–60.

thematic mandates overtook geographic mandates in 2005, having reached thirty-three mandates, and since then have been growing at more than double the rate of geographic mandates, as show on **Table 4**. This is striking not only because the number of countries required specific scrutiny by far exceeds the actual number of geographic mandates, as reports by state and nonstate actors systematically show, but also because since 2008 the general approach of thematic mandates has been overtaken by the Universal Periodic Review, applying universally in relation to all universal rights.

Table 4. Bifurcation of Special Procedures

Period	Geographic mandates	Thematic mandates
1967-1980	4	1
	South Africa ('67 – '95); Israel ('69 – '71); Chile ('75 – '79; '79 – '80; '79- '90); Equatorial Guinea ('79 – '80; '80 – '92).	Disappearances ('80 – current).
1981 - 1990	8	5
	Bolivia ('81 – '83); El Salvador ('81 – '92; '92 – '95); Guatemala ('82 – '86; '86-'87; '87-'97); Poland ('82-'84); Afghanistan ('84 – '03; '03-'05); Iran ('84-'02); Haiti ('87-'90; '90-'92); Equatorial Guinea ('92-'93; '93 – '99; '99 – '02).	Extrajudicial executions ('82 – current); Torture ('85 – current); Religious Intolerance ('86-'01); Mercenaries ('87- '05); Sale of children, child prostitution and pornography ('90- current);
1991 - 2007	19	27
	Haiti ('92-'95; '95- '17), Iraq (91 - 04), Kuwait (91- 92), Cuba (91; 92-98; 02-07); Former Yugoslavia ('92-'01; '01-'02); Myanmar (92 – current); Cambodia (93 – 08;	Arbitrary detention ('91-current); Property ('91-'94); Freedom of opinion and expression ('93 – current); Contemporary forms of Racism ('93-current); Violence

	08- current); Somalia (93 – current); Palestinian territories occupied since 1967 (‘93 – ‘ <u>until the end of the Israeli occupation</u> ’); Rwanda (94 – 97; 97-01); Sudan (93-03; 04 – 05; 05-09; 09-current); Burundi (95-04; 04–11); Congo/DRC (94-04; 04-08) Bougainville Papua New Guinea (94-95); Nigeria (97-99); Liberia (03-08); Belarus (04 – 07); North Korea (04 – current); Chad (04 – 05); (32)	against women (94 – current); Independence of judges and lawyers (94– current); Hazardous waste (95-current); Structural adjustment policies (‘97-‘00); Effects of foreign debt (‘98-‘00; ‘00- current); Poverty (‘98-‘11; ‘11- current); Education (98 – current); Migrants (‘99- current); Food (‘00- current); Adequate housing (00- current); Human rights defenders (‘00-‘08; ‘08– current); Indigenous people (‘01 – current); Freedom of religion and belief (‘01- current); African descent (‘02- current); Health (‘02 – current); Trafficking in persons (‘04 – current); Internally Displaced persons (‘92-‘04; ‘04- ‘10; ‘10-current); Mercenaries (‘05- current); Counter-terrorism (‘05 – current); Minority issues (‘05- current); International solidarity (‘05 – current); Contemporary forms of slavery (‘07 – current); Transnational corporations (‘05 – ’11) (33)
2008 - 2019	7	19
	Côte d’Ivoire (‘11- current); Belarus (‘12- current); Iran (‘11 – current); Eritrea (‘12– current); Syria (‘11– current); Central	Water (‘08-‘11; ‘11 – current); Human rights defenders (‘08– current); Water and sanitation (‘08 – current); Cultural rights (‘09 – current); Peaceful assembly (‘10 –

	African Republic ('13– current); Mali ('13 – current);	Current); Discrimination against women ('10 – current); Women and girls ('08- current); Democratic and equitable world order ('11 – current); Truth, justice, reparations ('11 – current); Transnational corporations ('11 – current); Environment ('12 – current); Older persons ('13- current); Unilateral coercive measures ('14 – current)' Persons with disabilities ('14 – current); Albinism ('15 – current); Privacy ('15 – current); Development ('16 – present); Sexual orientation and gender identity ('16 – current); Leprosy ('17 – current);
Total	38	52
Source ⁷¹⁰		

Such a clear bifurcation between these two types of mandates can be taken as an indication of the centrifugal forces moving towards toleration to reduce the constraints of consistency that they had to concede in the zone of recognition. Thematic mandates lower the salience of specific violations and absorb the disruptive exposure of Special Procedures; they make materially impossible what their proponents could not justify in openly rejecting it—individual scrutiny. Yet in doing so, they expanded the purview of Special Procedures to include potentially every country—not even the United States could escape—over an ever-growing

⁷¹⁰ Office of the United Nations High Commissioner for Human Rights (<https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>) Status as at 7 October 2019; Marc Limon and Hilary Power, 'History of the United Nations Special Procedures Mechanism: Origins, Evolution and Reform' (Universal Rights Group, 2014), Appendix I.

range of human rights questions. But as this strategy did not emasculate the geographic mandates, third world countries declared openly their intention to eliminate them altogether during the 2005-2007 reforms of the UN; yet they did not succeed in eradicating them as can be seen from the extension of geographic mandates beyond 2007, and the creation of new ones after 2008, even as thematic mandates continue to grow at more than double their rate. How this came about is the subject of the next section.

4.4. Negation

Elenore Roosevelt effectively secured the US line to suppress the right to petition during the drafting of the Universal Declaration; she was also effective in suppressing the ability of the Commission to consider any petitions of aggrieved individuals. Truman tasked her to suppress attempts by W.E.B. Du Bois to submit the petition of the National Association for the Advancement of Coloured People before the United Nations, and she succeeded again. Yet what is particularly striking is the reasons that she gives for her actions in the Commission and that of her colleague in the Sub-Commission, Jonathan Daniels, when she tries to rationalise her decision to Walter White, the Secretary of NAACP. Writing on 20 January 1948, she says:

‘Jonathan Daniels moved to accept all petitions which would have included accepting the NAACP petition though nothing could as yet be done about it. The Russians refused to include all and promptly suggested that only the NAACP and the International Democratic Women’s group, which is communist dominated, should be received because they represented the most people. Naturally it [sic] could not consent to that and when it came up in the Human Rights Commission I took the

same stand, namely, *that we must accept all or none* as we could not let the Soviet get away with attacking the United States and not recognize their own shortcomings'.⁷¹¹

In reality, Jonathan Daniels enlisted all the support he could get from the State Department and the White house to suppress Du Bois' Appeal and derail Soviet efforts to expose US's grandstanding. In private, Daniels confessed to Roosevelt that the Appeal exposed 'all the evils with which the sub-commission was set up to deal', but, in public, he declared that 'it was impossible to determine if blacks had a legitimate complaint', without an International Bill of Human Rights; this was exactly the same reason that Jan Smuts gave to justify apartheid.⁷¹² But beside her mischaracterisation of Daniels's role, the fundamental reason that Roosevelt gives for rejecting the Appeal was not its substance or the damage it would do to the United States, especially given the fear of providing more ammunition for the Soviet propaganda. Rather, it was her universal concern with the selectivity that would be involved in accepting Du Bois' Appeal, if all other petitions had to be ignored. No mention of substantive objections is made in her account. It is all about procedure.

What Roosevelt does in effect is evoke an extremely high representation of the universal to unequivocally deny recognition of egregious violations of universal human rights, which incidentally she had helped formulate. She uses a universal principle to raise the bar so high, that refusing to recognise egregious violations of universal rights in her own country is presented as a respectful, even a principled course of action. This is a travesty of universalism. It is the default strategy of violators of basic universal principles to reject

⁷¹¹ Quoted in Mackinnon, 'Declaration as Disavowal', 67 [Emphasis Added].

⁷¹² Quoted in Carol Anderson and Carol Elaine Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955* (Cambridge: Cambridge University Press, 2003), 107; 111.

international scrutiny. It is an intuitive charge that everyone can make, which is why it is so prevalent in the strategies that states deploy to repel attacks from adversaries or scrutiny from the Commission. What is less intuitive, however, is that ultimately this strategy subverts the intentions of agents and moves them closer to the principles they invoke, even if that is done to fend off criticism for violating those very same principles, or for undermining the principles as such. This is a triumph of universalism.

4.4.1. Travesty of universalism

The invocation of universal principles by Roosevelt is galling given her relentless efforts to thwart what she says she would have done in an otherwise ideal universal world. But the argument she uses is in fact part of a broader strategy that violators of human rights deploy to suppress public scrutiny. An eloquent exposition of this strategy comes from Tingfu F. Tsiang, a scholar and diplomat of the Republic of China, in response to '[t]he unceasing terrorism and mass executions in Greece' that the Soviet Union proposed for inclusion in the Security Council's agenda in 1950. Tsiang opens his remarkable intervention by openly questioning the 'noble cause of humanitarianism' in which the Soviets couched their proposal, then stresses that:

'[t]he Security Council -indeed the United Nations- could not be accused, could not afford to be accused, of being callous, of being inhuman, of being negligent of human rights in any part of the world. If that should be the motive for having a discussion here, I should applaud that motive; none of us could object to that motive'.⁷¹³

⁷¹³ Security Council, Official Record of the 493rd meeting (S/PV.493) 31 August 1950, p. 7-8.

Obviously, then, the ‘motive’ stood in the way of a compassionate UN. He presented two main reasons for rejecting the Soviet proposal. Predictably, he starts by arguing that the Security Council had no jurisdiction over such matters. ‘We are charged with the peace and security of the world’, Tsiang maintained, ‘not with the treatment of individuals in the Member countries of this Organization’.⁷¹⁴ But that was not the main reason. The main reason was the ‘motive’. He explains:

‘I am not sure what really is happening in Greece. I do not say that this item is justified or unjustified. It may be that the Government of Greece has committed irregularities. I have no idea, and with regard to that proposition I do not commit my delegation or myself. But we know very well that in this world violations of human rights occur in many countries. If the United Nations took up that work seriously -and I believe the United Nations should take that business very seriously- the proper thing for the United Nations to do is to have a *special commission set up to survey all the Member States in regard to violations of human rights, and wherever such violations occur, whether in my country, in Greece, in the Soviet Union, in the United States or the United Kingdom, let us stop such violations. The party that raises this question should be the first to welcome such a world-wide investigation, including the country of the party proposing the item*’.⁷¹⁵

The obvious thrust of the argument is to discredit the Soviet proposal by exposing the hypocrisy involved in it. But it cuts deeper. Its basic implication is that, whilst it is a noble thing for the United Nations to address violations of human rights, it must do so only if it

⁷¹⁴ Security Council, Official Record of the 493rd meeting (S/PV.493) 31 August 1950, p. 8.

⁷¹⁵ Ibid. [Emphasis added].

respects another noble principle: that it applies equally everywhere without discrimination. The UN should act by treating all equally or not act at all. Better a single standard than double standards. Tsiang invokes absolute universalism to overwhelm the overtly propagandist proposal of the Soviet Union, but in so doing he places an insurmountable obstacle to any type of action anywhere. He raises the universal standard to such dizzying heights to pillory the Soviet proposal that he contradicts himself—in that the Council could act to ‘stop violations’ if they were established via a universal process, when his first objection was that the Council had no such powers. The perverse implication of this logic is that if the UN cannot act in all cases it should not act in any. Action anywhere depends on action everywhere. No matter how noble the end, it must not be pursued through impure means. The purity of means must be preserved even at the cost of sacrificing the end itself.

What, then, is the purpose of having that pure mean at all? It is a means that allows agents to claim to be guided by principle whilst neutralising the practical consequences that the principle embodies. That is not what Tsiang advocates for. But that is the effect of actions by those who raise his objection. South Africa would question the impartiality of the Working Group to undermine its work in unearthing the scale and pattern of gross violations of the most basic universal principles. It was correct in the sense that the Working Group was neither expert nor impartial, as Alston notes,⁷¹⁶ but again that is mistaking the end for the means, which is exactly the end of such strategy. Likewise, Israel complains about the discriminatory and disproportionate focus of the UN to undermine its work in revealing the flagrant violations that include war crimes and crimes against humanity. It diverts attention from the gravity of violations it commits and the responsibility it has for putting an end to them, to the impure manner in which the UN reveals them. The ‘discriminatory obsession’

⁷¹⁶ Alston, ‘The Commission on Human Rights’, 165.

with Chile was the reason why the Junta objected to the Special Procedures, when the Commission omitted systematic and graver violations elsewhere, especially in the Soviet Union; it was the strategy that the Junta relied on to exonerate itself from any wrongdoing. The urge not to be singled out led the Argentina Junta to work against any attempt by the UN to consider the question of disappearances at all.

Despite being a travesty of universalism, this strategy operates as a powerful force against efforts by the UN to address human rights anywhere. The competition for the purer form of the universal can become so fierce that it puts jeopardises even elementary efforts to uphold the most elementary representations of the universal in the real world. The power of this discourse can vary in strength, but it nevertheless poses a constant threat to the operation and very existence of the Special Procedures, regardless of the country or group of countries that seek their destruction. Its force was so strong that it led the Assembly to replace the Commission with the Human Rights Council on 15 March 2006. With regard to the Special Procedures, the main reason for abolishing of the Commission, the Assembly decided that:

‘the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure; the Council shall complete this review within one year after the holding of its first session’.⁷¹⁷

⁷¹⁷ General Assembly Resolution 60 (251) 15 March 2006, OP 6.

What ‘reviewing’ and ‘rationalizing’ the mandates of Special Procedures entailed in practical terms was to occupy a central place in negotiations the following year, with the spectre of elimination becoming more real than ever before.

4.4.2. Triumph of universalism

The opponents of the Special Procedures sought to use the transition from the old Commission to the new Council to eradicate the geographic mandates. That is not what Annan had in mind, however. Aware that their existence was in question, he defended the importance of Special Procedures by comparing them to the crucial role that independent institutions play in ensuring the rule of law in democratic countries. To him they offered a necessary corrective to the intergovernmental character of the Council, concluding that the latter ‘cannot ensure the protection of human rights by taking all decisions into its own hands’. After his democratic defence of the Special Procedures, Annan expressed the fear of many when he issued a warning that the Council ‘must be careful to avoid any innovation that would erode or undermine the independence of the Special Procedures (...)’.⁷¹⁸ It was through the Special Procedures that the Commission had ‘made itself not only the promoter but also the protector of human rights’, ‘constituting the frontline troops to whom we look to protect human rights, and to give us early warning of violations’.⁷¹⁹ The Special Procedures could play such a role because:

⁷¹⁸ United Nations Secretary-General, Secretary-General, In Message to Human Rights Council, Cautions Against Focusing on Middle East at Expense of Darfur, other Grave Crises (SG/SM/10769-HR/4907) 29 November 2006 (<https://www.un.org/press/en/2006/sgsm10769.doc.htm>).

⁷¹⁹ United Nations Secretary-General, The Secretary-General's address to the Human Rights Council, 19 June 2006 (<https://www.un.org/sg/en/content/sg/statement/2006-06-19/secretary-generals-address-human-rights-council>).

‘[b]y raising the alarm and then investigating, they keep the spotlight of world attention focused on many of our most pressing human rights dilemmas. They give a voice to the voiceless victims of abuses, and their reports provide a starting-point for discussion on the concrete measures that governments need to take to put a stop to violations, and to ensure that human rights are protected in future’.⁷²⁰

Annan justified the Special Procedures by demonstrating their vital role in enhancing respect for human rights—but that was precisely the reason why so many countries sought to eliminate them. Perhaps the most articulated version of this position came from the Cuban Ambassador Juan Antonino Fernández, who in contrast to Annan, argued that the Assembly did ‘not endorse the current system of special procedures as it is’.⁷²¹ It is a ‘system that was far from being perfect’, he argued, especially because of the frequent ‘political manipulation’, the ‘lack of objectivity, the selectivity and partial approaches’, which together had created ‘the greatest amount of politicisation and the lack of credibility’ of the Commission.⁷²² What the Assembly means to say, Fernández points out, is that:

‘it is crucial to build a new system of special procedures benefiting from the achievements and redressing the shortcomings of the former system, with a view to

⁷²⁰ United Nations Secretary-General, The Secretary-General's address to the Human Rights Council, 19 June 2006 (<https://www.un.org/sg/en/content/sg/statement/2006-06-19/secretary-generals-address-human-rights-council>).

⁷²¹ Cuba, Contribution of Cuba to the work of the Working Group on the implementation of OP 6 of GA resolution 60/251, 12 December 2006, Section 1 (A). (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/ContributionsStates/Cuba%20contribution%20dated%202012%20december%202006.pdf>)

⁷²² Cuba, Contribution of Cuba to the work of the Working Group on the implementation of OP 6 of GA resolution 60/251, 12 December 2006, Section 1 (A). (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/ContributionsStates/Cuba%20contribution%20dated%202012%20december%202006.pdf>)

allow it to effectively promote and protect all human rights for all through cooperation, genuine dialogue and respect for the principles of universality, objectivity, non-selectivity, eliminating double standards and politicization'.⁷²³

What Fernández is trying to do with his 'new system of special procedures' is weaponize the universal to suffocate the actual Special Procedures, following a three-pronged approach. His strategy begins by framing a razor-sharp distinction between thematic and country-specific mandates.⁷²⁴ This separation is necessary for Cuba to be able to attack the latter without endangering the former, especially those dealing with socio-economic rights. Then Fernández could safely assault the country-mandates, demanding that the Council 'must examine all country mandates as a matter of priority, *with a view to eliminate them*; especially the ones imposed under former item 9 of the agenda of [the Commission] through politically motivated resolutions'.⁷²⁵ But note that, again, Fernández is careful to qualify his assault to presumably leave out the mandate on Israel, created under the fixed agenda item 8 of the Commission, which by implication does not count as an instance of politicisation. Finally, he identifies alternatives to the country-specific mandates and the criteria for the eventual creation of new ones. The Universal Periodic Review, the 1503 procedure, and emergency

⁷²³ Cuba, Contribution of Cuba to the work of the Working Group on the implementation of OP 6 of GA resolution 60/251, 12 December 2006, Section 1 A. (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/ContributionsStates/Cuba%20contribution%20dated%2012%20december%202006.pdf>)

⁷²⁴ Cuba, Contribution of Cuba to the work of the Working Group on the implementation of OP 6 of GA resolution 60/251, 12 December 2006, Section 1 A. (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/ContributionsStates/Cuba%20contribution%20dated%2012%20december%202006.pdf>)

⁷²⁵ Cuba, Contribution of Cuba to the work of the Working Group on the implementation of OP 6 of GA resolution 60/251, 12 December 2006, Section 1 C [Emphasis added]. (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/ContributionsStates/Cuba%20contribution%20dated%2012%20december%202006.pdf>)

sessions envisaged under the new Council could easily substitute for most of the work done by the country-specific mandates, Fernández argues.⁷²⁶ Fully concurring with the plausible substitutes outlined by Cuba, the Indian representative added that ‘the outcome of the review should not disturb, and where necessary, restore the balance between socio-economic and civil-political rights’, with special attention to the relation of the right to development’.⁷²⁷

If at all, new country mandates could be created only as a last resort according to ‘very clear and universal criteria’ but then solely in relation to ‘situations of manifested gross, massive, systematic and flagrant practices of violations of human rights, such as extrajudicial killings, summary executions, enforced disappearances and torture’.⁷²⁸ Even then, that mandate should be created by consensus and only as a last resort by absolute majority of the Council. The Indonesian representative seconded Fernández’ position, seeing the establishment of new mandates only as ‘a last resort’ after a ‘thorough examination’ of the case under ‘stringent safeguards’.⁷²⁹ Furthermore, the appointment of mandate-holders would have to be more transparent and accountable and therefore be elected directly by the Council, based on nominations from governments and regional groupings: all steps directly contradicting the

⁷²⁶ Cuba, Contribution of Cuba to the work of the Working Group on the implementation of OP 6 of GA resolution 60/251, 12 December 2006, Section 1 C. (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/ContributionsStates/Cuba%20contribution%20dated%2012%20december%202006.pdf>)

⁷²⁷ India, Statement by the representative of India, 14 November 2006, p. 1-2. (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/141106/India.pdf>)

⁷²⁸ Cuba, Contribution of Cuba to the work of the Working Group on the implementation of OP 6 of GA resolution 60/251, 12 December 2006, Section 1 (C). (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/ContributionsStates/Cuba%20contribution%20dated%2012%20december%202006.pdf>)

⁷²⁹ Indonesia, Remarks by the Indonesian delegation on the Non-paper by the Facilitator on the Review of Special Procedures, 7 February 2007, p. 2. (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/070207/Tab/Indonesia.pdf>)

justification of tackling politicisation, as the British representative points out.⁷³⁰ Aside from experience, expertise, impartiality and integrity, the mandate-holders would also have to reflect an equitable representation of all cultures, religions, civilisations, socio-economic and legal systems, and including gender.

On top of those stringent criteria, mandate-holders must be subjected to a Code of Conduct to regulate their role, in addition to field manuals. And above all, as a matter of principle ‘they must refrain from any interference in the internal affairs of the State visited’.⁷³¹ This was a position widely shared among African and Asian states and was turned into a concrete proposal by the African Union, with strong support from South Africa.⁷³² The proposal acknowledges that mandate-holders ‘enjoy complete independence’ given the ‘very nature of their functions’ and in that spirit proposes a Code of Conduct to ‘strengthen the capacity of mandate-holders to exercise their functions whilst enhancing their moral authority and credibility’.⁷³³ What was formulated in universalist and bureaucratic language to justify ‘a certain number of measures’ to ‘ensure the proper discharge of their prerogatives’ was in fact nothing more than a legal attempt to destroy what makes mandate-holders special –their independence from the Council.

⁷³⁰ United Kingdom, Statement by British representative, 7 February 2007.

(<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/070207/Tab/UnitedKingdom-1.pdf>)

⁷³¹ Cuba, Contribution of Cuba to the work of the Working Group on the implementation of OP 6 of GA resolution 60/251, 12 December 2006, Section 1 (B).

(<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/ContributionsStates/Cuba%20contribution%20dated%2012%20december%202006.pdf>)

⁷³² Eduard Jordaan, ‘South Africa and the United Nations Human Rights Council’, *Human Rights Quarterly* 36, no. 1 (2014): 98.

⁷³³ African Union, Draft Code of Conduct for Mandate-Holders under the Special Procedures of the Human Rights Council - African Group Proposal, 13 March 2007, Preambular Paragraphs 13-15.

(<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/ContributionsStates.html>)

With its intervention, Cuba had offered a detailed plan with plausible arguments for countries mobilizing to assault the Special Procedures, with a concentration on the delegitimization of geographic mandates and the control of the appointment and independence of mandate-holders. A large group of countries mirrored and reinforced these views, occasionally suggesting more draconic restrictions, as was the case with Asian countries.⁷³⁴ That was especially the case with China.⁷³⁵ China sought to impose a two-third majority threshold for any new mandate, in addition to explicit consent by the country concerned, measures that would have rendered it practically impossible to establish any new mandates. Yet this position was doomed to fail as it put in jeopardy the mandate on Israel –the main objective of the Organization of the Islamic Conference in the reforms. Its position read:

‘[a]s stipulated in the Commission on Human Rights Resolution 1993/2, the duration of mandate of the Special Rapporteur of human rights in Palestine occupied since 1967 has been established until the end of occupation. All thematic special procedures should focus on the situation of human rights in Palestine and other Occupied Arab Territories’.⁷³⁶

⁷³⁴ Asia Group, Document De Réflexion Initial Sur Le «renforcement De L’inefficacité Des Mécanismes Spéciaux De La Commission Des Droits De L’homme » Établi Par Le Groupe Asiatique (no date)

(<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/ContributionsStates/Asian-Fr.pdf>)

⁷³⁵China, Statement by the representative of China, 5 December 2006

(<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/3rdSession/OralStatements/051206/Tab15/Tab2/3.China.pdf>)

⁷³⁶ Organisation of Islamic Conference, Paper on Review of Mandates, 6 September 2006

(<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/ContributionsStates.html>)

Presumably this position implies that there should exist one country-mandate only, namely that on Israel, which in addition must be examined by all existing thematic mandates. At least this is how a pro-Israel NGO understood it, stating that:

‘[t]he proposal by some delegations to abolish all the country rapporteurs except for one should be rejected. Doing so would severely limit the Council’s ability to promote and protect human rights effectively worldwide. It also would further institutionalise the unfair discrimination of which the Council has already been accused and thereby further damage its credibility’.⁷³⁷

Nevertheless, the Organization persevered in its position adding that it had ‘consistently demanded that all thematic special procedures should focus on the situation of human rights in Palestine and other Occupied Arab Territories’;⁷³⁸ the emphasis on consistency presumably expresses some expectation of the appreciation of persistence. It could not count on appreciation from Israel. In light of such a blatant form of selectivity it should not have been that difficult for Israel to unmask and denounce it. In contrast with those attacking it, Israel declared its support for both country-specific and thematic mandates, then, predictably, to add that the reform should ‘ensure that all mandates are formulated according to the same criteria, that of universality, objectivity and non-selectivity. All mandates must be equal’; this

⁷³⁷ United Nations Watch, Statement on the Preliminary Consultation of the Working Group on the Implementation of OP6 of the GA Resolution 60/251 (Special Procedures) 5 December 2006 (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/3rdSession/OralStatements/051206/Tab16/Tab/1.UNWatch.pdf>)

⁷³⁸ Pakistan, Statement by Tehmina Janjua on behalf of the Organization of the Islamic Conference, 6 February 2007. ([https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/Pakistan\(OIC\).pdf](https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/Pakistan(OIC).pdf))

then included the mandate on Occupied Palestinian Territories.⁷³⁹ As the universal would command, Israel argued that ‘[t]he mandate in question must be extended to include *all* human rights violations and *all* human rights violators in the territories, and not be limited to one side alone’.⁷⁴⁰ Following the same logic, it demanded that the mandate ‘be subject to timely periodic review, *as all other mandates of the Council should be.*’⁷⁴¹ Here Israel is effectively unmasking the duplicity of countries demanding the ‘review’ of the Special Procedures (in order to kill them) but then only to reject reviewing the only mandate they care about –Israel.

But Israel goes further. It invokes the universal to make the mandate on Israel dependent on its universal application. ‘Let me clarify’, the representative of Israel resumes:

‘Israel is not requesting to delete the mandate. We are also not opposed to having this mandate be implemented as a thematic mandate, rather than a country-specific one, as a few delegations have suggested. But such an implementation—I stress—would of course allow the mandate to be consistently and properly used to discuss *all* claims of occupation and *all* claims of self-determination related to *all* countries in the world, in a universal manner’.⁷⁴²

⁷³⁹ Israel, Comment on Issue #2. Review of Mandates, 14 November 2006. (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/141106/Israel.pdf>)

⁷⁴⁰ Israel, Statement by the representative of Israel on Review of Mandates, 13 February 2007, p. 2 [Emphasis in original]. (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/130207/Tab/Israel.pdf>)

⁷⁴¹ Israel, Statement by the representative of Israel on Review of Mandates, 13 February 2007, p. 2 [Emphasis in original] (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/130207/Tab/Israel.pdf>)

⁷⁴² Israel, Statement by the representative of Israel on Review of Mandates, 13 February 2007, p. 2 [Emphasis in original]

The purpose of this intervention is exactly the opposite of what it says it is doing: abolish the Israel mandate. Only, it is not Israel that asks for it –it is what universalism demands of all. Because ‘singling out one country or one situation to be treated unequally would be in clear contrast to the noble goals of our new Council’, the Israel representative states. He confronts head-on the justifications that the Organization of the Islamic Conference and other countries have given for demanding reform, purporting ‘that above all, the process should avoid politicization, selectivity and double-standards’. It is then simply the concretisation of these noble aspirations that Israel is asking for when stressing that ‘all mandates should be treated equally, according to the same universal and objective criteria’.⁷⁴³

Israel was also faced with increased scrutiny from the new Council after the escalation of conflict and the war with Lebanon in July 2006, and seemed to get a sympathetic hearing from Annan. Whilst sharing the ‘deep concern’ about the escalation of conflict and expressing appreciation for the Council for ‘paying close attention to developments in the Middle East’, Annan showed understanding for Israel’s position when he stated:

‘I hope, however, that the Council will take care to handle this issue in an impartial way and not allow it to monopolize attention at the expense of others where there are equally grave or even graver violations. There are surely other situations, besides the

(<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/130207/Tab/Israel.pdf>)

⁷⁴³ Israel, Statement by the representative of Israel on Review of Mandates, 13 February 2007, p. 2

(<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/130207/Tab/Israel.pdf>)

one in the Middle East, which would merit scrutiny by a special session of this Council. I would suggest that Darfur is a glaring case in point'.⁷⁴⁴

There is, however, a fundamental difference between what Israel asked for and what Annan seemed ready to offer. He calls the Council to expand what it legitimately does in the Occupied Territories, and not to eliminate such scrutiny unless it applies universally, as Israel argues; he relies on the universal to denounce selective scrutiny of violations of the universal in a substantive manner. These are two fundamentally different ways of dealing with the Council's selective censuring of Israel, and Annan's view has proven more compelling.⁷⁴⁵ This question, however, was to remain central throughout the negotiations and thereafter.

There was another interpretation of the universal, diametrically opposed to the proponents of reform in order to eliminate the Special Procedures. Drawing from the same universal, a small group of countries which included the European Union and its member states, Norway, Switzerland, New Zealand, Argentina, Chile, Canada, and the United States sought to transform the urge for reform into an opportunity to further strengthen, rather than weaken or possibly eliminate, the Special Procedures and the Council's overall capacity to consider urgent and systematic human rights concerns. Despite being in an inferior position numerically, they offered staunch resistance in all the critical questions in dispute, such as the

⁷⁴⁴ United Nations Secretary-General, Secretary-General, In Message to Human Rights Council, Cautions Against Focusing on Middle East at Expense of Darfur, other Grave Crises (SG/SM/10769-HR/4907) 29 November 2006

(<https://www.un.org/press/en/2006/sgsm10769.doc.htm>).

⁷⁴⁵ In fact, after having held the first three special sessions on Israel, the Council held its fourth Special Session on Darfur; By its twenty-eighth emergency session in May 2018, the purview of Council's had expanded to include eleven additional cases, with five sessions on Syria, two on Myanmar, one on Sri Lanka, Haiti, Côte d'Ivoire, Libya, Central African Republic, Burundi, and another five on the Occupied Territories. It also held three thematic emergency sessions, including on Boko Haram, the world food crisis, and the global financial crisis.

overall preservation of geographic mandates, the nomination and selection of Special Rapporteurs and the imposition of a code of conduct.

The European Union did not support the replacing the Commission with the Council, in spite of its long-term efforts to reform and strengthen the UN, but when that became inevitable, it sought to defend and enhance what it had valued the most. From the outset, it stated its baseline position that ‘the review must aim at increased level of human rights protection’.⁷⁴⁶ The preservation and strengthening of Special Procedures was critical in that regard:

‘[...] the Special Procedures system is an indispensable mechanism for the promotion and protection of human rights worldwide, and this recognition will be the point of departure for the review process. The strong system encompassing both thematic and country mandates is necessary for the Council to implement its mandate effectively, to bring the debates closer to the reality on the ground and to alert the international community to human rights violations’.⁷⁴⁷

Following the same line, the representative of Norway expressed her dismay at ‘the lack of victims’ perspective when considering the strengthening of the system of special

⁷⁴⁶ European Union, Statement by the Representative of Finland on behalf of the European Union, 14 November 2006.

([https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/141106/Finland\(EU\).pdf](https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/141106/Finland(EU).pdf))

⁷⁴⁷ European Union, Contribution by Finland on behalf of the European Union to Working Group on the Implementation of para. 6 of GA resolution 60/251, 7-8 September 2006 (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/ContributionsStates.html>)

procedure’.⁷⁴⁸ And in case there were any questions about how a more effective system would look like, the answer was simple:

‘[s]tronger and more effective to promote and protect human rights, and not stronger and more effective to protect States from scrutiny, to limit the independence of the mandate holders, to prevent country focus, to limit interaction with the rest of the [human rights] machinery and with whole of the UN system, to limit the interaction with media’.⁷⁴⁹

Similarly, Argentina expressed a strong desire to strengthen the system of human rights protection and ensure that mandate-holders preserved their independence.⁷⁵⁰ It adopted a two-pronged approach to the review of mandates: to include the main internationally recognised rights and the perspective of persons or groups in need of protection.⁷⁵¹ The United States had a more differentiated position – it strongly supported the strengthening of ‘key mandates’ whilst also demanding the ‘rationalization’ of other mandates in order avoid duplication and

⁷⁴⁸ Norway, Intervention by the representative of Norway at Working Group on the Review of mandates. Topics 5, 6, 7 and 8, 7 February 2007 (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/070207.html>)

⁷⁴⁹ Norway, Intervention by the representative of Norway at Working Group on the Review of mandates. Topics 5, 6, 7 and 8, 7 February 2007 (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/070207.html>)

⁷⁵⁰ Argentina, Intervención Argentina, Grupo de Trabajo sobre la revisión de los mandatos de los procedimientos especiales, 6 February 2007 (https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/Argentina_0.pdf)

⁷⁵¹ Argentina, Intervención Argentina, Grupo de Trabajo sobre la revisión de mandatos, 13 February 2007 (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/130207/Tab/Argentina.pdf>)

‘maximise limited resources’.⁷⁵² But the bottom line was unambiguous: ‘[t]he United States strongly believes that all country-specific mandates must be retained, as they provide the only leverage the international community has to bring pressure to bear upon those countries that have no interest in the promotion and protection of human rights’.⁷⁵³ Whilst stating that cooperation with the countries concerned would be ‘the ideal’, it strongly supported the capacity of the Council to create new country mandates even when the country concerned refused to cooperate; after all, the Council ‘must ultimately answer to the victims of abuse’.⁷⁵⁴

This is a point that Japan also made: ‘[w]e hope, as all others, the day will come that we do not need to have country mandates. We earnestly believe so. Are we already at that stage? Regrettably no’.⁷⁵⁵ In addition, it considered China’s two-third majority threshold for new mandates as an unwarranted exception. These positions also rejected India’s calls to have such mandates created by consensus—which is almost a contradiction in terms.⁷⁵⁶

⁷⁵² United States, Statement by the representative of the United States in Working Group on Review of Mandates, 15 February 2007.

(<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/150207/USA.pdf>)

⁷⁵³ United States, Statement by the representative of the United States in Working Group on Review of Mandates, 15 February 2007.

(<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/150207/USA.pdf>)

⁷⁵⁴ United States, Statement by the representative of the United States in Working Group on Review of Mandates, 15 February 2007.

(<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/150207/USA.pdf>)

⁷⁵⁵ Japan, Statement by representative of Japan on point 2 of Facilitator’s non-paper (on the review of special procedures) 13 February 2007

([https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/130207/Tab/Japan\(1\).pdf](https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/130207/Tab/Japan(1).pdf))

⁷⁵⁶ India, Statement by the representative of India, Human Rights Council: Review of Mandates, 6 February 2007

(<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/India-.pdf>)

Nevertheless, it points to the enormous weight of consensus within the UN, when it undermines what is supposedly aimed at serving, as ultimately, consensus would mean taking the violator's line. The noble allure of insisting on consensus to deal with some of the most pressing issues of a non-ideal world comes down to making the consideration of the gravest violations of the highest universal ideal dependent on an ideal decision-making rule of an ideal world. It is a complete perversion of universalism.

The same could be said about the need for a Code of Conduct. What was phrased in universalist and bureaucratic language, such as the 'mandate holders should be independent, but also accountable to' the Council',⁷⁵⁷ was aimed exactly at neutralising the power of the Special Rapporteurs pre-emptively, as their very existence was still in play. They insisted that this Code should be in addition to the existing Manual for Special Procedures adopted in 1999, and later revised in 2008.⁷⁵⁸ Yet according to the European Union, this Manual and other existing rules were sufficient to form the backbone of a coherent and accountable system of the Special Procedures, stating that it 'finds it difficult to see the added value of yet another document, i.e. a code of conduct'.⁷⁵⁹ This was a position that caused a strong reaction

⁷⁵⁷ Organization of the Islamic Conference, Statement by Tehmina Janjua, Acting Permanent Representative of Pakistan, on behalf of the Organization of the Islamic Conference, 6 February 2007.

([https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/Pakistan\(OIC\).pdf](https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/Pakistan(OIC).pdf))

⁷⁵⁸ Office of the High Commissioner for Human Rights, Manual of Operations of the Special Procedures of the Human Rights Council, August 2008
(<https://www.ohchr.org/EN/HRBodies/SP/CoordinationCommittee/Pages/Manualofspecialprocedures.aspx>)

⁷⁵⁹ European Union, Statement by Ambassador Michael Steiner, Permanent Representative of the Federal Republic of Germany, on behalf of the European Union, 6 February 2007, p 3. [Emphasis added]
([https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/Germany\(EU\).pdf](https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/Germany(EU).pdf))

from among its proponents: ‘our delegation must express a certain amount of dismay, not to say disappointment’, the Indonesian representative declared.⁷⁶⁰

Yet the European Union went further to shift the terms of the debate, by divorcing the Code from the question of accountability, and then to push firmly for the latter, transforming the question into one of transparency and accountability of the selection process of the mandate-holders. It proposed a three-stage selection where candidates would be first created by ‘all relevant stakeholders’, then placed into a roster from which the High Commissioner would then select the candidate it saw fit for the mandate, again ‘in consultation with all stakeholders; this was nothing more than ensuring that universal criteria that ‘*all agree*’ on, such as independence, impartiality, objectivity, integrity ‘*are actually met*’ by the selected candidates’.⁷⁶¹ This position was further endorsed by the United Kingdom emphasising that it saw ‘no need for a code of conduct’.⁷⁶² It was clear that such a rival interpretation of the universal criteria went completely against what the proponents of the Code had in mind, but their universal justifications limited their capacity to resist its consequences. In an attempt to present the Code as being in line with its universal justifications, India claimed that it ‘is in no way inconsistent with our objective of

⁷⁶⁰ Indonesia, Remarks by the Indonesian delegation on the Non-paper by the Facilitator on the Review of Special Procedures, Working group on the Review of Mandates (Implementation of OP-6), 7 February 2007 (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/070207/Tab/Indonesia.pdf>)

⁷⁶¹ European Union, Statement by Ambassador Michael Steiner, Permanent Representative of the Federal Republic of Germany, on behalf of the European Union, 6 February 2007, p 3. ([https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/Germany\(EU\).pdf](https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/Germany(EU).pdf))

⁷⁶² United Kingdom, Statement by the representative of the United Kingdom, 7 February 2007 (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/070207/Tab/UnitedKingdom-1.pdf>)

strengthening the Special Procedures system. On the contrary, it will go a long way in enhancing the faith of all stakeholders in this system by making it more transparent'.⁷⁶³

This is a striking appeal to the universal to justify a Code for a system which it expressly said it did not want it to exist, that is, at the same time as India favoured the termination of country-specific mandates. India also tried to deflate the obviously debilitating consequences of governmental control of Special Rapporteurs by introducing a plausible distinction, that they would be accountable not to 'individual governments', but rather to 'the Council as a whole';⁷⁶⁴ the collegiality of the Council would thus allow for more collective or universal control, speaking always to the general and universal dimension, but nevertheless, at least technically, allowing for the possibility of greater degrees of freedom for Special Rapporteurs. That does not change the fact that the Indian intervention embodied an effort to employ the weapon of the universal to neutralise the universal criteria from which the power of Special Rapporteurs is derived. Not the safeguarding, but the destruction of the independence of Special Rapporteurs was the aim –the Ambassador of Algeria removed every doubt about that intention, when he stated that his main preoccupation was the absolute and 'total liberty' of the Special Rapporteurs.⁷⁶⁵ That a series of countries, including Jordan,

⁷⁶³ India, Statement by the representative of India. Review of Mandates: Items 5-8, 7 February 2007 (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/070207/Tab/India.pdf>)

⁷⁶⁴ India, Statement by the representative of India, Human Rights Council: Review of Mandates, 6 February 2007 (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/India-.pdf>)

⁷⁶⁵ African Group, Déclaration de Idriss Jazairy Ambassadeur, Représentant Permanent de l'Algérie au nom du Groupe Africain, Groupe de travail Intergouvernemental intersession sur la mise en œuvre du paragraphe 06 de la résolution 60/251 – Révision des mandats, 6 February 2007 ([https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/Algeria\(AfricanGroup\).pdf](https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/Algeria(AfricanGroup).pdf))

Egypt, Nigeria, Kenya, Algeria have invoked the Code after its adoption to reprimand Special Rapporteurs for their ‘illegal’ activities betrays the actual intention for creating one.⁷⁶⁶

Overall, the Special Procedures became a flashpoint of two antithetical visions about their added value, and continued existence: a majority view that sought their destruction, and a minority view that aimed at their preservation and strengthening. It is the illustration of a conflict between two antithetical interpretations of the universal that underpinned their respective positions and ultimately the combined outcome –an outcome that reflects more closely the view expressed by a minority but is nevertheless closer to the universal than the majority view. Their proximity to the universal gave them sufficient strength to thwart their destruction in the name of the universal: the minority embodied the universal sufficiently to negate attempts to manufacture an incompatibility between the continued existence, and even the strengthening of the Special Procedures, and the universal that for all intents and purposes serves as the polar star. It was a fierce battle to the very end, especially given China’s determination to undermine the Special Procedures and the Council’s ability to adopt country resolutions.

The stakes were so high that the European Union will have threatened to withdraw from the Council altogether, had China not backed down.⁷⁶⁷ It was the one issue where ‘China did not get its way’, Rosemary Foot and Rana Siu Inboden observe, an anomaly they attribute to ‘the reluctance of other states to support a controversial position clearly at odds with a number of

⁷⁶⁶ Philip Alston, ‘Hobbling the Monitors: Should U.N. Human Rights Monitors Be Accountable?’, *Harvard International Law Journal* 52, no. 2 (2011): 597–600.

⁷⁶⁷ Franziska Brantner and Richard Gowan, ‘A Missed Opportunity? The EU and the Reform of the UN Human Rights Architecture’, in *EU Foreign Policy in a Globalized World. Normative Power and Social Preferences*, ed. Zaki Laïdi (London: Routledge, 2008), 97.

key, mainly Western European countries'.⁷⁶⁸ But it is hard to explain what made the Chinese position 'controversial' or gave blocking power to a minority of states without considering the imperatives of the universal horizon within which they operated. After all, it was not just a defeat for China but also a major defeat for other Asian and African countries who had supported the reform all along in order to kill the country-specific mandates, when they had a comfortable numerical majority to do so. This defeat exemplifies the power of proximity with the universal to neutralise deviant action of even the majority or major powers.

The universal horizon did not only secure the survival of the Special Procedures—it also made them stronger, thanks to the very efforts aimed at their destruction. It is true that the battle very nearly killed the Special Procedures, as after the long-standing and persistent attempts by Russia and Cuba, the mandates on Belarus and Cuba were eliminated, without any notable improvements on the ground to justify change in policy.⁷⁶⁹ The future prospect of their further development seemed also quite grim. As Czech Ambassador Tomas Husak, after having acted as facilitator of negotiations, testifies: '[t]he majority of States over the past year sought to limit the role of the Special Procedures and weaken this essential tool the Council needs to address human rights violations effectively [...]. The final agreement has been a fragile consensus, and the Special Procedures may not be considered on the safe side'.⁷⁷⁰ It is also true that the final deal retained a permanent mandate on Israel, in addition to the fixed item on the Council's agenda.

⁷⁶⁸ Rosemary Foot and Rana Siu Inboden, 'China's Influence on Asian States during the Creation of the U.N. Human Rights Council: 2005–2007', *Asian Survey* 54, no. 5 (2014): 852.

⁷⁶⁹ Tomas Husak, 'In Defence of the United Nations Special Procedures', in *The First 365 Days of the United Nations Human Rights Council*, ed. Lars Müller (Geneva: Political Affairs Division IV, Swiss Federal Department of Foreign Affairs, 2007), 95.

⁷⁷⁰ Husak, 94.

Yet, it is also hard to see what could have defeated the Asian and African majority in their attempts to eradicate the Special Procedure, had they not preserved the precedent with their insistence on the mandate on Israel. Their position on Israel could not but compromise their potentially lethal hostility to the Special Procedures, which also doomed the Chinese incessant efforts to impose a two-thirds threshold. Without Israel as precedent, the majority could have comfortably framed its opposition to Special Procedures in universal terms – thereby allowing them to justify the use of their voting power to realise a universal goal. Equally important was also the preservation of mandates on Myanmar and North Korea.

Despite the immediate impact, both the principle and the precedent of the Special Procedures remained intact, and thanks to the universal horizon they were to grow again, as they have. In contrast to the intention of the Code, the European Union and a few other countries managed to exploit the justifications in favour of the Code to further expand and solidify the standing of Special Rapporteurs.⁷⁷¹ They were able to extrapolate the universality behind calls for a Code to implant universal elements within the Code. Endeavours to limit Special Rapporteurs led to an ‘unintended positive outcome –the establishment of a clear legal basis to exercise their most exceptional powers’, Dominguez-Redondo observes;⁷⁷² she calls it paradoxical and a ‘blessing in disguise’; from the point of view of the universal horizon, it is a predictable and natural development. The attempt to have the Council appoint Special Rapporteurs in the name of universal considerations led to the creation of greater transparency and inclusiveness

⁷⁷¹ European Union, Negotiation paper on the Code of Conduct - suggested changes in yellow- Draft Code of Conduct for the system of Special Procedures, (no date) (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/ContributionsStates/African%20COC%20EU%20comments%20final.pdf>)

⁷⁷² Elvira Domínguez Redondo, ‘Rethinking the Legal Foundations of Control in International Human Rights Law – The Case of Special Procedures’, *Netherlands Quarterly of Human Rights* 29, no. 3 (1 September 2011): 262.

in selecting Special Rapporteurs, and limited the power of the Council to choose from a list of candidates that possessed the highest degree of ‘expertise, experience, independence, impartiality, integrity and objectivity’, reflecting more the universal justifications invoked rather than the intention of the proponents of the Council’s role. As a result, the Special Procedures are as strong as ever.⁷⁷³ This is a triumph of universalism.

⁷⁷³ Ted Piccone, *Catalysts for Change: How the U.N.’s Independent Experts Promote Human Rights* (Washington D.C.: Brookings Institution Press, 2012); Ted Piccone, ‘The Contribution of the UN’s Special Procedures to National Level Implementation of Human Rights Norms’, *The International Journal of Human Rights* 15, no. 2 (2011): 206–31.

Chapter V: The Universal Periodic Review

‘But all the Rogues cry’d brazenly
Good Gods, had we but Honesty!’

— Mandeville, *The Grumbling Hive*⁷⁷⁴

Having failed to eradicate the Special Procedures but determined to neutralise their operation, Third World states contrived a demand for a new institution to achieve the universal aspiration of the new Council; it was a brazen manipulation of the universal to quash scrutiny of serious violations of the most elementary universal rights, but again, they could not control the force of the universal horizon they employed to create the new institution: the Universal Periodic Review. The universal horizon forced them to design an institution that increased international scrutiny of their human rights practices, rather than decreasing it or undermining the Special Procedures in the process. They had painted it as a revolutionary institution—a cooperative, apolitical body to put an end to all forms of politicization to achieve the unencumbered realisation of all human rights of all in all countries: this became the *raison d’être* of the Periodic Review.

Curiously, the ambitious goal of non-political treatment of human rights had to be attained not through experts, invoked typically for their objectivity and impartiality, but rather through states themselves. States had to retain full and exclusive control over the Periodic Review to achieve those very same goals: impartial and objective assessment of human rights practices. That is, states collectively driving and watching over the non-political treatment of human rights in order to avoid politicization. But nothing in their actions pointed in that

⁷⁷⁴ Mandeville, *The Fable of the Bees*, 27 [Emphasis in original].

direction. A state-driven institution created with the manifest aim of achieving impartial arbitration of human rights could just as well stand for exactly the opposite: the total neutralisation of the normative force of human rights in the name of appropriating and adjudicating them in a ‘non-politicised’ or ideal manner.

That is not what happened. Proponents of what became the Periodic Review made a momentous intervention in the architecture of monitoring of human rights, as they did not create just a new institution, but one created *in opposition* to existing ones, raising fundamental questions about its purpose and design. It is not what either of the rival forces wished for, yet the universal horizon forced them to move in that direction. The rhetoric of the universal is critical to both the proponents and opponents of monitoring and serves as the unrivalled and unquenchable resource to both expose and deny the deficiencies of existing institutions or alternatives to them. The contentious process that ultimately produced a demand for the Periodic Review and shaped negotiations about its institutional design, points to an underlying multidimensional conflict and divisions among state and non-state actors – not only about the norm of monitoring, but also about the different monitoring alternatives that they have produced over time.

The chapter is in four parts. The first part traces the dynamic of the competing grievances about the ideal form of oversight and how that grew into a formidable force that destabilised the whole Commission, making reform possible. The second part explores the replacement of the Commission with the new Council, and the birth of the Periodic Review. In the third and most substantive part, the focus is on how competing and sometimes antithetical visions about monitoring translated into actual institutional choices that shaped the distinct institutional design of the Periodic Review. The final and concluding section considers the

defeat of open defiance to the Periodic Review and the consolidation of the institution and its contribution to strengthening the role of Treaty Bodies and the Special Procedures, rather than undermining them—as one side hoped, and the other feared.

5.1. Polarization

Never has the Commission enjoyed full support by any country or group at any point in time, even as various states have employed it occasionally against their adversaries, yet nearly all of them have had very strong views about what the Commission should do and how it should do it. But by invariably appealing to the universal to evaluate the work of the Commission, various countries pursuing competing interests have not only raised expectations about what the Commission can do, but have also inevitably exposed the inadequacy of how the Commission pursues its noble mission. Their interaction generated two antithetical interpretations of the distance of the Commission from the universal, whilst both sides agreed that there was a disturbing distance that undermined the ability of the Commission to pursue its noble goals, and that that distance was only growing, as the charge and counter-charge of politicisation neared its zenith in the 2000s. A rather unusual statement at the closing meeting of the fifty-ninth session of the Commission in 2003, by the then High Commissioner for Human Rights, Sergio Vieira de Mello, conveys the atmosphere and the deleterious effects of the prevailing discourse with the following words:

‘[t]his brings me to what, in my opinion, has been a cause for concern at this Commission: a lack of directness and openness. In addressing this, I will myself be direct, trusting that you will take my remarks in the constructive spirit in which they are intended. Let me suggest, first of all, that the word "*politicization*" and its variants be retired from active service. I have used the word myself, so I will try to

lead by example. Let me be frank: most of the people in this room work for governments or seek to affect the actions of governments. That is politics. For some to accuse others of being political is a bit like fish criticizing one another for being wet. The accusation hardly means anything anymore. It has become a way to express disapproval without saying what is really on our mind. The Commission could use[sic] with plainer speaking. This, rather than charges of politicization, *will truly help us get beyond politics* to the strengthening of human rights in all countries'.⁷⁷⁵

Sergio Vieira de Mello had just made a remarkable confession that defied the prevailing perception of politicization as the main cause behind the malaise of the Commission. His address displays courage in exposing the blatant hypocrisy that is involved in unrelenting charge and counter-charge of politicization, which ultimately obscures responsibility for gross violations of basic rights – all in the illusive quest for some elusive impartial application of human rights. Yet, and this is crucial, de Mello's core message suggests that politicization can be separated from politics, and that the Commission can admit politicization whilst overcoming politics. Or, taking it one step further, the admission of politicization would be a strategy to move beyond politics. This is a contradiction in terms.

But as it was de Mello speaking, a man of extraordinary rigour and passion for philosophy, as Samantha Power vividly narrates,⁷⁷⁶ this contradiction might be just a rhetorical intervention to deflate the value of incessant denunciations of politicization in the name of overcoming

⁷⁷⁵ High Commissioner for Human Rights, 'Commission's structures are sound, problems can be surmounted, High Commissioner says as main UN human rights body ends session', statement at the fifty-ninth Session of the Commission on Human Rights, 25 April 2003. [Emphasis added] (<http://www.usp.br/svm/textos/t-dh-07.php>)

⁷⁷⁶ Samantha Power, *Chasing the Flame: Sergio Vieira de Mello and the Fight to Save the World* (London: Allen Lane, 2008), 21–22.

politics, rather than flawed reasoning on his part. His perfunctory reference to ‘moving beyond politics’ may be just an empty admission to make his critique of the hypocrisy of politicization acceptable. His real target is not ‘politicization’, but governments that appeal to the universal to actually undercut indignation over violations of human rights. For as he later emphasises: ‘[w]hen a charge of partiality – of failure to recognize the indivisibility of human rights – destroys a resolution on an important question, this is not to be celebrated. It is a disaster. It is a failure to take up the burden’.⁷⁷⁷ He is here illustrating the raw reality of a travesty of universalism.

Nevertheless, what begins as an unorthodox position that breaks away from mainstream discourse, especially of the UN officialdom, in effect ends up reinforcing the prevailing assertion that human rights should be placed above and beyond politics, and that politics must be overcome for their effective realisation. This powerful (mis)conception animates the positions and actions of both those who seek to advance or disrupt the cause of human rights. De Mello would have known that ‘politicisation’ is here to stay – it can never retire; it is a signifier of deeper currents that it generates and in turn informs the pronouncements and actions of agents that invoke it. This is because politicisation offers the veneer of universality to intentions and actions to resist or support the work of the Commission in pursuit of universal respect for human rights. The argumentative spiral that this exchange generated grew so powerful that ultimately engulfed and obliterated the Commission as a whole, leading to its replacement with a new institution, the Human Rights Council. But despite the antithetical intentions in evoking the universal, the actual result resembles more strongly the natural implications of universal justifications that rival agents relied on, rather than their

⁷⁷⁷ High Commissioner for Human Rights, ‘Commission's structures are sound, problems can be surmounted, high commissioner says as main UN human rights body ends session’, statement at the fifty-ninth Session of the Commission on Human Rights, 25 April 2003.

intentions. It created a demand for ever-more universal institutions as embodied in the Periodic Review.

5.1.1. Disavowing own creation

The whole Commission came under attack, but the epicentre of that attack was the Special Procedures: the very countries that had created them increasingly sought their destruction, in a way disavowing their own creation to the extent it went beyond their immediate priorities—South Africa and Israel. Newly independent countries traded attitudes to the Special Procedures with their formal colonial rulers. With the process of decolonisation nearing its completion, colonial powers had less and less reasons to fear or obstruct UN scrutiny, and became increasingly active in mobilizing the Commission to address ever more cases of violations. Newly decolonised countries had more and more reasons to fear the Commission and its Special Procedures, especially as the state apparatus inherited from former colonial rulers continued to generate systematic violations of human rights, but now under supposedly sovereign leaders.

These leaders sought refuge in sovereignty to hide grave and systematic violations of human rights they caused after independence. They evoked the highest universal ideals to resist and delegitimise the institution and practice of colonial rule in order to justify their right to self-rule, but now they were exercising self-rule to hide the denial of elementary universal rights. In invoking sovereignty and the principle of non-interference, they relied on the same exact ground that colonial powers had invoked to deny their right to self-determination. Even the Indian representatives, who set the first precedent in moving the UN towards the consideration of human rights, fell silent after India itself came under attack for massacring

the Muslim population during the ‘police action’ in Hyderabad, after which it increasingly sought shelter under the principle of ‘non-interference’.⁷⁷⁸

Newly independent countries began using their sovereignty as a shield against the Commission that greatly facilitated their independence. Attempts by the Commission to address violations of human rights where they occurred in the most extreme forms –in former colonial countries–fostered growing resentment and outrage in the Third World, given its unmistakable concentration on them. That former colonial powers reinvented themselves as proponents of an activist Commission made it easier to portray the latter as an extension of colonial domination. In the name of universality, these countries became champions of archaic notions of sovereignty and, at every turn, they tried to disrupt and undermine the Commission and its Special Procedures in addressing violations of human rights. They relied on the language of impartiality and non-interference to resist both scrutiny and social opprobrium.

In passing a remarkable resolution in 1981, aptly titled ‘Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States’, the Assembly formalised the growing resentment toward interference on grounds of human rights.⁷⁷⁹ The Declaration uses the strongest terms to affirm the duty of states to observe strict respect for sovereignty and reject any direct or indirect external interference that affects their natural resources and autonomous rule. It calls on all states to desist from the ‘exploitation and the distortion of

⁷⁷⁸ Thakur, ‘The “Hardy Annual”’, 407.

⁷⁷⁹ General Assembly Resolution A/RES/36/103. ‘Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States’ of 9 December 1981.

human rights issues'⁷⁸⁰ and 'any defamatory campaign, vilification or hostile propaganda'⁷⁸¹ as a means of meddling in the internal matters of sovereign states. Yet, and here lies the Achilles heel, the Declaration does not reject interference *in toto* but only in well-defined direction, that is, *selectively*. In fact, it strongly affirms the duty of states 'fully to support the right of self-determination, freedom and independence of peoples under colonial domination, foreign occupation or racist regimes',⁷⁸² and this with all means necessary, including 'political and armed struggle', especially when it concerns the 'elimination of massive and flagrant violations of the rights of nations and peoples, and in particular, for the elimination of apartheid and all forms of racism and racial discrimination'.⁷⁸³

The blatant double standard exemplified in affirming the principle of non-interferences as a general rule but then strongly endorsing intervention in select cases could not be clearer. Nevertheless, and this is critical, the mere admission of intervention in certain cases leaves behind traces of recognition that rivals can reanimate into precedents for future action, and to keep the principle of intervention alive, and use it, even if not immediately acted upon by rival agents in other similar cases. This declaration refers again to other declarations from the 1970s, which refer back to other resolutions from the 1960s, and then further back. In other words, these initiatives are not disparate or isolated interventions, but interconnected actions revealing a common source: shared universal, and expectations of consistency with it. It is a source that fuels expressions of a wider struggle of the periphery to resist and offer an

⁷⁸⁰ General Assembly Resolution A/RES/36/103. 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States' of 9 December 1981. (II, (I))

⁷⁸¹ General Assembly Resolution A/RES/36/103. 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States' of 9 December 1981. (II, (j))

⁷⁸² General Assembly Resolution A/RES/36/103. 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States' of 9 December 1981. (III, (b))

⁷⁸³ General Assembly Resolution A/RES/36/103. 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States' of 9 December 1981. (III, (c))

alternative to the domination of the core –using the same normative resources that the core adopts to justify the domination and exploitation of the periphery.

These same concerns, as Menno Kamminga reveals, were raised also in a failed resolution from 1985, sponsored by Angola, Czechoslovakia, Ethiopia, the Laos, the Syria, Ukraine, and Vietnam. Bearing the evocative title ‘Inadmissibility of exploitation or distortion of human rights issues for interference in the internal affairs of States’, the draft resolution reasserted ‘the duty of States to refrain from the exploitation or distortion of human rights issues for interference in the internal affairs of State’, and strongly denounced the ‘defamatory campaign, vilification and hostile propaganda by the *apartheid* regimes of South Africa and Israel for the purpose of (...) interfering in the internal affairs of the neighbouring States’.⁷⁸⁴ Here the appropriation of impartiality for denouncing external interference becomes totally transparent. Yet the reason that Kamminga gives for its failure is highly revealing for the double-edged character of the uses of the universal. He attributes it to the intervention of a Zimbabwean diplomat, who opposed the resolution ‘because it included a perfunctory reference to South Africa “simply to get some votes”. *Apartheid* was too serious an affair to be used in such a way, he said’.⁷⁸⁵ This illustrates the limits of the manipulation of the universal –the perversity of universalism- and the boomerang risk associated with it, which might contribute to the triumph of universalism.

One of the most striking examples is the case of Cuba, for whom the UN has served as the main platform from which to confront the embargo imposed by the United States and their resulting isolation. Denunciation of politicization and an appeal to impartiality has been

⁷⁸⁴ Menno T. Kamminga, *Inter-State Accountability for Violations of Human Rights* (Philadelphia: University of Pennsylvania Press, 1992), ix.

⁷⁸⁵ Kamminga, x [Emphasis in original].

central to their discourse. A resolution Cuba submitted to the General Assembly in 1990, with the instructive title ‘Strengthening of United Nations action in the human rights field through the promotion of international co-operation and the importance of non-selectivity, impartiality and objectivity’ is just one illustration of the typical employment of politicization and impartiality.⁷⁸⁶ Whereas the resolution mentions it only once, in its first operative paragraph, what it really is about—rejection of external interference—the entire preamble and the other eight operative paragraphs are dedicated to the importance of the observance of international standards and international cooperation and impartiality for the advancement of all human rights.

It recognises that international concern for ‘flagrant violations of human rights’ is a legitimate concern, yet it adds that that concern should be ‘guided by the principles of non-selectivity, impartiality and objectivity and should not be used for political ends’.⁷⁸⁷

Cooperation is presented as the only method to effectively advance all human rights and freedoms, which in turn can be further enhanced by an ‘unbiased and fair approach to human rights’.⁷⁸⁸ Finally, the resolution insists on the ‘continuing need for impartial and objective information on the political, economic and social situations and events of all countries’,⁷⁸⁹

⁷⁸⁶ The General Assembly, Resolution A/RES/45/163 ‘Strengthening of United Nations action in the human rights field through the promotion of international co-operation and the importance of non-selectivity, impartiality and objectivity’, 18 December 1990.

⁷⁸⁷ The General Assembly, Resolution A/RES/45/163 ‘Strengthening of United Nations action in the human rights field through the promotion of international co-operation and the importance of non-selectivity, impartiality and objectivity’, 18 December 1990. OP 5.

⁷⁸⁸ The General Assembly, Resolution A/RES/45/163 ‘Strengthening of United Nations action in the human rights field through the promotion of international co-operation and the importance of non-selectivity, impartiality and objectivity’, 18 December 1990. OP 6.

⁷⁸⁹ General Assembly Resolution A/RES/45/163 ‘Strengthening of United Nations action in the human rights field through the promotion of international co-operation and the importance of non-selectivity, impartiality and objectivity’, 18 December 1990. OP 7.

and calls on the Commission to explore ways of achieving all these ends.⁷⁹⁰ In draft form, Kamminga notes, the resolution was more assertive in denouncing the ‘exploitation and distortion of human rights’ and external intervention in their name as violation of international law, but the Cuban representatives had to accept many amendments that ultimately watered down the text, reflecting perhaps the withering away of the traditional support that Cuba had enjoyed in the UN throughout the Cold War.⁷⁹¹

5.1.2. China awakens

In the twilight of the Cold War it was China that emerged as the protagonist of a position that had been traditionally voiced by Cuba and its allies. Especially after 1989, it was China that gave new life to this old practice. The growing assertiveness of Chinese diplomacy coincided with the *Tiananmen Square Massacre* – ‘June Fourth Incident’ as the China refers to it – where the Chinese army deliberately killed thousands of civilians to put an end to a demonstration by students and workers demanding basic rights and freedoms.⁷⁹² The domestic and international response to this massacre was so vociferous, that it threatened to derail reforms within China and its opening.⁷⁹³ This event put China under considerable pressure, including at the UN, where Western countries mobilised the Commission, and its subsidiary body, the Sub-Commission, to expose the flagrant breaches of human rights in

⁷⁹⁰ General Assembly Resolution A/RES/45/163 ‘Strengthening of United Nations action in the human rights field through the promotion of international co-operation and the importance of non-selectivity, impartiality and objectivity’, 18 December 1990. OP 9.

⁷⁹¹ Kamminga, *Inter-State Accountability for Violations of Human Rights*, 1992, xi.

⁷⁹² Liang Zhang, *The Tiananmen Papers*, ed. Andrew J. Nathan and Perry Link (London: Abacus, 2002), Chapter 10; Zhao Ziyang, *Prisoner of the State: The Secret Journal of Zhao Ziyang*, ed. and trans. Adi Ignatius, Bao Pu, and Renee Chiang (New York: Simon & Schuster, 2009), Chapter 4.

⁷⁹³ Zhang, *The Tiananmen Papers*, 481.

China. This involved the tabling of annual resolutions on the situation of human rights in China that met increasingly forceful resistance from the Chinese government.⁷⁹⁴

Initially, China and its allies used procedural tactics, the so-called ‘no-action motion’, to block action being taken on draft resolutions on China, effectively dodging scrutiny. But very quickly, China switched from a defensive to an offensive posture, using the universal to discredit its adversaries and, increasingly, the human rights system in its entirety. It relied increasingly on *tu quoque* arguments to undermine initiatives directed at China, as Ambassador Qiao Zonghuai’s response to a draft resolution in 1999 illustrates. In a fundamental way, Zonghuai questioned the moral standing of the United States to denounce violations of human rights in China or ask to ratify human rights treaties or stop using no-action motions, at a time when ‘gross violations of human rights in the US are well documented: racial discrimination, police violence, torture in prison, death penalty for minors, just to name a few problems of racial discrimination’, coupled with a ‘poor record in acceding to human rights conventions’, and even the use of a no-action motion.⁷⁹⁵

The implication was that the US initiative embodied ‘double standards and the politicization of human rights’. Aside from ‘tramp[ing] upon the credibility of the Commission’, the US initiative had as its ulterior moved the undermining of ‘reforms, development and stability in

⁷⁹⁴ Ann Kent, ‘China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989-1994’, *Human Rights Quarterly* 17, no. 1 (1 February 1995): 1–47; Ann Kent, ‘States Monitoring States: The United States, Australia, and China’s Human Rights, 1990-2001’, *Human Rights Quarterly* 23, no. 3 (2001): 583–624; Toby King, ‘Human Rights in European Foreign Policy: Success or Failure for Post-Modern Diplomacy?’, *European Journal of International Law* 10, no. 2 (1 January 1999): 313–37.

⁷⁹⁵ China, Statement by Ambassador Qiao Zonghuai, Head Of The Chinese Delegation, Before The Vote On The Draft Resolution ‘Situation Of Human Rights In China’ 23 April 1999 (http://www.china-un.ch/eng/dbtyw/rqrd_1/thsm/t85086.htm)

China'.⁷⁹⁶ Voting in favour of no-action motions—blocking Commission action on violations of universal rights in China—was portrayed as ‘an act to safeguard the solemnity, objectivity, impartiality, and thus credibility, of the Commission’.⁷⁹⁷ The silencing effect that results from forging symmetry among asymmetric violations—i.e. that the poor credentials of the accuser would undermine the legitimacy of its accusations— can be observed in numerous statements made by Chinese diplomats in their attempt to justify the blocking UN action against them.

The intensification of the Chinese offensive moved beyond the UN as it began using financial and economic means to attract support among traditional allies, and managed to break the cohesion of European countries that co-sponsored the US resolutions on China, from 1998 onwards.⁷⁹⁸ The United States continued to introduce resolutions even as they had little chance of succeeding,⁷⁹⁹ but China succeeded in neutralising their intended exposure. This included the beginning of bilateral ‘dialogues’ and ‘quiet diplomacy’ with the European Union and other countries, which effectively stifled focused public exposure and global

⁷⁹⁶ China, Statement by Ambassador Qiao Zonghuai, Head Of The Chinese Delegation, Before The Vote On The Draft Resolution ‘Situation Of Human Rights In China’ 23 April 1999 (http://www.china-un.ch/eng/dbtyw/rqrd_1/thsm/t85086.htm)

⁷⁹⁷ China, Statement By H.E. Ambassador Qiao Zhonghuai, Head of the Chinese Delegation, Before the Vote on the Draft Resolution ‘Situation of Human Rights in China’ at the 56th Session of the Commission on Human Rights, 18 April 2000 (http://www.china-un.ch/eng/dbtyw/rqrd_1/thsm/t85096.htm)

⁷⁹⁸ Philip Baker, ‘Human Rights, Europe and the People’s Republic of China’, *The China Quarterly*, no. 169 (1 March 2002): 45–63; King, ‘Human Rights in European Foreign Policy’.

⁷⁹⁹ Draft resolution E/CN.4/1999/L.22 ‘Situation of human rights in China’ submitted by the United States, sponsored by Poland, 23 April 1999 (blocked by no-action motion by 22 to 17, with 14 abstentions); Draft resolution E/CN.4/2000/L.30 ‘Situation of human rights in China’ submitted by the United States, 18 April 2000, (blocked by no-action motion by 22 to 18, with 12 abstentions); Draft resolution E/CN.4/2001/L.13 ‘Situation of human rights in China’ introduced by the United States, 18 April 2001 (blocked by no-action motion by 23 votes to 17, with 12 abstentions); Draft resolution E/CN.4/2004/L.37 ‘Situation of human rights in China’ introduced by the United States, 15 April 2004 (blocked by no-action motion by 28 to 16, with 9 abstentions).

opprobrium of violations and repression in China.⁸⁰⁰ At the same time, China managed to attract a number of countries, the so-called Like Minded Group, to launch a broader offensive on the structures and practices of the Commission, especially its Special Procedures.⁸⁰¹ This group became increasingly vocal about what they saw as biased and politicised action of the Commission, demanding dialogue and cooperation as means to overcome its supposed deficiencies.

5.1.3. Acceleration

The Chinese offensive intersected with a competing stream of discontent with the politicised operation of the Commission – but for exactly the opposite reasons; it encountered the discontent of many Western or industrialised countries and NGO's who decried the inaction of the Commission in the face of blatant violations of human rights, primarily on the periphery. The explosion of their discontent coincided with the failure of the United States to secure a seat on the Commission in 2001, losing by a large margin to France, Austria, and Sweden that competed for the three vacant places reserved for the Western European and Other Group (WEOG), one of the five electoral caucuses of the UN.⁸⁰² It was the first time in the history of the Commission that the United States did not sit on this body, and the discontent with the Commission rose dramatically.

⁸⁰⁰ Baker, 'Human Rights, Europe and the People's Republic of China'.

⁸⁰¹ This group consisted of Algeria, Bangladesh, Belarus, Bhutan, Cuba, China, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Sudan, Syria, Viet Nam, Zimbabwe. 'Statement by H.E. Ambassador SHA Zukang, on behalf of the Like Minded Group, at the Informal Meeting on Reform of the UN Human Rights Machinery (No date); <http://www.china-un.ch/eng/rqrd/thsm/t191364.htm#>)

⁸⁰² Economic and Social Council, Decisions adopted by the Economic and Social Council at its resumed organizational session for 2001 (E/2001/INF/2/Add.1) 18 June 2001. (France received 52 votes (out of 54), Austria 41, Sweden 32, and the United States 29).

The absence of the United States in the Commission also meant that no government could dared to place China under UN scrutiny, something that was duly noted by Chinese official media, as Alston notes.⁸⁰³ The ‘People’s Daily’ attributed this ‘embarrassing defeat’ of the United States to its disregard for the organization and human rights treaties and unilateral policies, and ‘its attempt to use the so-called human rights issue as a tool to pursue its power politics and hegemonism in the world’. But China also offered a clear alternative. The United States had to stop ‘politicising’ human rights and ‘enter in dialogue on equal footing with other countries, rich or poor strong or weak’ in order to avoid embarrassing itself in the future.⁸⁰⁴

The United States managed to regain its seat in 2002, but the damage was done. The appointment of Libya as Chair of the Commission in 2003, a position that rotates among the five UN electoral caucuses, caused ‘apoplexy among Western governments’ and handed ‘a propaganda gift to those who wanted to discredit the Commission for other, often very different, reasons’, Alston observes.⁸⁰⁵ But in contrast to what this reaction may suggest, there was nothing abnormal about these elections: they followed to the letter the procedures decided at the creation of the Commission in 1946 and subsequent practice, determined mainly by the United States and the Soviet Union. What was unusual is that this standard practice came to be considered as intolerable practice from the point of view of the universal. And this irrespective of whether the principle of universal human rights drove the conflict about the role and performance of the Commission.

⁸⁰³ Philip Alston, ‘Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council’, *Melbourne Journal of International Law* 7 (2006): 191.

⁸⁰⁴ People’s Daily, ‘Vote for Justice, Embarrassment for U.S.’, 4 May 2001. (http://en.people.cn/english/200105/04/eng20010504_69258.html)

⁸⁰⁵ Alston, ‘Reconceiving the UN Human Rights Regime’, 192.

Discontent generated from both sides spilled over into the official discourse of the United Nations proper, which is remarkable, as it ultimately meant open acknowledgement of its own inadequacy. Whilst appreciating the vital role of the Commission, the Secretary General Kofi Annan made a forceful pronouncement, warning its members that:

‘(...) if they allow elections and debates to be dictated by political considerations, or by block positions, rather than by genuine efforts to strengthen human rights throughout the world, the credibility and usefulness of the Commission will inevitably be eroded’.⁸⁰⁶

The Secretary General saw the danger of politicization not just to the operation of the Commission but also to its continued existence. The High-Level Panel that Annan convoked to contemplate the role of the UN in facing critical challenges to global order came with an unusually damning assessment of the Commission as a whole. What made their verdict more atypical was that they expressed it in unambiguous terms:

‘[...] the Commission’s capacity to perform [its] tasks has been undermined by eroding credibility and professionalism. Standard-setting to reinforce human rights cannot be performed by States that lack a demonstrated commitment to their promotion and protection. [...] in recent years States have sought membership of the Commission not to strengthen human rights but to protect themselves against

⁸⁰⁶ Secretary General of the United Nations, ‘Strengthening of the United Nations: an agenda for further change’, report of the Secretary-General (A/57/387) 9 September 2002, OP 46.

criticism or to criticize others. The Commission cannot be credible if it is seen to be maintaining double standards in addressing human rights concerns'.⁸⁰⁷

Such an assessment leaves little space for the preservation of the *status quo*, making whatever reform of the Commission a necessity. The High-Level Panel recommended a series of reforms, including the expansion of the Commission's membership to universal membership, as a way to overcome the futile debate about membership criteria that risked 'further politicizing the issue'.⁸⁰⁸ More radically, but for the long term, it proposed to upgrade the status of the Commission to that of a 'Human Rights Council', as a principal organ of the United Nations, alongside the Security Council.⁸⁰⁹

Strikingly, the long term was compressed to less than four months, because in March 2005 Annan came out with another report, urging states to replace the Commission with a 'smaller standing Human Rights Council' and one that consists of members that 'abide by the highest human rights standards' to be elected directly and by two-thirds majority of the members of the General Assembly.⁸¹⁰ This was seen as necessary to recognise the primacy of human rights in the Charter, and meet the expectations of people about the UN. In the span of a few months, the 2005 World Summit endorsed Annan's assessment and resolved to 'create a Human Rights Council' and requested the President of the General Assembly to open the negotiations.⁸¹¹

⁸⁰⁷ High-level Panel on Threats, Challenges and Change, 'A more secure world: our shared responsibility' (A/59/565) 2 December 2004, OP 283.

⁸⁰⁸ High-level Panel on Threats, Challenges and Change, 'A more secure world: our shared responsibility' (A/59/565) 2 December 2004 OP 285.

⁸⁰⁹ High-level Panel on Threats, Challenges and Change, 'A more secure world: our shared responsibility' (A/59/565) 2 December 2004 OP 291.

⁸¹⁰ Secretary General of the United Nations, 'In larger freedom: towards development, security and human rights for all, report of the Secretary-General (A/59/2005) 26 May 2005, OP 183.

⁸¹¹ General Assembly Resolution 60(1) 25 October 2005.

5.2. Recognition

The travesty of universalism and attempts to resist it generated a powerful storm that washed away the Commission and gave rise to the new Council on 15 March 2006, following arduous negotiations in the Assembly.⁸¹² But in many ways the finale design of the Council reflected a triumph of universalism, contrary to the intentions behind incessant calls for reform. It is true that the transition from the Commission to the Council strengthened the voting power of Asian and African countries that demanded reform, at the cost of Latin American and Western countries who were mainly on the defensive.⁸¹³ But this is an illustration of the power of the universal embodied in the demands for greater representation and fairer distribution of seats to better reflect the world and the inability of incumbent dominant groups to resist such demands.

But proponents of reform got more than they wished for. The reform elevated the status of the Council from a subsidiary organ of the Economic and Social Council to a subsidiary organ of the Assembly, which elects its forty-seven members by simple majority. Aspiring members had to make additional voluntary pledges to human rights and now NGOs such as Amnesty International and the International Service of Human rights hold ‘pledging events’ for states that stand for election, screening them on the degree of cooperation with the Council and its mechanisms, support for civil society and prevention of reprisals, Treaty

⁸¹² General Assembly Resolution 60/251 of 15 March 2006.

⁸¹³ The redistribution of seats among the five electoral caucuses in the transition from the Commission (53 members) to the Council (47 members) was as follows: Africa maintained roughly the same vote share, (15 (28%) compared to 13 (28%), whilst Asia increased its share with over five percent, 12 (23%) compared to 13 (28%) and Eastern Europe with four percent 5 (9%) compared to 6 (13%). In sharp contrast, both Latin America, and Western countries saw their vote share shrink by four percent each, 11 (21%) compared to 8 (17%) and 10 (19%) compared to 7 (15%) respectively.

ratification and Treaty Body cooperation, National human rights institutions etc. What is more, the Assembly gave itself the power to suspend membership for large-scale violations, as was the case with Libya in 2011, following the brutal onslaught of civilians by Muammar Gaddafi's forces.⁸¹⁴ All these measures were taken in the name of enabling a Council to work towards 'ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization',⁸¹⁵ to be guided by 'the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation'.⁸¹⁶ But achieving the high universal aspirations that the arguments in favour of reform created the need for a new institutional structure to pursue that noble goal. Hence the Assembly empowered the new Council to undertake 'a universal periodic review of human rights obligations of all states in a manner that 'ensures universality of coverage and equal treatment' based on 'objective and reliable information'.⁸¹⁷ The groundwork for yet another monitoring institution was thus laid down.

This is not the outcome rival force fought for; this is the outcome that the use of their source of justification – appeals to the universal – dictated and ineluctably led to. The United States expressed strong objection towards the proposals for the new Council and called for a vote and voted against it, together with Israel and Marshall Islands, and later boycotted it. Even as the European Union came to play a major role, it was dragged into a process without a shared assessment of flaws of the old Commission or the need for its replacement, let alone the need for and the design of the new institution.⁸¹⁸ Judging from a crude inspection of voting

⁸¹⁴ General Assembly Resolution 65/265 of 18 November 2011.

⁸¹⁵ General Assembly Resolution 60/251 of 15 March 2006, PP 9.

⁸¹⁶ General Assembly Resolution 60/251 of 15 March 2006, OP 4.

⁸¹⁷ General Assembly Resolution 60/251 of 15 March 2006, OP 5(e)).

⁸¹⁸ The redistribution of seats among the five electoral caucuses in the transition from the Commission (53 members) to the Council (47 members) was as follows: Africa maintained roughly the same vote share [(15 (28%) compared to 13 (28%)] whilst Asia increased its

numbers, the Western group where most EU members belong shrank by four percent, whilst that of Asian countries grew by over five percent.

Unless the European Union and other Western countries secretly supported a more equitable representation within the Council at their own expense, which is something that cannot be inferred from their discourse or action, this is an outcome that does not reflect maximising of their preferences. The same holds for the opposing stream. Third World countries mobilised impartiality to suppress the capacity of the Commission to monitor violations of human rights –most notably through the Special Procedures. In this way they very nearly succeeded as explained in the previous Chapter, but ultimately helped generate a dynamic that led to the creation of yet another institution to scrutinise their records, which is something they deeply resented, and that in addition to the continued existence of their primary target—the Special Procedures. This is hardly a measure of success, unless they also secretly sought the expansion of the monitoring system to strengthen, rather than weaken, it.

It is tempting to see this outcome as just another compromise, the product of the mundane diplomatic exchange of give-and-take. That would be too simplistic. It would tell us nothing of what the compromise is about, and why the actors engaged in the process of making and justifying concessions produced the outcome they did. Nor is it something that can be derived from the ‘objective facts’. Objectivity became central to the discourse that brought down the Commission but that had little or no bearing on the scholarly assessment of its operation.

There was nothing abnormal in the functioning of the Commission when compared to its

shared with over five percent [12 (23%) compared to 13 (28%)] and Eastern Europe with four percent [5 (9%) compared to 6 (13%)]. In sharp contrast, both Latin America and WEOG saw their vote share shrink by four percent each [11 (21%) compared to 8 (17%)] and [10 (19%) compared to 7 (15%) respectively.

sexy-years of existence. If anything, the Commission had become more effective, not less, after the Cold War, as James Lebovic and Eric Voeten show.⁸¹⁹ Although this analysis starts from the typical assumption of politicization working against human rights scrutiny, and thus does not notice the striking paradox in the increasing effectiveness of the Commission despite the supposedly debilitating effects of politicization, it does indicate that the two competing streams which manufactured the demand for the reform of the Commission did not stem from an ‘objective’ assessment of its operation.

This is not to say that the avid invocation of the universal by both camps did not betray glaring contradictions, as illustrated by the replacement of the powerful Sub-Commission with an impotent ‘Advisory Body’. Consisting of twenty-six experts, from the five electoral caucuses, and acting as a collegial body when interpreting and addressing human rights issues, the Sub-Commission was known for its autonomy vis-à-vis the Commission, and the exceptional access it gave to civil society.⁸²⁰ These were two central objectives that Western countries ostensibly defended. Yet its pioneering work with regard to minority rights, racial discrimination and indigenous rights had generated great animosity from many countries, especially the United States and the United Kingdom. In fact, the latter had tried to abolish it already in the early 1950s, and very nearly succeeded, had post-colonial and socialist states not come to its rescue.⁸²¹ In the last stages of the reform process, there was ‘no one to defend it’, de Frouville recounts; while some countries found it ‘too pro-active’, others thought it

⁸¹⁹ Lebovic and Voeten, ‘The Politics of Shame’.

⁸²⁰ Asbjorn Eide, ‘The Sub-Commission on Prevention of Discrimination and Protection of Minorities’, in *The United Nations and Human Rights. A Critical Appraisal*, ed. Philip Alston (Oxford: Oxford University Press, 1996), 211–65.

⁸²¹ Gonzales, ‘Political Sources of Procedural Debates in the United Nations’, 434.

was ‘too ‘politicised’, especially as it insisted on expanding scrutiny of human rights to socio-economic rights and the protection of indigenous peoples.⁸²²

It is not obvious that Western countries—the same countries that pushed for the preservation and strengthening of the Special procedures—opposed the Sub-Commission because it lacked effectiveness in executing its mandate; what seems more plausible is that they opposed it because it addressed human rights matters that exposed their violations and that they could not control its operation. Conversely, the opposite stream which was so vocal about the politicization of the Commission, insisted on preserving a unique agenda item of the Council to focus exclusively on the human rights violations that Israel commits in the Occupied Palestinian Territories.⁸²³ This remains one of the most controversial issues in the Council, but is just one instance of a larger underlying pattern. The conspicuous absence here is the Treaty Bodies: despite long-standing concerns about their effectiveness,⁸²⁴ nothing was changed. What one side deems ineffective or selective in one case, is normal and appropriate in another case. And vice-versa. This means that there is nothing inherent in the positions that either side takes—their content depended on the location agents occupy in political space in

⁸²² Olivier De Frouville, ‘Building a Universal System for the Protection of Human Rights: The Way Forward’, in *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?*, ed. Cherif Bassiouni and William Schabas (Cambridge: Intersentia, 2011), 245.

⁸²³It concerns agenda *Item 7* ‘Human rights situation in Palestine and other occupied Arab territories’ This represents the culmination of earlier attempts to put the Occupied Palestinian Territories at the centre of Council’s attention. For example, in its Decision 1/106 (OP 2) the Council decided to ‘undertake substantive consideration of the human rights violations and implications of the Israeli occupation of Palestine and other occupied Arab territories at its next session and to incorporate this issue in following sessions.” In so doing, the Council violates its own founding principles such as impartiality and non-selectivity. Furthermore, the in-built selectivity against Israel is reinforced in the unequal duration of Special Procedure mandates. All Council mandates have term limits with the exception of that on the Occupied Palestinian Territories since 1967 which ‘has been established until the end of the occupation’ (See Annex of Human Rights Council Resolution 5/1 of 18 June 2007).

⁸²⁴ Philip Alston and James Crawford, *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000).

relation to the universal, not the disposition or some essence of agents or of the principles they evoke.

It is one of the reasons why this reform process, as Alston protests, showed such a ‘complex, even bizarre’ character. This assessment is particularly striking, since it comes from perhaps the most well-informed and prominent scholar and practitioner in the field, in one of the most elaborate analyses of the matter to date. He explicates:

‘It is a story of competing perspectives, often based on fundamentally incompatible assumptions, nevertheless coalescing to provide the impetus for major structural changes. The almost completely contradictory diagnoses put forward by different groups of states, and the radically different expectations that they hold for the outcome of the reform process, are a striking part of the mix. These inconsistencies serve to highlight several characteristics of the current situation, including: the problematic nature of actually achieving deep-rooted change despite agreement on major institutional restructuring; the uncertain nature of the process and the difficulty of predicting whether the eventual outcomes will be more favourable to human rights; and the inability of any one group of states to dominate the debate or to impose any particular formula for reform’.⁸²⁵

What is particularly valuable in this exposition is the acknowledgement of the indeterminacy of the process and the collective character of the ultimate outcomes. It also clearly articulates key aspects of the phenomena that tend to generate confusion and disbelief among scholars and practitioners, but Alston does not offer an explanation as to why those puzzles arise and

⁸²⁵ Alston, ‘Reconceiving the UN Human Rights Regime’, 222.

what they mean. It is in this context that the logic of consistency helps make sense of what can be misconceived as ‘bizarre’ or absurd contradictions. These ‘bizarre contradictions’ can be accounted for by the movement of the dialectical struggle over the distance of particular practices to the universal, where rival actors draw on the same universal to articulate antagonistic positions depending on their relation to the universal. They might use the same moral resources for completely contradictory reasons but the fact that they do so pushes them in a direction that reflects more closely the universal spirit than their parochial concerns; they produce a shared outcome that reflects the attempts of all actors to claim the universal, rather than their dispositions or particular positions.

5.3. Toleration

That the creation of a new monitoring institution was not what either camp sought can be seen in their positions as regards the design of its core features. Having gradually embraced human rights and acquired a reputation for protecting them at home and defending them abroad, Western countries did not want an institution that applied universally. They did not need scrutiny by the United Nations when they had strong institutions in place to uphold high standards of respect for human right –arguably higher than anywhere else. Doing so would needlessly exhaust limited resources which the United Nations could use better in scrutinising compliance with human rights elsewhere, where they occurred more systematically. Hence their strong support and investment in preserving and strengthening the Special Procedures –as they deal with the most serious violations of human rights. This is not what any of the representatives of these countries have said explicitly, but it is what transpires from their statements and action, and especially what the opposite camp charges them with. Likewise, the intention of non-Western countries was not to create yet another institution to increase scrutiny of their questionable human rights records, although putting

the spotlight on Western countries was certainly something they wanted. What they needed was a rival institution to destabilise and undermine the institution they resented the most—the Special Procedures

What is striking is that several countries were quite explicit about this intention. The representative of Cuba saw in the Periodic Review the solution for the ‘politically motivated’ country-mandates, which they had to be eliminated in order to ensure the proper functioning of the new Council. He argues:

‘The [Periodic Review] aims at ensuring universality of coverage and equal treatment for all States. *It is useless then to have another mechanism* [i.e. Special Procedures] which would not only duplicate the work done in the context of the [Periodic Review], but would also lead to further confrontation’.⁸²⁶

The representative of India concurred. In his effort to outline substitutes for the Special Procedures, he asserted that:

‘[w]ith the advent of [the Periodic Review] and easier convening of special sessions, the relevance of [...] country resolutions needs to be re-assessed. In our view, country situations can be adequately address [sic] within the framework of [the Periodic

⁸²⁶ Cuba, Contribution of Cuba to the work of the Working Group on the implementation of OP 6 of GA resolution 60/251, 12 December 2006 [Emphasis added] (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/ContributionsStates/Cuba%20contribution%20dated%2012%20december%202006.pdf>)

Review] (which would be a cooperative mechanism), special sessions and complaint mechanism'.⁸²⁷

The main thrust in both cases is to talk up the powers of the Periodic Review to overshadow and render redundant the actual power of the Special Procedures which they so much resented. What is beyond doubt is that they did not seek to create a more powerful or effective institution than the Special Procedures. Their effort was intended to remove or neutralise the attributes of the Special Procedures with a new institution that conjured up the impression of scrutiny whilst in actuality reducing pressure on them. This travesty of universalism was clearly exposed and rebuffed by the position of the European Union, firmly arguing that 'country mandates could not be substituted by the Universal Periodic Review and Special Sessions'.⁸²⁸ In contrast, the representative of the European Union tried to show the added value and complementarity of both institutions arguing that: '[t]he EU is of the view that Special Procedures can nevertheless provide valuable input to both fora, for example by providing background material to the Universal Periodic Review or by participating in Special Sessions'.⁸²⁹ But in clinging to complementarity between the two institutions in order to rescue the Special Procedures, the European Union was endorsing the Periodic Review, whether that was its intention or not.

⁸²⁷ India, Statement by the representative of India, Human Rights Council: Review of Mandates, 6 February 2007 (<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/India-.pdf>)

⁸²⁸ European Union, Statement by Ambassador Michael Steiner, Permanent Representative of the Federal Republic of Germany, on behalf of the European Union, 6 February 2007, p. 3. ([https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/Germany\(EU\).pdf](https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/OralStatements/060207/Germany(EU).pdf))

⁸²⁹ Ibid.

Nonetheless, the question of whether or not the Periodic Review and Special Sessions could provide an alternative to country mandates became a key element ‘for further discussion’ in the negotiations, with the Facilitator of negotiations referring to the existence of ‘many arguments for and against a symbiosis of country mandates with the [Periodic Review] and Special Sessions’.⁸³⁰ Nevertheless, in line with the position of the European Union, he highlighted several areas of potential synergies between the two institutions so as to enhance the implementation of their respective recommendations.⁸³¹ But the powerful articulation for the complementarity of both institutions was offered by Kofi Annan, when he asserted that the institutional design of the Periodic Review was where innovation was most needed. Reflecting a clear understanding of what was at stake, Annan masterfully presented the *expressed* intention for the institution as the *actual* intention of the institution, forcing its proponents to show consistency between the two:

‘[t]his transformative idea was certainly not intended to impede or discourage the Council from bringing massive and gross violations of human rights to the world’s attention as and when they occur. It was intended to give concrete form to our shared

⁸³⁰ Human Rights Council, Draft Non-paper by the Facilitator on the Review of Special Procedures Tomas Husak, Ambassador of the Czech Republic, 2nd Session of the Working Group on the Implementation of OP 6 of GA Res. 60/251 (5 to 16 February 2007), 26 January 2007, OP 23.

(<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/Non->

[paper%20on%20the%20review%20of%20special%20procedures%20by%20the%20Fac.pdf](https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/Non-paper%20on%20the%20review%20of%20special%20procedures%20by%20the%20Fac.pdf))

⁸³¹ Human Rights Council, Draft Non-paper by the Facilitator on the Review of Special Procedures Tomas Husak, Ambassador of the Czech Republic, 2nd Session of the Working Group on the Implementation of OP 6 of GA Res. 60/251 (5 to 16 February 2007), 26 January 2007, OP 54; 69; 74; 78.

(<https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/Non->

[paper%20on%20the%20review%20of%20special%20procedures%20by%20the%20Fac.pdf](https://extranet2.ohchr.org/Extranets/HRCExtranet/portal/page/portal/HRCExtranet/WG-ReviewMechanisms/Non-paper%20on%20the%20review%20of%20special%20procedures%20by%20the%20Fac.pdf))

principles of universality, non-selectivity, objectivity and cooperation. The world looks to the Council to develop a review mechanism that lives up to those ideals.⁸³²

This was a crucial intervention pushing the negotiations towards the direction of the natural implications of the universal arguments behind the calls for the Periodic Review, rather than the actual intention of those who called for it. He then moved to debunk arguments about duplication between the two institutions by articulating their synergy as being fully consistent with, rather than contrary to, the proper functioning of the Council, when he emphasised that:

‘[t]his dual approach to human rights -- combining universality with specificity -- must be based on the understanding that the Council can only be effective if it undertakes specific work at the country level. We have to face the fact that States are not only the collective protectors of our international norms but also, too often, the violators of those norms’.⁸³³

This powerful articulation was unable not resolve the basic tension resulting from antithetical visions about the purpose of the Periodic Review. It was a tension that created a bifurcation in the design of the Periodic Review, where rival forces sought to avoid the constraints of appeals to the universal to the point they would not appear in open contradiction with it. It is what was required for neither camp to appear in contradiction with the universal that gives

⁸³² United Nations Secretary-General, Secretary-General, In Message to Human Rights Council, Cautions Against Focusing on Middle East at Expense of Darfur, other Grave Crises (SG/SM/10769-HR/4907) 29 November 2006 (<https://www.un.org/press/en/2006/sgsm10769.doc.htm>).

⁸³³ United Nations Secretary-General, Secretary-General, In Message to Human Rights Council, Cautions Against Focusing on Middle East at Expense of Darfur, other Grave Crises (SG/SM/10769-HR/4907) 29 November 2006 (<https://www.un.org/press/en/2006/sgsm10769.doc.htm>).

unity to the final design of Periodic Review, allowing it to resemble more the expressed rather than actual intentions of its proponents. What might resemble some form of ‘synthesis’ is, in fact, the bridge between two rival visions of the institution that do not merge but coexist with one another. Both sides seek to stretch the meaning of the universal to such an extent that it justifies their stance in the name of the universal, diminishing to the maximum the potential of exposure of inconsistency with it. The main drive of either camp is to shape the institution in such a way so as to allow either of them to be judged on their own terms whilst claiming to subject themselves to an automatic and independent universal review. It is in the context of these ineluctable tensions that we can understand contradictory choices about the design of the Periodic Review.

Irresolvable antagonism can be observed in all aspects of its design, including the formulation of principles, objectives, mandate, operation, information, inclusiveness, as well as the final decisions and their evaluation. These are the core elements that serve as points of reference to assess positions and justifications vis-à-vis the Periodic Review but also in relation to UN monitoring in general. The analysis of each instance serves to highlight the relevance of the issue at stake, the spectrum of positions on it, the final outcome and relation to the overall design of the Periodic Review, and finally the extent to which they represent expressions of the idea of consistency. The structuring of the empirical analysis in this manner also serves also the purpose of introducing the core elements of the Periodic Review before making a final assessment about its meaning.

5.3.1. Principles

The negotiations about the institutional set-up of the Periodic Review began with a consideration of the principles that ought to guide its purpose and operation. Positions on this

aspect reveal little disagreement. This is consistent with a general pattern that can be gleaned from looking at negotiations as a whole between June 2006 and June 2007, where positions diverge more sharply as they move from general to concrete features of the Periodic Review.⁸³⁴ This is remarkable but not surprising if seen from the point of view of consistency—it is not easy to reject principles that reach for the universal as long as all agents justify their positions in relation to the universal, regardless of what they defend. After all, it is the concern with the universal that justified the demand for reform and the need for a new institution that should embody those principles. Virtually all positions on the Periodic Review refer to antecedent justifications for the reform of the Commission.

All positions converge around the importance of equal treatment, the universality and indivisibility of human rights and impartiality.⁸³⁵ The position of Cuba illustrates this convergence. It stressed that the Periodic Review should ‘[e]nsure universality, objectivity, impartiality and non-selectivity, and the elimination of double standards and politicization’.⁸³⁶ This formulation featured in the negotiation text prepared by the Facilitator of the negotiations, the Moroccan Ambassador, Mohammed Loulichki. It stated that the Periodic Review ought to operate in an ‘objective, transparent, non-selective, constructive, non-confrontational and non-politicised manner’.⁸³⁷

⁸³⁴ Human Rights Council Decision 1/103 of 30 June 2006; Human Rights Council Resolution 5/1 of 18 June 2007. Major informal negotiation took place in July, August and September 2006, and February 2007.

⁸³⁵ Brazil, Non-Paper by Brazil: Informal Consultations of The Inter-Sessional Working Group on the UPR Mechanism, 20 November 2006.

⁸³⁶ Cuba, Contribution by Cuba, Working Group on the UPR Mechanism Human Rights Council, 20 November 2006.

⁸³⁷ Human Rights Council Vice-President, Non-Paper on the UPR Mechanism, prepared under the authority of the Facilitator and Vice-President of the Human Rights Council, Mr Mohammed Loulichki (Morocco), 27 April 2007.

Relatedly, state positions show a striking degree of agreement about the importance of dialogue. Rather uncharacteristically, Australia came to emphasise the role of the Periodic Review in offering an opportunity for scrutiny and frank dialogue amongst peers, to be conducted in a transparent and constructive manner.⁸³⁸ For Canada, too, ‘constructive and frank dialogue’⁸³⁹ had to be the hallmarks of the Periodic Review. These positions are striking because the importance of dialogue and cooperation has been typically propagated by non-Western governments in response to what they portray as the aggressive and interventionist practices of Western governments. But what it is also important to note here is that Australia speaks about ‘dialogue amongst peers’, meaning *dialogue among states*, and not among states and civil society, which is a position that is typically associated with Western governments, and opposed by those who are perceived to be the worst violators of human rights and have the most to fear from a more universal scrutiny. This was indeed one of the points that Cuba made and entered into the Facilitator’s proposal when the latter emphasised that the Periodic Review would be a cooperative mechanism to foster interactive dialogue among states, thus a ‘UN-member driven’ intergovernmental process.⁸⁴⁰

Yet, underneath the manifest appeals to the universal lurk long-standing divisions. A striking example of this is provided by one of Cuba’s proposals according to which the Periodic Review would have to ‘respect the national legislation of the country under review’.⁸⁴¹ This may seem an innocuous addition, but it is not. To the extent that national legislation diverges

⁸³⁸ Australia, Universal Peer Review (UPR) Australian views, 12 February 2007.

⁸³⁹ Canada, Mécanisme d’examen périodique universel. Non-document canadien - Version n° 3, 21 July 2006.

⁸⁴⁰ Human Rights Council Vice-President, Non-Paper on the UPR Mechanism, prepared under the authority of the Facilitator and Vice-President of the Human Rights Council, Mr Mohammed Loulichki (Marocco), 27 April 2007.

⁸⁴¹ Cuba, Contribution by Cuba, Working Group on the UPR Mechanism Human Rights Council, 20 November 2006

from the principles of the Periodic Review, endorsing this proposition would basically undermine all pretences to the universal. The Cubans pushed this line further, asking that the conduct of the Periodic Review should:

‘[b]ear in mind the different political, economic and social systems, as well as national and regional particularities and various historical, cultural and religious backgrounds; the different levels of development and barriers beyond the governments’ control that could hinder the implementation and fulfilment of their human rights’.⁸⁴²

This makes the purpose of the earlier proposal about the importance of respecting domestic legislation much more obvious. This position appears in a more condensed form in the Facilitator’s text, when it emphasises that the review should take into account ‘the level of development and specificities of countries’.⁸⁴³ This is a symptom of a long-standing debate that has raged across the UN and beyond about whether and to what extent prosperity is a condition for or a result of the realisation of human rights. In some cases, it is rather obvious that the form of the political regime, rather than material resources, are at the root of widespread violations of basic rights, such as with the case of famine as Amartya Sen has argued.⁸⁴⁴

⁸⁴² Cuba, Contribution by Cuba, Working Group on the UPR Mechanism Human Rights Council, 20 November 2006

⁸⁴³ Human Rights Council Vice-President, Non-Paper on the UPR Mechanism, prepared under the authority of the Facilitator and Vice-President of the Human Rights Council, Mr Mohammed Loulichki (Marocco), 27 April 2007.

⁸⁴⁴ Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 2001), Chapter 6.

This is a line of argument that is pursued mainly by Western governments who resist calls for economic aid and the use of the level of development as a pretext for avoiding responsibility for protecting basic rights. This is especially the case with negative rights, such as the prohibition of torture, which would require states not to do, rather than to do something. It also creates a dichotomy between civil and social rights, which is what Western governments claim to prioritise. Yet this is a political, not an analytical distinction as, in practice, they are indistinguishable. Extreme poverty deprives individuals of their agency to exercise any of the so-called civil and political rights, making it practically indistinguishable from torture, a civil right. There are manifold aspects to either position that continue to animate political and scholarly debates, making general statements either way problematic. It is the historical context in which these arguments are used that we can approximate their intention. But for objectively poor countries that rely on such justifications, it is hard to distinguish whether they do it to subvert responsibility for protecting human rights and making them contingent upon foreign aid, or they are genuinely constrained in their capacities, or both.

Furthermore, the evocation of particular ‘specificities’ of countries is not necessarily or always opposed to the realisation of the universal, as Tom Zwart argues.⁸⁴⁵ In fact, localised and idiosyncratic interpretations of the universal can generate a plurality of reasons to articulate the universality of human rights, as Amy Gutman points out.⁸⁴⁶ It is therefore difficult to establish *a priori* whether such arguments are pernicious or genuine, but in the context in which they are used, especially when seen in relation to other arguments, they do tend to correspond with attempts by certain states to rebuff or deflect scrutiny of their human

⁸⁴⁵ Tom Zwart, ‘Using Local Culture to Further the Implementation of International Human Rights: The Receptor Approach’, *Human Rights Quarterly* 34, no. 2 (2012): 546–69.

⁸⁴⁶ Amy Gutmann, ‘Introduction’, in *Human Rights as Politics and Idolatry*, ed. Michael Ignatieff (Princeton: Princeton University Press, 2011), xiii.

rights practices, and responsibility to remedy violations. Ultimately, recognition of these specificities would make the universal respect for human rights subject to particular contingencies, effectively neutralising their normative power.

The final text on principles does not resolve this problem. It recognises the rival perspectives rather than favouring one over the other.⁸⁴⁷ The principles that should guide the Periodic Review include a general commitment to the ideal of the universal –such as the equality among human rights and fair treatment of all states, transparency, and objectivity– at the same time taking into account ‘the level of development and specificities of countries. Whilst the Periodic Review should be an ‘intergovernmental process’, it should also be ‘action-oriented’, and allow the participation of ‘all relevant stakeholders, including NGOs’. Furthermore, it stresses that the Periodic Review should ‘complement and not duplicate’ other monitoring institutions, and not exhaust the resources of the Council.

These are inherently antithetical principles that reflect the diametrically opposed positions of the different streams, but they cannot be rejected in principle. They are hard to reject in principle, even if in practice they can have deleterious effects. Furthermore, embracing one of these principles undermines the possibility of refusing rival principles that can make a plausible claim to the universal. The desire to enshrine particular principles and the inability to reject rival particular principles allows for the inclusion and coexistence of multiple and antagonistic principles, which reflect and justify perpetual strife, rather than leading to a new synthesis.

⁸⁴⁷ Human Rights Council Resolution 5/1. ‘Institution-building of the United Nations Human Rights Council’ 18 June 2007, Part B, Section 1, OP (a)-(m).

5.3.2. Objectives

The move from abstract principles to more tangible objectives of the Periodic Review reveals the scale and the depth of divisions that underpin them, even as they are always mediated through the language of the universal. Diametrically opposed positions appear in the form of two basic and contrasting proposals about the main objectives of the Periodic Review: ‘implementation’ versus ‘fight against politicization’. Attempts to include the pursuit of ‘cooperation and technical assistance’ among the objectives of Periodic Review are also a prominent feature of the discussion, but they do not fit neatly within one camp. These objectives are usually promoted by Third World countries and presented as a solution to the problem of politicization. Indeed, a great number of positions sought to make struggle against politicization the central feature of the new institution. The Brazilian delegation spoke for many when it stated that the ‘elimination of the political selectivity that pervaded the former [Commission]’ should be the ‘main objective’ of the Periodic Review.⁸⁴⁸ This chimes with the position of the Non-Aligned countries for whom the main objective of the new institution was to ‘eradicate selectivity, double standards and politicization in the consideration of human rights issues’.⁸⁴⁹

Numerous statements echo this concern, especially when they speak about what the Periodic Review should *not* become. The Iranian delegation was adamant that the Periodic Review should not be used ‘as a tool for the imposition of one group values’ or as ‘a mere tribunal, a forum for accusations motivated by political purposes’;⁸⁵⁰ it should not serve as ‘some sort of

⁸⁴⁸ Brazil, Non-Paper by Brazil: Informal Consultations of The Inter-Sessional Working Group on The UPR Mechanism, 20 November 2006.

⁸⁴⁹ Non-Aligned Movement, Final document, 14th Summit Conference of Heads of States or Government of the Non-Aligned Movement, Havana, Cuba (NAM 2006/Doc.1/Rev.3), 11-16 September 2006.

⁸⁵⁰ Iran, Comments in addition to statement made by Islamic Republic of Iran in the Working Group on the UPR mechanism (UPR), 21 July 2006.

tribunal or platform for condemnation’, the Philippine representative concurs.⁸⁵¹ The Malaysian position reiterated the same point when it stressed that ‘[e]arrested efforts must be made not to turn the review exercise into a tribunal-like process’.⁸⁵² The same could be observed in the Algerian position and other similar interventions, although not always explicitly framed in those terms.⁸⁵³

Avoiding the confrontation and selectivity that had brought down the old Commission, the Tunisian delegation argued, was crucial not only for the Periodic Review but for the new Council proper, if it is ever to achieve its *raison d’être*, that is, the promotion and protection of human rights across the world.⁸⁵⁴ It is ‘of critical importance’, the Indian position states, to make sure that the Periodic Review does not ‘degenerate’ into the country-specific and confrontational mechanisms of the old Commission. The statement ended with a warning that this was bound to happen, if the new institution decided to make its decisions in a ‘non-consensual manner’.⁸⁵⁵

Even the positive case for the Periodic Review came to be dominated by an overriding desire amongst Third World countries to create an ‘anti-Commission, or at least an antidote to its intrusive practices. Instead of confrontation and intervention, the Periodic Review had to focus on promoting cooperation, interactive dialogue, mutual understanding and respect,

⁸⁵¹ Philippines, General Statement on Non-Paper on UPR, 12 February 2007

⁸⁵² Malaysia, Statement by Malaysia in the Working Group on the UPR mechanism (UPR), 21 July 2006.

⁸⁵³ Algeria, Groupe de travail intergouvernemental intersession sur la mise en œuvre du paragraphe 06 de la résolution 60/251 de l'Assemblée générale des Nations Unies -Examen Périodique Pniversel (Algeria), 12 February 2007.

⁸⁵⁴ Tunisia, Déclaration de la Délégation tunisienne au groupe de travail intergouvernemental intersessions chargé d’élaborer les modalités de la procédure d’examen universel (U.P.R), Ali Cherif, 12 February 2007.

⁸⁵⁵ India, General Statement by India on the non-paper, 12 February 2007.

exchange of ideas and sharing of best practices, capacity building, and technical assistance. This is a prevailing feature of virtually all their positions and appears explicitly in interventions made by representatives of South Africa,⁸⁵⁶ Malaysia,⁸⁵⁷ Philippines,⁸⁵⁸ and Algeria.⁸⁵⁹ The Indian position articulates the components of this vision:

‘[t]he objective of the [Periodic Review] should not be to point fingers at States but to work with them, encourage them and enhance their capacity to help them move up the ladder of promotion and protection of Human Rights and attain higher levels of observance. The Council has several other mechanisms to deal with States which do not cooperate. The [Periodic Review] should be designed for that large majority of States, which are committed to promotion and protection of human rights. It is, therefore, essential that the [Periodic Review] outcome should be adopted with the consent of the country being reviewed’.⁸⁶⁰

There are two dimensions to this position. It is as much about what the Periodic Review should be as about what it should not be. It reveals the underlying but deep relation with existing monitoring institutions: that is, it must provide an alternative to them. This is just one indication of how monitoring institutions are viewed by states as an interacting whole rather than as isolated and barely connected bodies that appear in the literature. The Indian position would allow for some type of coexistence and pluralism, but that does not seem to be the

⁸⁵⁶ South Africa, Input by the South African delegation on the UPR Mechanism, 12 February 2007.

⁸⁵⁷ Malaysia, Statement by Malaysia in the Working Group on the UPR mechanism, 21 July 2006.

⁸⁵⁸ Philippines, General Statement on Non-Paper on UPR, 12 February 2007.

⁸⁵⁹ Algeria, Groupe de travail intergouvernemental intersession sur la mise en œuvre du paragraphe 06 de la résolution 60/251 de l'Assemblée générale des Nations Unies -Examen Périodique Pniversel (Algeria), 12 February 2007.

⁸⁶⁰ India, General Statement by India on the non-paper, 12 February 2007.

main concern in other positions. For example, South Africa proposed that the Periodic Review should ‘replace the politically-charged country specific resolutions’.⁸⁶¹ It is not obvious here, but this position is typically associated with opposition to the country-specific mandates of the Special Procedures –the most intrusive form of monitoring that generates persistent resistance.

This is at the forefront of the position of the Non-Aligned countries as it states that the Periodic Review ‘should not be used as a tool to coerce states and subject them to politically motivated country-specific resolutions’.⁸⁶² More broadly, this position echoes the grievances of governments that demanded reform and indicates a desire to deploy the Periodic Review as a means to antagonise or overtake the Special Procedures, which was particularly visible in the Chinese positions. The United States explicitly acknowledged this connection, albeit negatively, when it called on other states to avoid linking the design of the Periodic Review with other ‘divisive debates’ about the Special Procedures, stressing that the Periodic Review is ‘new and should stand on its own’.⁸⁶³

It must be emphasised that attempts to endow the Periodic Review with a universal appeal reflect a prevailing desire to draw a sharp contrast with existing monitoring institutions, in particular the Special Procedures. The discourse of equal treatment of all countries, with ‘no exceptions’ as the Brazilian position cares to note, is an expression of this underlying

⁸⁶¹ South Africa, Input by the South African delegation on the UPR Mechanism, 12 February 2007

⁸⁶² Non-Aligned Movement, Final document, 14th Summit Conference of Heads of States or Government of the Non-Aligned Movement, Final document, Havana, Cuba (NAM 2006/Doc.1/Rev.3), 11-16 September 2006.

⁸⁶³ United States, document without title, reaction to the Facilitator’s non-paper, 12 February 2007.

logic.⁸⁶⁴ Thus the Periodic Review had to create a ‘unique opportunity to reflect the diversity of each and every country and society’, the Iranian position stated.⁸⁶⁵ This usually goes with demands for full cooperation and involvement of the country under review with the process, as the positions of Philippines⁸⁶⁶ and Pakistan testify.⁸⁶⁷

There was some nuance, especially in the position of Ecuador, which, recognising the need to treat all states equally, stressed that the Periodic Review should pursue the protection of all rights without distinction, irrespective of the political, economic or cultural system of the country concerned.⁸⁶⁸ This is a crucial point. For whilst the equal treatment sounds reasonable and attractive in principle, in practice it can have subversive effects. Given the deeply asymmetric levels of respect for human rights among states, equal attention to everyone creates a false symmetry and depletes limited resources that could be put to use to shed light on the most serious violations. This point represents a common thread in several positions, especially amongst European countries.

Indeed, beyond attempts to build an anti-Commission and overshadow, if not overtake, existing monitoring institutions, the proponents of the Periodic Review framed their positions about the objectives of the Periodic Review in direct opposition to their opponents,

⁸⁶⁴ Brazil, Non-Paper by Brazil: Informal Consultations of The Inter-Sessional Working Group on the UPR Mechanism, 20 November 2006.

⁸⁶⁵Iran, Statement by Ambassador, Deputy Permanent Representative of the Islamic Republic of Iran, Informal Consultations on Universal Periodic review and Review of mandates and Mechanisms, Geneva, 21 July 2006.

⁸⁶⁶ Philippines, General Statement on Non-Paper on UPR, 12 February 2007.

⁸⁶⁷Organisation of Islamic Conference, Statement by Faisal Niaz Tirmizi, First Secretary on behalf Member States of the OIC at the Second Session of the intersessional open-ended intergovernmental Working Group to develop the modalities of the UPR mechanism established pursuant to the Human Rights Council decision 1/103, 12 February 2007.

⁸⁶⁸ Ecuador, Misión Permanente del Ecuador Ginebra, Declaración del Ecuador en el Grupo de Trabajo sobre el Examen Periódico Universal Consejo de Derechos Humanos, 12 February 2007.

especially the European Union and Australia, less so the United States, which kept a low profile throughout the negotiations, after having voted against the creation of the Council. The latter sought to resist and mitigate this enterprise by a twofold strategy: 1) by reframing the meaning of the universal, and 2) by adding functional considerations to the overall viability of the UN monitoring system. Both in their positive and negative vision of the Periodic Review, they reiterate the need for the Periodic Review to concentrate on the implementation of existing obligations, avoiding hampering the operation of existing monitoring institutions –the main concern but rarely or indirectly admitted being the Special Procedures, less so the Treaty Bodies.

From the beginning, the European Union put the emphasis on the ‘enhancement of implementation’ of the existing commitments and obligations.⁸⁶⁹ They read the Facilitator’s proposal that put cooperation and dialogue at the heart of the Periodic Review as a means to ‘assist all states in their efforts to fully implement their human rights obligations’, by [contributing] to effective implementation and follow up’ in order to help them ‘improve the situation of those most in need of protection’.⁸⁷⁰ This is far more demanding than what can be gleaned from Facilitator’s perfunctory one-line reference to the need for ‘improvement of the human rights situation on the ground’.⁸⁷¹ Apart from acknowledging a truism that no-one can afford to contradict, the Facilitator’s proposal did not include specific, practical steps to enshrine this truism in the design of the Periodic Review.

⁸⁶⁹ European Union, Contribution by the European Union, UPR Mechanism, 18 August 2006.

⁸⁷⁰ European Union, Statement by the European Union, WG on UPR, General remarks, 12 February 2007.

⁸⁷¹ Human Rights Council Vice-President, Non-Paper on the UPR Mechanism, prepared under the authority of the Facilitator and Vice-President of the Human Rights Council, Mr Mohammed Loulichki (Morocco), 27 April 2007.

In addition to reframing the meaning and implications of ‘cooperation and dialogue’, the insistence on the part of the European Union on offering a competing vision involved also the revision of the typical meaning-in-use of the universal. It distinguished five aspirations associated with the ‘word universal’, following a clear order:⁸⁷²

- 1 – ‘promoting *worldwide* respect for the protection of human rights and fundamental freedoms’, embodied in all actions of the Periodic Review;
- 2 – ‘addressing *all* human rights and fundamental freedoms for *all*’;
- 3 – ‘the very opposite of ‘selectivity, politicization and double standards’, mentioned in passing as ‘catch-words’; it refers to ‘impartiality and objectivity’ and ‘a common understanding of all UN-member states of what is right and what is wrong’, in short, a ‘*common* achievement’;
- 4 – transparency, ‘allowing full and effective involvement of all stakeholders, including NGOs as well as openness to the public at large’;
- 5 – requires that ‘all member states are on board’ and sees the Periodic Review ‘first and foremost as an exercise aimed at improving the promotion and protection of human rights through encouragement and support’, based on co-operation and dialogue, with the full involvement of the country under review’... ‘fair consideration of all states with the same yardstick’.⁸⁷³

This is one of the most explicit and comprehensive attempts to rescue the universal from particularistic representations, appealing directly to the Platonic vision of the universal. It is

⁸⁷² European Union, Statement by the European Union, WG on UPR, General remarks, 12 February 2007.

⁸⁷³ European Union, Statement by the European Union, WG on UPR, General remarks, 12 February 2007, [emphasis in original].

an explicit attempt to neutralise a rival reading of the universal by appealing to the same universal. Indirectly, this means deflating the pretences to the universal of the opposite side and limiting their space to water-down the protection function of the Council and its mechanisms under the pretext of respecting the universal.

This carefully argued view resonates with other positions as well, especially Australia and Canada. Whereas the proponents of the Periodic Review view the fight against politicization as its main objective, the Australian position saw it as a means to ‘improve the implementation of human rights obligations, standards and commitments by all Member States’.⁸⁷⁴ Furthermore, it acknowledges but revises the typical framing of dialogue and cooperation. It speaks of the Periodic Review offering an opportunity ‘for scrutiny and frank dialogue amongst peers’ to be conducted in a ‘transparent and constructive’ fashion.⁸⁷⁵

This is an important reframing. It is not neither dialogue nor scrutiny, but it is both: scrutiny and frank dialogue –suggesting that that it is not a logrolling exercise. Furthermore, Australia reframes technical assistance as a way of ‘identifying needs and opportunities to support interested states with technical assistance and capacity development’.⁸⁷⁶ This is thus not automatic but conditional aid to assist specific states interested to improve their human rights record, not blanket support for all states regardless of what they do. This may be an uncharacteristically unambiguous position, but not an isolated one. The Canadian position

⁸⁷⁴ Australia, Australian views, Universal Peer Review (UPR), 18 August 2006.

⁸⁷⁵ Australia, Australian views, Universal Peer Review (UPR), 18 August 2006

⁸⁷⁶ Australia, Australian views, Universal Peer Review (UPR), 18 August 2006

echoes these same reflections.⁸⁷⁷ Brazil also acknowledges that the Periodic Review ‘must indicate, if necessary, the need for cooperation’.⁸⁷⁸

The negative case for the Periodic Review propounds the same message via different arguments. Predominantly Western countries highlight in different ways the need for the Periodic Review to complement and not duplicate or subvert other monitoring institutions. The Australian position was emphatic about this, stressing in different ways that the Periodic Review should ‘not detract’ from other goals of the Council, or ‘diminish in any way the Council’s capacity to respond to urgent human rights situations’, or ‘replace nor duplicate existing mechanisms, such as the treaty bodies or special procedures’. Instead it should add value to and draw from the information and expertise of the existing monitoring institutions – and thus create synergy.⁸⁷⁹ The Philippine position also affirmed that the Periodic Review should ‘complement and not duplicate existing mechanisms’.⁸⁸⁰ Tunisia⁸⁸¹ and Thailand⁸⁸² made a similar argument but seemed to be concerned more about duplication with the Treaty Bodies and the need to create a positive relation with them. The Turkish position⁸⁸³ points in passing to the question of ‘cost-effectives’, which is then taken to a different level by the US position.

⁸⁷⁷ Canada, Mécanisme d’examen périodique universel. Non-document canadien - Version n° 3, 21 July 2006.

⁸⁷⁸ Brazil, Non-Paper by Brazil: Informal Consultations of The Inter-Sessional Working Group on the UPR Mechanism, 20 November 2006.

⁸⁷⁹ Australia, Australian views, Universal Peer Review (UPR), 18 August 2006.

⁸⁸⁰ Philippines, General Statement on Non-Paper on UPR, 12 February 2007.

⁸⁸¹ Tunisia, Déclaration de la Délégation tunisienne au groupe de travail intergouvernemental intersessions chargé d’élaborer les modalités de la procédure d’examen universel (U.P.R), Ali CHERIF, 12 February 2007.

⁸⁸² Thailand, Statement by the Thai Delegation At the intersessional open-ended intergovernmental working group to develop the modalities for the UPR, 12 February 2007.

⁸⁸³ Turkey, Contribution to Intergovernmental working group on UPR, 12 February 2007.

Generally disinterested and apathetic in the negotiations, the United States nevertheless called on countries to be realistic and exercise caution in the creation of the Periodic Review so as not to ‘duplicate the work of other mechanisms’ and consider the ‘tremendous impact on resources’ – both of the UN system and national delegations.⁸⁸⁴ It stressed the need to keep the Periodic Review ‘light and efficient’, and avoid entering into ‘divisive debates’ about its mandate. This was somewhat echoed by the Argentine position as it argued that the Periodic Review should not be a burden on states.⁸⁸⁵

Given the antagonistic positions of states about the objectives of the Periodic Review, it is striking to observe how close they relate to the universal, or the ideal of the realisation of human rights.⁸⁸⁶ The ‘improvement of human rights situation on the ground’ and ‘fulfilment of State’s human rights obligations and commitments’ were enshrined as the two most important objectives of the Periodic Review. Its objectives became the ‘enhancement of states’ capacities’ through ‘technical assistance’, ‘sharing of best practices’, ‘support for cooperation in the promotion and protection of human rights’ and ‘encouragement of full cooperation and engagement with the UN human rights system. These are all indications of the ability of Western countries to monopolise the meaning of the universal and frame the objectives of the Periodic Review in a manner that is close to the ideal. Clearly, the original proponents of the Periodic Review have failed in their attempts to associate their concerns with the universal and have had to accept objectives that increase rather than decrease

⁸⁸⁴ United States, (document without title), reaction to the Facilitator’s non-paper, 12 February 2007;

⁸⁸⁵ Argentina, Intervención Argentina, Examen periódico universal, 12 February 2007.

⁸⁸⁶ Human Rights Council Resolution 5/1. ‘Institution-building of the United Nations Human Rights Council’ 18 June 2007, Part B, Section 2, OP (a)-(f).

scrutiny over them. The universal they relied on to instil reform requires them to concede to objectives that are not of their liking.

5.3.3. Mandate

The establishing of the legal basis and purview of the Periodic Review presented states with rather surprising challenges and elements not typically associated with the framing of human rights at the UN and beyond: the link with International Humanitarian Law. This is surprising and hard to explain. It is not to say that conceptually, Humanitarian Law is strictly speaking not human rights law –they are after all two branches of international law that endeavour to protect similar interests from different angles and in different circumstances.⁸⁸⁷ There is both conflict and synergy between them as in other branches of international law and their separation is historical and political, rather than analytical.⁸⁸⁸

In practice, they have been kept separate for political reasons, and there is no clear pattern in positions that states took in defending the inclusion or exclusion of Humanitarian Law as part of the legal basis of the Periodic Review. Roughly, the proponents of the Periodic Review expressed strong support for its inclusion, whereas the opposite was true for their counterparts. Furthermore, few positions defend clear-cut exclusion or inclusion of Humanitarian Law –most have a more nuanced position to either the general principles of this body of law or its specific instruments adopted by states. This division occupied most of the space dedicated to the formulation of the mandate of the Periodic Review.

⁸⁸⁷ René Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2005).

⁸⁸⁸ Marko Milanović, ‘A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law’, *Journal of Conflict and Security Law* 14, no. 3 (1 December 2009): 459–83; Erika De Wet and Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights* (Oxford: Oxford University Press, 2012).

The most vocal support for the inclusion of Humanitarian Law as a basis of the review came from Cuba⁸⁸⁹ and the Organization of the Islamic Conference, represented vigorously by Pakistan,⁸⁹⁰ whereas Algeria,⁸⁹¹ Azerbaijan,⁸⁹² and Malaysia⁸⁹³ offered qualified support;— Humanitarian Law could be considered only in cases in which it operates as *lex specialis* and only in relation to legal instruments to which states had previously given their consent. Other countries, such as Argentina, expressed general support for its inclusion,⁸⁹⁴ whilst Indonesia⁸⁹⁵ stated that it had no strong view on the matter. Intriguingly, Switzerland too, called for the inclusion of Humanitarian Law – with the proviso that this would include the universal body of Humanitarian Law, not just specific instruments of it.⁸⁹⁶ But the general underlying current supporting the inclusion of Humanitarian Law can be more firmly connected with the long-standing opposition of several countries to the Israeli occupation of Palestine and the US-led interventions and invasions in the Global South.

It is part of a larger struggle of the disenfranchised periphery who seek to use the Council as an instrument to expose violations that cannot be addressed by the Security Council –due to

⁸⁸⁹ Cuba, Contribution by Cuba to Working Group on The UPR Mechanism, Human Rights Council, 12 February 2007.

⁸⁹⁰ Organisation of Islamic Conference, Statement by Faisal Niaz Tirmizi, First Secretary on behalf Member States of the OIC at the Second Session of the intersessional open-ended intergovernmental Working Group to develop the modalities of the UPR mechanism established pursuant to the Human Rights Council decision 1/103, 12 February 2007.

⁸⁹¹ Algeria, Groupe de travail intergouvernemental intersession sur la mise en œuvre du paragraphe 06 de la résolution 60/251 de l'Assemblée générale des Nations Unies -Examen Périodique Pniversel (Algeria),12 February 2007.

⁸⁹² Azerbaijan, Human Rights Council Working Group on the UPR, Statement by the Delegation of the Republic of Azerbaijan, 12 February 2007.

⁸⁹³ Malaysia, General Comments by Malaysia, Intersessional Working Group on UPR, 12 February 2007.

⁸⁹⁴ Argentina, Intervención Argentina, Examen periódico universal, 12 February 2007.

⁸⁹⁵ Indonesia, Intervention at the Working Group on the Implementation of OP 6 of the GA Res. 60/251 UPR, 12 February 2007.

⁸⁹⁶ Switzerland, Basis of the review, principles and objectives, 12 February 2007.

the US veto; it is thus an attempt to elevate the Council into an *anti*-Security Council, or a ‘Security Council of the South’, given their systemic under-representation and restricted influence in the actual Security Council. This fits within the broader *tu quoque* tactics to undermine the ability of any state to be able to point their finger at other states when they themselves are in violation of the same or other norms; it is also a way of sharing the burden of guilt for not being the only one to be constantly singled out for transgression of shared norms. It is not clear how Switzerland fits within this narrative, however, especially given its traditional role of reaching for the middle ground and preserving good working relations with all groups, not least because of the UN’s large presence in Geneva.

It has not been possible to find out whether the United States has made a statement on this point or that such a statement is not publicly available, but Allehone Abebe argues that the United States opposed this proposal, together with other African countries, although he refers to a statement made by the United States in 2016 in another context.⁸⁹⁷ The statement concerns a Special Session that the Council convened on Israeli military incursion in Beit Hanoun, Gaza, which, indeed, states that the Council should not address cases of armed conflict ‘clearly governed by the law of war’. Furthermore, it also raises concerns about the selectivity of the Council against Israel when it poses the question of why the Council is ‘loath to address important human rights violations elsewhere’.⁸⁹⁸ This would be in line with the persistent attempts of the United States to resist any form of accountability for crimes of

⁸⁹⁷ Allehone Mulugeta Abebe, ‘Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council’, *Human Rights Law Review* 9, no. 1 (1 January 2009): 6.

⁸⁹⁸ United States, Statement by the United States, 3rd Special Session of the Human Rights Council, 15 November 2006.

aggression and other war-related crimes, such as those committed in the context of the ‘war on terror’.⁸⁹⁹

However, the United States was not alone in its opposition. An assorted group of countries offered clear opposition to this provision as well. Both Turkey⁹⁰⁰ and Norway⁹⁰¹ argued that the Council did not have a mandate nor the expertise to assess provisions of humanitarian law. Norway argued instead that it was the task of the International Committee of the Red Cross to oversee the application of humanitarian law and therefore should not be included as a basis for the review. Whilst acknowledging the overlap between international human rights law and humanitarian law, Australia came to the same conclusion, that ‘the Council is neither mandated nor equipped to assess detailed and specific issues emerging from [humanitarian law] obligations’.⁹⁰²

The question of the mandate brought to the fore other issues of contention, although not with the same intensity. One question concerned whether or not states should be reviewed for obligations from treaties they had not ratified. However, it is hard to explain why the very states that typically oppose external scrutiny of any kind would be so keen to push for an expansive mandate, breaking with the treaty-bound practice of the Treaty Bodies –unless it is seen as part of a strategy to emasculate all of these monitoring institutions. What is more, some states sought to expand further the mandate to include obligations arising from

⁸⁹⁹ Philip Alston, Jason Morgan-Foster, and William Abresch, ‘The Competence of the UN Human Rights Council and Its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the “War on Terror”’, *European Journal of International Law* 19, no. 1 (1 February 2008): 183–209.

⁹⁰⁰ Turkey, Intergovernmental Working Group On UPR, 12 February 2007

⁹⁰¹ Norway, Basis of review and Principles and objectives, 12 February 2007.

⁹⁰² Australia, hand-written comment on the Basis of the review, 12 February 2007.

domestic legislation and constitutions,⁹⁰³ national particularities, as well as historical, and cultural and religious specificities of countries.⁹⁰⁴

The final document included humanitarian law as a basis of the review, in addition to the Charter, the Universal Declaration, human rights treaties to which states are party to, as well as voluntary pledges made by states.⁹⁰⁵ The inclusion of the humanitarian law remains intriguing but cannot be explained without reference to the universal and the interrelation of rights despite belonging to deferent departments of international law. More broadly, this is an instance of how states take risks of exposing themselves in attempts to use the available normative resources to punish their adversaries. This practice contributes to legal and institutional development, even if that may not be the first goal of the states advancing these initiatives.

5.3.4. Information

Information is the most critical element of the entire edifice of the Periodic Review, but also of human rights monitoring in general. This is because monitoring is ‘always a struggle over information’, as Sally Engle Merry emphasises.⁹⁰⁶ The struggle relates to the sources of information but also to the type of information that is provided and how it is framed. The more specific and reliable the information, the more sustained and focused the monitoring of

⁹⁰³ Bangladesh, Comment on non-paper, 12 February 2007.

⁹⁰⁴ Malaysia, General Comments by Malaysia, Intersessional Working Group on UPR, 12 February 2007; Organisation of Islamic Conference, Statement by Faisal Niaz Tirmizi, First Secretary on behalf Member States of the OIC at the Second Session of the intersessional open-ended intergovernmental Working Group to develop the modalities of the UPR mechanism established pursuant to the Human Rights Council decision 1/103, 12 February 2007.

⁹⁰⁵ Human Rights Council Resolution 5/1 of 18 June 2007, Part A.

⁹⁰⁶ Merry, ‘Human Rights Monitoring, State Compliance, and the Problem of Information’, 34.

obligations can be. States resist monitoring not just by withholding damaging information but also by framing it in specific ways: they can provide general information or an overload of details to subvert monitoring mechanisms. This may involve providing composite indicators rather than ratios or counts to make comparison possible.⁹⁰⁷ Control over information is therefore vital for both those who resist or support scrutiny and is a basic tension that can be observed throughout the negotiations. It comes in the form of disagreements about who should provide the information, in what form, who should assess it, how and when, and how it should be acted upon.

The source of information –who provides it– remains the most important question. Here the main line of division was between reliance on existing information produced by UN monitoring institutions and mechanisms or creating a separate mechanism to gather information. This reflected a division between those who argued in favour of having the governments act as the main source of information, if not the sole source, and those that sought to rely on existing sources of information provided by the UN, including the participation of NGOs. Flatly contradicting their universal justifications, the proponents of the Periodic Review advocated for the primacy of state information, based on standardized and simple questionnaires. This was the position of Cuba and Iran, although the latter did not exclude the use of information from the Treaty Bodies and Special Procedures as ‘additional information’.⁹⁰⁸ Non-Aligned countries mention only the state as the source of information – NGOs or other non-state actors are completely left out.⁹⁰⁹

⁹⁰⁷ Merry, ‘Human Rights Monitoring, State Compliance, and the Problem of Information’.

⁹⁰⁸ Iran, Comments in addition to statement made by Islamic Republic of Iran in the Working Group on the UPR mechanism (UPR), 21 July 2016.

⁹⁰⁹ Non-Aligned Movement, Final document, 14th Summit Conference of Heads of States or Government of the Non-Aligned Movement, Havana, Cuba (NAM 2006/Doc.1/Rev.3) 11-16 September 2006.

The Chinese position offers a rationalisation for this: '[w]e do not support NGOs', the representative of China states, 'because we cannot ensure the reliability and objectivity of the material presented by NGOs'.⁹¹⁰ Restricting information to one single source, the state, would thus ensure universal criteria of reliability and objectivity, rather than by relying on multiple and alternative sources of information, including from NGOs; China here offers yet another illustration of the perversity of universalism: presenting extremely demanding of the reliability of information in order to prevent NGOs from reporting on basic violations that can be relatively easily established and corroborated.

The opposite view held by Western countries emphasised instead the need to rely on existing sources of information and tried to sidestep the role of the state in order to embolden non-state sources, including the Office of the High Commissioner, General Conclusions and Recommendations of the Treaty Bodies and Special Procedures. This comprehensive approach was exemplified by the position of the European Union, which included a role for NGOs and National Human Rights Institutions, but did not mention at all the role of the state.⁹¹¹ Similar reasoning can be observed in the position of Lichtenstein too.⁹¹² Australia also expressed its opposition to a 'separate reporting process' emphasizing once more the need to gather comprehensive information, including from academic sources, in order to assess and identify challenges to implementation and ways of remedying them, without excluding the possibility of cooperation and technical support.⁹¹³

⁹¹⁰ China, General comments on the non-paper, 12 February 2007.

⁹¹¹ European Union, Contribution by the European Union, UPR Mechanism, 18 August 2006.

⁹¹² Liechtenstein, Interventions by the Principality of Liechtenstein, UPR Working Group, 12-16 February 2007.

⁹¹³ Australia, Australian views, Universal Peer Review (UPR), 18 August 2006.

Canada followed the same line but added that the state under review could prepare a declaration outlining their achievements and the challenges they face in implementing their obligations, including indications for assistance.⁹¹⁴ Later it suggested that the state under review should use a hybrid questionnaire, addressing standard but also tailored concerns specific to each country, and involve experts to fill out the questionnaire.⁹¹⁵ Norway followed the same line adding that the state report is not a ‘self-assessment report’ but should be based on a standardized questionnaire responding to general and tailor-made requests.⁹¹⁶ This point was made by New Zealand as well.⁹¹⁷ The position of Bangladesh states that the issue of the reliability of information should be a central concern in compiling the information and filling out the questionnaire.⁹¹⁸

The seemingly tedious and technical discourse about information might obscure the underlying rivalry over the monopoly of information and control over the sources of scrutiny. In their attempt to build an anti-Commission, the proponents of the Periodic Review were struggling to restore the centrality of the state in the monitoring of human rights—which is something they gave up when creating of the Special Procedures in the late 1960s!—and monopolise information in order to control their own assessment. But this position directly contradicts their manifest quest of eradicating subjectivity, selectivity and politicization, given that the state as the sole source of information exemplifies each and every one of those supposed flaws. The representative of Uruguay articulated this contradiction in an exemplary fashion: he could ‘not conceive of a mechanism’ that does not take into account existing

⁹¹⁴ Canada, Mécanisme d’examen périodique universel. Non-document canadien - Version n° 3, 21 July 2006

⁹¹⁵ Canada, HRC Working Group on UPR, 12 February 2007.

⁹¹⁶ Norway, Periodicity and order of review, 13 February 2007.

⁹¹⁷ New Zealand, Working group on UPR section IV ‘Process and Modalities of Review’, 13 February 2007.

⁹¹⁸ Bangladesh, Comment on non-paper, 12 February 2007.

sources, asserting that ‘the plurality of sources of information is inherently related to the objectivity and impartiality’ that the Periodic Review should strive for.⁹¹⁹ In other words, the proponents of state-only information were doing exactly the opposite of what they were claiming to do when pushing for the creation of a new institution to address the flaws of existing ones.

Conversely, their Western counterparts reinterpreted their constant concern of ‘duplication’ and sought to establish the Periodic Review within the existing institutions, adding another layer that conforms largely to existing practice. Yet their emphasis on the value of expertise and reliable information stands in stark contrast to their push for the abolition of an expert-body *par excellence* –the Sub-Commission. These positions show the contingent and subjective criteria for actions justified in the name of the universal—exemplified by objectivity and impartiality—but also how they move and fluctuate depending on the position they occupy in relation to the universal.

The final document envisages three main sources of information as the basis of the review.⁹²⁰ The first source consists of a state or ‘national report’ of maximum twenty pages. The other two consist of a compilation based on information from the Treaty Bodies and Special Procedures, and a summary of submissions by national stakeholders, both prepared by the Office of the Human rights High Commissioner, not exceeding ten pages each. The preparation and presentation of these reports had to follow specific guidelines adopted by the Council. In the end, the proponents of the Periodic Review managed to reinstate the role of

⁹¹⁹ Uruguay, Intervención de Uruguay, Grupo de Trabajo, Modalidades del Mecanismo de Revisión Periódica Universal, 13 February 2007.

⁹²⁰ Human Rights Council Resolution 5/1. ‘Institution-building of the United Nations Human Rights Council’ 18 June 2007, Part D, Section 1.

the state as the main source of information, but not without conceding a significant role for alternative sources. Indeed, as Abebe remarks, the final document does not enshrine a hierarchy among sources of information, as is the case with the Treaty Bodies.⁹²¹ This in line with the imperatives of objectivity that supposedly motivated the demand of their counterparts.

5.3.5. Process

Negotiations about who exactly should participate in and conduct the review process offer another illustration of how the universal is used to both expose and mitigate contradictions. This is especially the case when the concrete proposals of the proponents of the Periodic Review are decoupled and often antithetical to their manifest intentions. The conduct of the review process involved choices about the periodicity of review cycles, their duration, the number and order of countries reviewed, the time allocated to each review, the place where the review would be conducted as well as its audience, and most importantly, the participants in this process and their role. Proposals about the periodicity of cycles ranged from three to five years, and the duration of each cycle about four weeks. No major disagreement can be observed about the allocation of three hours for each country under review. In contrast, the location or site where the actual review or ‘interactive dialogue’ was to take place reveals major disagreements. Some representatives argued that the review should be held in a Working Group created for that purpose, whilst others preferred the Plenary meetings of the Council. Furthermore, and as in the case with information, there was deep disagreement about the involvement and role of experts and NGOs in the review process.

⁹²¹ Abebe, ‘Of Shaming and Bargaining’, 11.

These divisions follow familiar lines. The proponents' proposals envisaged the longest cycles, meaning that the intervening period between the review of a country should be at least five years. This is a position that found support from Cuba, China,⁹²² Malaysia, Azerbaijan,⁹²³ and India.⁹²⁴ Intriguingly, the Organization of Islamic Conference represented by Pakistan asked for the adoption of different times.⁹²⁵ It proposed what it called a 'staggered examination based on the level of development', which basically meant that developing countries were to be examined once in five years, whilst developed countries once in three years. Pakistan did not give the grounds for such a curious proposal, but an earlier position of Iran alludes to a similar idea:

'In order to avoid political selectivity, the [Periodic Review] must be really universal, and all States, with no exception- beginning with the members of the Council must be scrutinized. It must be carried out on regular basis and for that it could be considered a period of 3 years for developed countries and every 5 years for developing countries'.⁹²⁶

How exactly such a differentiation would avoid 'political selectivity' remains a mystery. The grounds for introducing different periods escaped many other representatives, who came to portray as antithetical to the purported universal character of the Periodic Review –i.e. in

⁹²² China, General comments on the non-paper, 12 February 2007.

⁹²³ Azerbaijan Human Rights Council Working Group on the UPR Statement by the Delegation of the Republic of Azerbaijan, 12 February 2007.

⁹²⁴ Azerbaijan, Human Rights Council Working Group on the UPR Statement by the Delegation of the Republic of Azerbaijan, 12 February 2007.

⁹²⁵ Organisation of Islamic Conference, Statement by Faisal Niaz Tirmizi, First Secretary on behalf Member States of the OIC at the Second Session of the intersessional open-ended intergovernmental Working Group to develop the modalities of the UPR mechanism established pursuant to the Human Rights Council decision 1/103, 12 February 2007.

⁹²⁶ Iran, Comments in addition to statement made by Islamic Republic of Iran in the Working Group on the universal periodic review mechanism (UPR), 21 July 2016.

treating all states in the same manner according to the same standards. Several countries objected to this provocative proposal, based on the universal aspiration of the Periodic Review, including Guatemala, Norway, and Canada. They asked for a shorter cycle between three and four years, with Chile⁹²⁷ and Canada⁹²⁸ argued that a longer cycle would create anomalies in the operation of the system.⁹²⁹

As was the case with the inclusion of experts and NGOs in the relation to the collection of information, the proponents of the Periodic Review objected to the role of experts in assessing the information provided –justified as an attempt to preserve the integrity of the Periodic Review as ‘an inter-governmental process’.⁹³⁰ Algeria objected to the involvement of experts on the curious ground that ‘many countries opposed them’.⁹³¹ Conversely, Western nations showed support for experts, demanding that they play a key role in helping states to filter information and make it actionable. For New Zealand, it was necessary to have this intermediate stage in order to cope with the deluge of information that the review of nearly fifty states per year would produce; focusing this information in five-six pages would make for ‘focused, fair and predictable’ dialogue with the state under review.⁹³²

⁹²⁷ Chile, Intervención de la Delegación de Chile Grupo De Trabajo Sobre Mecanismo De Revision Periodica Universal, 13 February 2007.

⁹²⁸ Canada, UPR WG, 13 February 2007.

⁹²⁹ Guatemala, Intervención de la Delegación de Guatemala Mecanismo de Revisión Universal Discusión de los elementos que requieren mayor consideración sobre: periodicidad, orden, proceso y modalidades de la revisión 13 de febrero de 2007; Ecuador [handwritten note], 13 February 2007; New Zealand, Working Group On UPR Section III: ‘Periodicity And Order Of Review’, 13 February 2007; Norway, Periodicity and order of review, 13 February 2007; Argentina, Intervención Argentina, Examen periódico universal, 12 February 2007; Japan, Statement by JAPAN, Comment of the non-paper, 12 February 2007.

⁹³⁰ Malaysia, General Comments by Malaysia, Intersessional Working Group on UPR, 12 February 2007.

⁹³¹ Algeria, Groupe de travail intergouvernemental intersession sur la mise en œuvre du paragraphe 06 de la résolution 60/251 de l'Assemblée générale des Nations Unies -Examen Périodique Pniversal (Algeria),12 fevrier 2007.

⁹³² New Zealand, Working Group on UPR Section IV ‘Process and Modalities of Review’, 13 February 2007.

A similar view was expressed by the representative of Norway, reiterating the need for an ‘independent expert or panel of independent experts’ to prepare a focused list of issues to be discussed in the interactive dialogue.⁹³³ A similar dynamic can be observed in relation to the involvement of the NGOs in the process. For Belgium, interactive dialogue ‘naturally included NGOs and the civil society’.⁹³⁴ The involvement of all relevant stakeholders, argued Norway, was key to the credibility of the Periodic Review, which included NGOs and National Human Rights Institutions. It argued that the presence of civil society is what reframed the ‘peer review as originally envisaged into the ‘universal peer review’– meaning that it should not be solely between states.⁹³⁵ The taken-for-grantedness of the intergovernmental nature of the Periodic Review was put in question by Argentina as well.⁹³⁶ Poland also saw the participation of civil society as an ‘essential element’ in the interest of transparency.⁹³⁷ In the same spirit, Indonesia argued that ‘the participation of civil society including NGOs and National Human Rights Institutions must be secured’, but then only at a preparatory stage, so as not to jeopardise the intergovernmental character of the process.⁹³⁸

However, Libya saw this process as too limiting, limited only to Western civil society and delegations, which went against the spirit of interactive dialogue that should underpin the Periodic Review. It made a radical proposal to resolve this problem, proposing two necessary requirements for the ‘completion of the process’:

⁹³³ Norway, Periodicity and order of review, 13 February 2007

⁹³⁴ Belgium, Déclaration Belgique, UPR, 12 February 2007.

⁹³⁵ Norway, Basis of review and Principles and objectives, 12 February 2007.

⁹³⁶ Argentina, Intervención Argentina, Examen periódico universal, 12 February 2007.

⁹³⁷ Poland, Statement to the Working Group on the UPR of the HRC, 12 February 2007.

⁹³⁸ Indonesia, intervention at the Working Group on the Implementation of OP 6 of the GA Res. 60/251 Universal Periodic Review Geneva, 12 February 2007.

- ‘1. The periodic review of the state concerned should be open to the media, especially the media of the concerned country, and if this is not affordable for the state concerned, then the Council should provide financial coverage for that.
2. The review process should be broadcasted in real time by the relevant radio and TV stations of the state concerned, to allow all members and segments of the population to follow the periodic review process’.⁹³⁹

This proposal asserted the need for ‘full transparency’ in order to educate people about their rights and duties –including victims – and evaluate both the achievements and challenges that states face in realising human rights.⁹⁴⁰ No other position did reflected such idiosyncratic proposals, but it is striking nevertheless to observe that even a despotic regime like Gadhafi’s would appeal to the universal in its positioning at the margins of global political space. But if this arrangement had gone through it could have mitigated if not offset the role of Western-dominated civil society in the review process.

Divergences about the site for the conduct of the review reveal a similar pattern. China suggested to conduct the review in the plenary sessions of the Council, with member states the main players: ‘in order to ensure the objectivity and impartiality of the review’ and avoid ‘duplication’. *Nota bene*, the Chinese representative advocated for a *peer* review driven by the forty-seven members of the Council, thus excluding even the rest of UN member states which have observer status in the Council, not to mention non-state actors. Yet he sought to

⁹³⁹ Libya, Statement by the Libyan delegation on the Facilitator’s non-paper, Intersessional Working Group on UPR, 12 February 2007 (Translation from Arabic by Dr. Marina Calculli is gratefully acknowledged).

⁹⁴⁰ Libya, Statement by the Libyan delegation on the Facilitator’s non-paper, Intersessional Working Group on UPR, 12 February 2007 (Translation from Arabic by Dr. Marina Calculli is gratefully acknowledged).

present this proposal in the name of universality, transparency and the need for ‘more dialogue and conversation’ and since ‘everyone [was] on the same boat’.⁹⁴¹ Algeria concurred with this proposal echoing that the conduct of the review in a specific Working Group would be burdensome. Similarly, Pakistan did not support the idea of the working group as a site but demanded equitable representation in case that came to pass.⁹⁴² In contrast, Western countries defended an alternative arrangement, exemplified by the position of the European Union, proposing that:

‘the [Periodic Review] should be conducted by a preparatory group outside the regular sessions, in order to allow a more detailed and constructive dialogue. The recommendations emanating from such an exercise should then be adopted in the plenary’.⁹⁴³

It is exactly to avoid overburdening the Council, Norway argued, that they supported the creation of a ‘working group or subcommittee’ to conduct the review ‘based on the list of issues provided by the independent expert(s)’.⁹⁴⁴ New Zealand saw in this proposal the possibility of prioritizing issues and producing recommendation with concrete action-steps.

The final agreement resolves that all states will go through the review process every four years. The review is to be conducted in a Working Group consisting of members of the

⁹⁴¹ China, General Comments to the Facilitator’s non-paper, 12 February 2007 (Translation from Chinese by Dr. Xiaoyu Lu is gratefully acknowledged).

⁹⁴² Organisation of Islamic Conference, Statement by Faisal Niaz Tirmizi, First Secretary on behalf Member States of the OIC at the Second Session of the intersessional open-ended intergovernmental Working Group to develop the modalities of the UPR mechanism established pursuant to the Human Rights Council decision 1/103, 12 February 2007.

⁹⁴³ European Union, Statement by the European Union, WG on UPR, General remarks, 12 February 2007.

⁹⁴⁴ Norway, Periodicity and order of review, 13.02.07

Council, as well as observer states and civil society organizations. It provides for three rapporteurs (*Troika*) – selected among the members of the Council and belonging to different electoral causes– to facilitate the review process. The Working Group is the site where the ‘interactive dialogue’ or public hearing between the country under review and the Council takes place. The state under review is given thirty minutes to presents its assessment of human rights, which is then followed by two hours of exchange of views with the members and observers of the Council, who can raise questions and make recommendations, to which the state under review is obliged to respond and declare which recommendations they accept or reject. The Troika filters these questions and recommendations and compiles them into a report which is then put forward to the working group for adoption. The final outcome of the review is then presented to the plenary of the Council and is given one hour for its adoption.

Overall, the actual choices about the conduct of the Periodic Review are the furthest apart from the proposals defended by its proponents, especially their overarching goal of making the Periodic Review into a peer-review exercise. It is striking to observe how the final agreement weeds out virtually all elements of the conduct of the review that do not fit with its universal aspiration.⁹⁴⁵ The basic contradiction in the position of proponents, which presented pure state-to-state peer-review as a remedy for the problem of politicization which they decried, allowed opposing states to appeal much more credibly to the universal in giving shape to the process. The opposite camp was far more successful in showing the incompatibility of these proposals with the universal, which they both appealed to, but for virtually antithetical aims, contributing nevertheless to an outcome that is closer to the justifications for which it is pursued, than whatever ulterior intentions its proponents might have had in mind.

⁹⁴⁵ Human Rights Council Resolution 5/1 of 18 June 2007, Part D, Section 2.

5.3.6. Outcome

Negotiations about the outcome of the review process show unsurprisingly strong divergences, revealing deep but predictable disparities and contradictions between the manifest goals and actual behaviour of states that asked for reform or resisted it. Yet the assorted positions put forward are hard to fit into two or three streams of argumentation, revealing greater diversity and disagreement. The majority of states favoured a non-binding outcome, in the form of observations and recommendations, justified mainly on the grounds of reducing costs, avoiding duplication and preserving the ‘cooperative’ character of the Periodic Review. The Australian proposal to incorporate the review outcomes into ‘mainstream [Office of the High Commissioner] activity... with the exception of urgent or serious human rights situations’ exemplifies the desire to preserve maximum flexibility;⁹⁴⁶ it further states that ‘the outcomes and recommendations from the [Periodic Review] process should be practical, realistic, achievable’ whilst the establishment of ‘resource-intensive’ new monitoring processes should be avoided.⁹⁴⁷

In a similar vein, the Philippines favoured a ‘constructive, cooperative, credible, realistic and cost-effective’ outcome in the form of ‘recommendations and conclusions derived from the actual review session and the interactive dialogue’.⁹⁴⁸ The Philippines also expressed the concern that admitting live Webcast and media representatives to the plenary discussion of the outcome could put a strain on the three-hour public hearing between the Council and the state under review.⁹⁴⁹ There was also a general resistance to link the review outcome with

⁹⁴⁶ Australia, Comment to the non-paper, 12 February 2007.

⁹⁴⁷ Australia, Comment to the non-paper, 12 February 2007.

⁹⁴⁸ Philippines, Intervention on UPR Non-Paper (Part V: Outcome), 14 February 2006.

⁹⁴⁹ Philippines, Intervention on UPR Non-Paper (Part V: Outcome), 14 February 2006.

[Office of the High Commissioner]-sponsored forms of field presence, Special Procedures, dispatching of fact-finding missions or commissions of inquiry, as can be seen from the positions of China,⁹⁵⁰ Pakistan,⁹⁵¹ Guatemala,⁹⁵² and Norway.⁹⁵³ The convergence of these states on this point is intriguing but perhaps illustrative of the fluidity of positions in relation to various aspects of the design of the Periodic Review.

Broadly speaking, the proponents of the Periodic Review called for the centrality of the state under review in the compilation, discussion and approval of the outcome. China, for instance, favoured the establishment of a ‘cooperative [mechanism], adopted *by consensus with the full agreement of the state under review*’.⁹⁵⁴ Predictably, China justified this stance on universal grounds, asserting that:

‘recommendations should focus on enhancing the capacity of the reviewed country through technical assistance, not shaming and blaming it, because this will undermine the purpose of setting up [the Periodic Review] or even the Council, which is to promote and protect human rights through dialogue and cooperation rather than political confrontation’.⁹⁵⁵

In a similar vein, Pakistan called for an outcome in the form of ‘a *procès-verbal* containing a summary of proceedings with recommendations to be adopted by consensus’.⁹⁵⁶ It further

⁹⁵⁰ China, General comments on the non-paper, 12 February 2007.

⁹⁵¹ Pakistan, Statement on the Outcome of the Review, 14 February 2007.

⁹⁵² Malaysia, Statement by Malaysia Intersessional Working Group on the Universal Periodic Review, 14 February 2007.

⁹⁵³ Norway, Statement on the Outcome of the review, 14 February 2007.

⁹⁵⁴ China, General comments on the non-paper, 12 Feb 2007. [emphasis added].

⁹⁵⁵ China, Statement on revision of UPR, 14 February 2007.

⁹⁵⁶ Organisation of Islamic Conference, Statement by Faisal Niaz Tirmizi, First Secretary on behalf Member States of the OIC at the Second Session of the intersessional open-ended

reiterated the need to focus on technical assistance and capacity-building if and when the state under review requests it. But proposals by European states to make review outcomes and recommendations freely accessible,⁹⁵⁷ were seen by Pakistan as a danger for further politicization:

‘the objective is the promotion and protection of human rights on the ground, and not politicization. Outcomes should not be widely disseminated, especially [in the case of states that are] encouraged to improve their human rights situation’.⁹⁵⁸

Pakistan here acknowledges the universal aspiration of the Periodic Review only to undercut its substantive implications in practice. For how can human rights be improved if we should not know what their state is? In the case of Guatemala, the process had to respect the ‘principle of sovereignty’ at all times.⁹⁵⁹ For Cuba, it was essential for the views of the state to be reflected integrally in the final outcome, including their decisions to accept or reject recommendation made by other states.⁹⁶⁰ Surprisingly, Canada expressed a similar position, arguing that the outcome should not to be ‘overly prescriptive’ or ‘bind the hands of the

intergovernmental Working Group to develop the modalities of the UPR mechanism established pursuant to the Human Rights Council decision 1/103, 12 February 2007.

⁹⁵⁷ Organisation of Islamic Conference, Statement by Faisal Niaz Tirmizi, First Secretary on behalf Member States of the OIC at the Second Session of the intersessional open-ended intergovernmental Working Group to develop the modalities of the UPR mechanism established pursuant to the Human Rights Council decision 1/103, 12 February 2007.

⁹⁵⁸ Organisation of Islamic Conference, Statement by Faisal Niaz Tirmizi, First Secretary on behalf Member States of the OIC at the Second Session of the intersessional open-ended intergovernmental Working Group to develop the modalities of the UPR mechanism established pursuant to the Human Rights Council decision 1/103, 12 February 2007.

⁹⁵⁹ Guatemala, Statement by Guatemala, Universal Periodic Review Mechanism - Outcome of the Review, 14 February 2007.

⁹⁶⁰ Human Rights Council Vice-President, Non-Paper on the Universal Periodic Review Mechanism, prepared under the authority of the Facilitator and Vice-President of the Human Rights Council, Mr Mohammed Loulichki (Morocco), 27 April 2007.

workings groups or the Council'.⁹⁶¹ Furthermore, it suggested that the establishment of OHCHR-sponsored programmes of technical cooperation should be available upon the request and consent of the state under review.⁹⁶² More in general, Canada supported a comprehensive outcome consisting of a questionnaire, responses by the State concerned, a summary of proceedings, as well as the conclusions and recommendations of the review committee.⁹⁶³

A contrary view came from the European Union and New Zealand, who defended 'an action-orientated' Periodic Review⁹⁶⁴ so as to produce 'concrete improvements on the ground'.⁹⁶⁵ To the European Union, the Periodic Review was to operate as a 'forum for exchanging best practices' aimed at assisting states:

'[...] through capacity building and technical cooperation, recommend practical measures to the State concerned and other actors (such as UN funds and programmes) and also decide on additional measures to be taken by the Council itself, if needed (i.e. the Council could appoint a special rapporteur, a fact-finding mission, it could issue further recommendations to other UN bodies or recommend other follow-up measures)'.⁹⁶⁶

⁹⁶¹ Canada, WG UPR - Outcome of the Review, 14 February 2007.

⁹⁶² Canada, Mécanisme d'examen périodique universel. Non-document canadien - Version n° 3, 21 July 2006

⁹⁶³ Canada, Contribution to HRC Working Group on UPR, 12 February 2007.

⁹⁶⁴ New Zealand, Contribution to Working Group on UPR, Section V, 'Outcome of The Review', 14 February 2007.

⁹⁶⁵ European Union, Statement by the European Union, Universal Periodic Review Mechanism, 18 August 2006, Geneva.

⁹⁶⁶ European Union, Statement by the European Union, Universal Periodic Review Mechanism, 18 August 2006.

The European Union envisaged substantial synergy among different UN organs, something that went against not only the key proponents of the Periodic Review, but also their counterparts. In an effort to enhance the transparency and accountability of the process itself, the European Union proposed the creation of a real-time Periodic Review database ‘open for all stakeholders to consult freely’ in order ‘to ensure that [they are all] aware of the process and outcome’.⁹⁶⁷ These efforts contrasted with the position of the United States, which favoured a more open-ended process eschewing formal procedures about the format and content of the outcome.⁹⁶⁸ It also favoured firm control of the review process by the Council, stating that ‘any actions emanating from the [Periodic Review] process, including recommendations for assistance or other resolutions should be adopted by the Council plenary during its session on Periodic Review once or twice a year’.⁹⁶⁹ Given its support for centralisation of power in the hands of the Council, this position could have as well come from China or other proponents of the Periodic Review. It is hardly a position intended to avoid selectivity and politicization and make the review process more accountable and transparent, given its dependency on the expediencies of the majority in the Council.

The apparent fluidity of positions with regard to the character of the ultimate outcome of the entire review process might be seen as variations of a common theme or underlying convergence of interests. No position defends robust outcomes, let alone binding outcomes. Not a single position shows an attempt to associate robust or binding outcomes with the realisation of the universal that all this activity is supposed to embody. In spite of their manifold divergences, all speakers converge around a lax or expressly propaedeutic function

⁹⁶⁷ European Union, Statement by the European Union, Universal Periodic Review Mechanism, 18 August 2006.

⁹⁶⁸ United States, Statement on the outcome of the review, 14 February 2007.

⁹⁶⁹ United States, Statement on the outcome of the review, 14 February 2007.

of the final outcome of the review. But overall, the final agreement on the Periodic Review reveals an underlying preference for a state-driven process, as can be seen in the provisions regarding the format, content, and the adoption of the outcome.

The outcome consists of a summary of proceedings, including the recommendations and commitments made by the state under the review. The content of the outcome should be defined by the ‘cooperative’ spirit of the Periodic Review and reflect an ‘objective and transparent’ assessment of the human rights situation in the country under review but also the positive results and challenges that it faces in upholding human rights. It also includes best practices and pledges by the state concerned, and, eventually, provisions of technical assistance ‘in consultation with, and with the consent of’ the state under review. Finally, the outcome comprises the recommendations that the state accepts or rejects, as well as its comments on them. If there were any doubt about the centrality of the state in the decision-making of the adoption of the outcome, the agreement states that the state under review ‘should be fully involved in the outcome’, have ample opportunities to respond to questions and clarify its positions before the outcome is considered for adoption by the plenary of the Council.

The race to the lowest common denominator of both camps as regards the value of the final outcome betrays the intention of the proponents of the Periodic Review not to create a meaningful alternative, and the obvious reluctance of the European Union and other countries to expose that contradiction, given that they, too, did not intend to bind themselves by the outcomes of an institution they did not ask for to begin with. The collusion of both parties on this fundamental point normalised the discrepancy between their combined action and the universal which they aspired to embody in their action.

5.3.7. Evaluation

We can see that all states have coalesced around a weak and nonbinding outcome of the review process, even as the Periodic Review aspires to achieve the highest enjoyment of human rights. This tendency becomes clearer in relation to action following the adoption of the outcome, that is, measures about the follow-up or evaluation of the outcomes. State positions reveal a broad convergence towards the preservation of the autonomy of the state under review in implementing outcome recommendations. Where they differ is the measures to be taken in case of non-compliance with the state's human rights obligations and commitment to follow up on the report. The basic line of this divergence can be illustrated by the position of Indonesia, according to which 'no punitive measures should be taken in any case',⁹⁷⁰ and that of Switzerland according to which the Council should be able to issue a declaration against a state which has failed to implement the Periodic Review recommendations, and be free to take all measures which it deems necessary within the limits of its competences.⁹⁷¹

The typical configuration of positions reemerges on this point, with the proponents of the Periodic Review such as Malaysia, dismissing the whole idea of follow-up on whatever states under review have agreed to, as that would contradict the cooperative character and the 'interactive dialogue' of the Periodic Review.⁹⁷² The Malaysian delegate stressed that '[w]e do not agree that there should be any provision on measures to be taken in case of

⁹⁷⁰ Indonesia, Statement by the Indonesian delegation on the Non-paper by the Facilitator on the Universal Periodic Review WG on the Universal Periodic Review (Implementation of OP-6), 12 February 2007.

⁹⁷¹ Switzerland, Statement on Outcome and Follow-up, 14 February 2007.

⁹⁷² Malaysia, Statement by Malaysia Intersessional Working Group on the Universal Periodic Review 14 February 2007

[non]compliance by a state with [the UPR]. Having such a provision is already prejudging the positions of countries and assuming a confrontational attitude'.⁹⁷³ Pakistan was more forgiving when it said it could live with a follow-up mechanism that did not go beyond a set of 'voluntary initiatives by states, technical cooperation and review of progress at the next [Periodic Review]'.⁹⁷⁴ The European Union did not go much further than emphasising the need for transparency and publicity of the process.⁹⁷⁵

Nevertheless, some states tried to maintain the impression of some type of follow-up –in order to preserve the credibility of the Periodic Review, which could easily be subject to question if no concrete measures were to follow from the process. Azerbaijan, for instance, warned that 'some mechanism should be envisaged in case of an outright non-cooperation of a state with the [Periodic Review]. Otherwise its credibility will very soon be undermined'.⁹⁷⁶ In a similar vein, Algeria recognized the need to give concrete substance to the nature of cooperation within the framework of the Periodic Review, even as it rejected the creation of any 'constraining mechanisms'.⁹⁷⁷ But it was ready to support the creation of a Fund to

⁹⁷³ Malaysia, General Comments by Malaysia, Intersessional Working Group on UPR, 12 February 2007.

⁹⁷⁴ Organisation of Islamic Conference, Statement by Faisal Niaz Tirmizi, First Secretary on behalf Member States of the OIC at the Second Session of the intersessional open-ended intergovernmental Working Group to develop the modalities of the UPR mechanism established pursuant to the Human Rights Council decision 1/103, 12 February 2007.

⁹⁷⁵ European Union, Statement by the European Union, Universal Periodic Review Mechanism, 18 August 2006.

⁹⁷⁶ Azerbaijan, Human Rights Council Working Group on the Universal Periodic Review Statement by the Delegation of the Republic of Azerbaijan, 12 February 2007.

⁹⁷⁷ Algeria, Groupe de travail intergouvernemental intersession sur la mise en œuvre du paragraphe 06 de la résolution 60/251 de l'Assemblée générale des Nations Unies -Examen Périodique Universel (UPR), 2 February 2007.

guarantee technical assistance and development of national capacities for the implementation of Periodic Review recommendations.⁹⁷⁸

However, the final agreement does not offer a synthesis but preserves the coexistence of two different positions on evaluation. The power is conferred on the Council to decide on an *ad hoc* basis ‘if and when any specific follow-up is necessary’ and to ‘address, as appropriate, cases of persistent non-cooperation with the mechanism’.⁹⁷⁹ Despite their opposing goals and positions, both camps avoided any binding mechanism to induce states to fulfil their human rights obligations, showing a staggering degree of consistency with all other human rights mechanisms including the Treaty Bodies and the Special Procedures.

What can be gleaned from the foregoing discussion is that the struggle between the two rival groups of states in designing the Periodic Review was a struggle that weaponized the universal to arrive at a new balance within the existing monitoring system, and not in the pursuit of competing visions of the monitoring of universal respect for human rights. If one camp supported the Periodic Review as a means of undermining the Special Procedures, the other camp was dragged into the negotiations in order to limit the damage and preserve the *status quo*; it was not a battle between reformist and conservative forces, but one between two forms of *status quo*. Antithetical positions in relation to core elements of the Periodic Review coexisted without offering a new synthesis, despite the concessions that each side had to make in order to avoid flagrant inconsistency with the universal. Whatever measures were taken were measures to compensate for the lack of real commitment in changing the

⁹⁷⁸ Algeria, Groupe de travail intergouvernemental intersession sur la mise en œuvre du paragraphe 06 de la résolution 60/251 de l'Assemblée générale des Nations Unies -Examen Périodique Universel (UPR), 2 February 2007.

⁹⁷⁹ Human Rights Council Resolution 5/1 of 18 June 2007, Part D, OP 37-38.

status quo, and not to enhance overall capacity of the Council to better monitor universal respect for human rights.

5.4. Negation

What is more striking than the creation of a new institution to rebalance the position of rival forces within existing monitoring institutions, is that the Periodic Review embodies the universal more than any other institution. In sharp contrast to the Treaty Bodies and the Special Procedures, the Periodic Review assesses all countries in relation to all rights, making it doubly universal. Universal censure emerged as the solution to incessant efforts to avoid or destabilise selective censure. Having tried and failed to eradicate geographic scrutiny, they saw that extending scrutiny to everyone was the way to deal with resistance to singular scrutiny—they pushed for universal scrutiny even as they abhorred individual scrutiny. Combined, rival forces brought about fundamental change they had persistently resisted since WWII, especially after the creation of the United Nation. This is not just remarkable but revolutionary institutional change, one that cannot be explained without reference to the invocation of the universal by the rival parties and the subsequent demands that appeals to the universal places on them to produce consistency with it, whatever their intentions. In their efforts to pillory each other's positions they generated a process that subverted their individual resistance to scrutiny by bringing into life a monitoring institution with a universal reach, setting another landmark precedent towards global oversight of domestic practices.

It is not that its significance was immediately recognised, however. In fact, the initial reception of the Periodic Review showed cautious optimism at best and low expectations.⁹⁸⁰

⁹⁸⁰ Gareth Sweeney and Yuri Saito, 'An NGO Assessment of the New Mechanisms of the UN Human Rights Council', *Human Rights Law Review* 9, no. 2 (1 January 2009): 218–19.

And not without reason. Aside from the fact that neither camp was particularly keen to have another monitoring institution, the Periodic Review was generally considered as a Trojan Horse in the human right system, meant to deplete the limited resources of the United Nations for sheer ritualism, without adding tangible value.⁹⁸¹ On the contrary, the fear was that it would morph into a logrolling exercise where abusers would use the review process to praise fellow abusers then to be praised by them and so on. The ‘prevailing gentility’ in the review process, John Carey, a former representative of the United States in the Commission and former member of the Sub-commission, explains, ‘may result from the fact that each country is itself scrutinized every four years. Some countries that have probed a bit sharply may regret it when their turn comes. Others will go easy in a spirit of mutual back-scratching’.⁹⁸²

The iterative character of the review renders the prospect of retaliation real—a force that should normally run against meaningful scrutiny, as no state has an obvious interest in exposing itself to sustained attacks. And indeed, there was evidence of that, with countries coordinating amongst themselves to fill up the list of speakers with their friends and allies, limiting the limited time available for critical voices to be heard.⁹⁸³ That all states went

⁹⁸¹ Felice D. Gaer, ‘A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System’, *Human Rights Law Review* 7, no. 1 (1 January 2007): 109–39; Hilary Charlesworth and Emma Larking, ‘Introduction: The Regulatory Power of the Universal Periodic Review’, in *Human Rights and the Universal Periodic Review: Rituals and Ritualism*, ed. Hilary Charlesworth and Emma Larking (Cambridge: Cambridge University Press, 2015), 1–21.

⁹⁸² John Carey, ‘The U.N. Human Rights Council: What Would Eleanor Roosevelt Say?’, *ILSA Journal of International & Comparative Law* 15, no. 2 (1 January 2009): 460.

⁹⁸³ Jessica Duggan-Larkin, ‘Can an Intergovernmental Mechanism Increase the Protection of Human Rights? The Potential of Universal Periodic Review in Relation to the Realisation of Economic, Social and Cultural Rights’, *Netherlands Quarterly of Human Rights* 28, no. 4 (1 December 2010): 553,.

through the review process in the first cycle of the Periodic Review concluded in March 2012 was a reason to celebrate, but also to worry for states challenging it.

A first challenge came from North Korea in 2010. Having received hundred a sixty-seven recommendations from other states, it explicitly rejected fifty of them, but did not specify its position with regard to the rest. This was read as an act of defiance toward the Periodic Review, and the human rights regime in general.⁹⁸⁴ But just before its second review in 2014, the North Korean delegation submitted an annex to its national report explaining its position in relation to recommendations received in the first cycle. After ‘serious consideration to the recommendations’ received, including through ‘broad consultation’ with national stakeholders, it had finally resolved to accept eighty-one recommendations, partially accept six, take note of other fifteen of them, and reject another fifteen.⁹⁸⁵

It did not give a reason for making its position known after a four-year delay, but it did take care to give the reason for the recommendations it rejected: ‘they seriously distorted the reality of and slandered the country’.⁹⁸⁶ Nevertheless, it added that North Korea ‘will in the future continue to attach its importance to [the Periodic Review] mechanism and faithfully implement its commitments to international field of human rights’.⁹⁸⁷ The North Korean delegation made good on this commitment by showing a greater degree of cooperation and explicit acceptance of the review process, in line with the unwavering determination of the

⁹⁸⁴ Pilar Elizalde, ‘A Horizontal Pathway to Impact? An Assessment of the Universal Periodic Review at 10’, in *Contesting Human Rights: Norms, Institutions and Practice*, ed. Alison Brysk and Michael Stohl (Cheltenham, United Kingdom: Edward Elgar Publishing, 2019), 90.

⁹⁸⁵ Elizalde, 91.

⁹⁸⁶ North Korea, Position of the DPRK on the recommendations received during its first cycle UPR, 1 May 2014 (<https://www.ohchr.org/EN/HRBodies/UPR/Pages/KPindex.aspx>)

⁹⁸⁷ North Korea, Position of the DPRK on the recommendations received during its first cycle UPR, 1 May 2014 (<https://www.ohchr.org/EN/HRBodies/UPR/Pages/KPindex.aspx>)

supreme leader Kim Jong Un ‘to build a socialist thriving nation that effectively ensures people’s happy well-being and genuine human rights’.⁹⁸⁸ North Korea offers the best example of how one of world’s worst violators of human rights endorses the Periodic Review without undertaking any serious measures to alter its behaviour. Its prime objective, as Jonathan Chow demonstrates, was to create the impression of being scrutinised by the Periodic Review to delegitimise the role of Special Rapporteurs, who a few months earlier had released a report accusing North Korea of potential crimes against humanity, illustrating the main argument of this chapter.⁹⁸⁹ Still, open defiance and disengagement would be far more damage to the Periodic Review than engagement in bad faith, because the integrity of the review process rests on it being universal.

Yet the most serious act of defiance against the Periodic Review came in March 2012, when Israel suspended its relations with the Council, and refused to participate in its second review scheduled for 29 January 2013. This decision came immediately after the Council decided to investigate the legality of the expansion of Israeli Settlements on the West Bank, but the ground that Israel gave was the Council’s in-built bias against Israel.⁹⁹⁰ Israeli disengagement threatened that which made the Periodic Review unique: in contrast to other institutions, it had secured one hundred percent participation from states on a completely voluntary basis. Its value rested more on universal participation than on the active engagement of the participants to enhance the universal protection of human rights. Israel set a dangerous

⁹⁸⁸ Human Rights Council, National report by Democratic People’s Republic of Korea (A/HRC/WG.6/19/PRK/1) 30 January 2014, OP 2.

⁹⁸⁹ Jonathan T. Chow, ‘North Korea’s Participation in the Universal Periodic Review of Human Rights’, *Australian Journal of International Affairs* 71, no. 2 (4 March 2017): 146; 159.

⁹⁹⁰ Israel, Speech by Ambassador Eviatar Manor, Permanent Representative of Israel to the United Nations Office in Geneva before the 17th Session of the UPR Working Group – Review of Israel’s report, 29 October 2013, p 3.

precedent for universal participation, as its exit made it easier for other countries to follow suit, and unsurprisingly, provoked widespread condemnation and calls urging Israel to resume cooperation with the Council and appear before the Periodic Review; even countries notorious for violating basic universal rights called on Israel to return to the Periodic Review so as to preserve its universality and integrity.⁹⁹¹

Despite its long-standing resentment to being singled out by the Council, Israel decided to return to the Council and appear before the Periodic Review in October 2013.⁹⁹² It was out of respect for ‘UN Resolutions, human rights in general and human rights mechanisms in particular’ that Israel appeared before the Periodic Review, notwithstanding ‘strong reservations’ about the unfair treatment it receives from the Council, Ambassador Eviatar Manor stated.⁹⁹³ ‘We come to the [Periodic Review]’, he continued, ‘with respect for the process, belief in the importance of its universality and cooperative nature, and with great pride in our achievements’.⁹⁹⁴ It provided Israel with another ‘opportunity for in-depth self-examination’ in an ‘ongoing process of reflection ...to build upon its achievements and address the challenges that lie ahead’.⁹⁹⁵

⁹⁹¹ Human Rights Council, Draft report of the Working Group on the Universal Periodic Review (A/HRC/WG.6/17/L.12) 1 November 2013, Part I, Section B.

⁹⁹² Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review’ (A/HRC/25/15), 19 December 2013.

⁹⁹³ Israel, Speech by Ambassador Eviatar Manor, Permanent Representative of Israel to the United Nations Office in Geneva before the 17th Session of the UPR Working Group – Review of Israel’s report, 29 October 2013, p 3.

⁹⁹⁴ Israel, Speech by Ambassador Eviatar Manor, Permanent Representative of Israel to the United Nations Office in Geneva before the 17th Session of the UPR Working Group – Review of Israel’s report, 29 October 2013, p 3.

⁹⁹⁵ Israel, Statement by Shai Nitzan, Deputy Attorney General (Special Affairs), Ministry of Justice, State of Israel, 17th Session of the Working Group on the Universal Periodic Review, 29 October 2013, p 2.

Reference to ‘continued diplomatic engagement’ to resolve the outstanding issues, especially with regard to Item 7 for Israel’s return might point to the intensive negotiations that took place between Israel and especially the European Union and the United State. The admission of Israel to WEOG in November 2013 is one concession that Israel managed to extract in exchange for its return, Pilar Elizalde confirms.⁹⁹⁶ Another such concession might be declining participation and engagement by European and other Western countries in discussions and resolutions adopted under Council’s agenda Item 7, the main source of Israeli discontent. These concessions indicate not only the ability of Israel to use universality as a bargaining chip but also the readiness of its counterparts to make concessions in order to keep that universality intact. Disproportionate scrutiny of Israeli violations of human rights remains perhaps the most divisive issue within the Council; in fact, the United States decided to boycott the Council on 18 June 2018 because of the selectivity involved in its operation and in particular the ‘chronic bias’ and the ‘disproportionate focus and unending hostility’ towards Israel.⁹⁹⁷

Nonetheless, these divisions have not prevented the overwhelming majority of countries from rallying behind the preservation of the universal charter of the Periodic Review. In its third cycle of reviews to be completed in 2021, the Periodic Review has weathered the initial setbacks and has managed to consolidate itself into a distinct platform for public deliberation on the promotion of respect for human rights.⁹⁹⁸ It is precisely its political character, Elivera

⁹⁹⁶ Elizalde, ‘A Horizontal Pathway to Impact? An Assessment of the Universal Periodic Review at 10’, 92.

⁹⁹⁷ United States, Remarks on the UN Human Rights Council. Mike Pompeo, Secretary of State, and Nikki Haley, U.S. Permanent Representative to the United Nations, Washington, DC, 19 June 2018, (<https://usun.state.gov/remarks/8486>)

⁹⁹⁸ Karolina M. Milewicz and Robert E. Goodin, ‘Deliberative Capacity Building through International Organizations: The Case of the Universal Periodic Review of Human Rights’, *British Journal of Political Science* 48, no. 2 (April 2018): 514.

Dominguez-Redondo observes, that the Periodic Review has shown to be a useful instrument to reinforce and implement human rights.⁹⁹⁹ Rather than duplicating or undermining the work of the Treaty Bodies and Special Proceed, the public hearings have so far relied heavily on their findings, conclusions and recommendations, giving them unprecedented visibility and greater weight instead; ultimately, the process leads to a far more comprehensive and triangulated scrutiny of human rights records and more detailed information about the state of human rights in the world.¹⁰⁰⁰

Working on the assumption that politicisation is detrimental and trying to assess its degree of occurrence, Valentina Carraro, too, discovers that the political character of the Periodic Review reveals some ‘unintended positive consequences’ especially after countries have accepted recommendations from ‘political allies’.¹⁰⁰¹ Similarly, Rochelle Terman and Erik Voeten reveal ‘somewhat counterintuitive implications’ of politicisation in that they discover that political ties between target and reviewer affect the weight of recommendations made in the review process – those coming from allies carry far more weight than those coming from adversaries, because they care about preserving their close relationship. ‘If the UPR “matters,” they argue, ‘it is likely due to these political interactions, not because the process approximates and independent or impartial assessment of human rights’.¹⁰⁰² These indications are part of a larger and deeper pattern captured by the logic of consistency which considers selective action as a necessary condition for any type of action, and that the appeal

⁹⁹⁹ Elvira Dominguez-Redondo, ‘Universal Periodic Review - Is There Life beyond Naming and Shaming in Human Rights Implementation, The’, *New Zealand Law Review* 2012 (2012): 674–75.

¹⁰⁰⁰ Dominguez-Redondo, 696–99.

¹⁰⁰¹ Carraro, ‘The United Nations Treaty Bodies and Universal Periodic Review’, 967; 969.

¹⁰⁰² Rochelle Terman and Erik Voeten, ‘The Relational Politics of Shame: Evidence from the Universal Periodic Review’, *The Review of International Organizations* 13, no. 1 (1 March 2018): 2–3.

to the universal generates pressure to address it, not by overcoming selective action, but by *multiplying* it.

Yet the claim that impartial assessment would not be relevant understates or completely overlooks the force of the universal that enables and gives meaning to the phenomenon of relational shaming which the authors identify. The universal is critical but overlooked in what Hilary Charlesworth and Emma Larking identify as the regulatory character of the Periodic Review which, thanks to civil society and media, could transcend ritualism and produce substantive transformation.¹⁰⁰³ The self-regulating character that stems from states giving accounts and rationalising their behaviour in line with the goals of the regulatory regime, as Charlesworth and Larking point out,¹⁰⁰⁴ would be incomplete without appreciating the immanent disruptive force of the struggle for the universal and how that subverts individual intention and preference in favour of the universal to which they profess allegiance.

The universal is constitutive of the Periodic Review. The power of the universal embedded in the constitution of the Periodic Review, and immanently generated in the pursuit of consistency induced by the review process itself, is so strong that it can even suspend the public display of bloc division and loyalties, something that is unprecedented anywhere in the UN. Despite the soft obligations concerning follow-up on recommendations, the combined interventions from various states and NGOs give them substance and make them politically binding. No state takes the review process lightly and nearly all of them go to great lengths to demonstrate their achievements and areas of improvement in light of recommendations received and publicly accepted. They have little room for manoeuvre as long as they operate

¹⁰⁰³ Charlesworth and Larking, 'Introduction: The Regulatory Power of the Universal Periodic Review', 16.

¹⁰⁰⁴ Charlesworth and Larking, 19.

in a highly universalising environment that pushes them ever closer to the universal norms that drive the process. It is in this way that soft obligations acquire moral force and tangible effects, and subvert the purpose-built constrictions and constraints. It is how the Periodic Review withstands and absorbs resistance and open disobedience and gives substance to the ideal drive to enhance the respect for all rights for all people in all countries at all times.

Chapter VI: Conclusions

‘But *Jove*, with Indignation moved,
At last in Anger swore, *He’d rid*
The bawling Hive of Fraud, and did.
The very Moment it departs,
And Honesty fills all their Hearts;
There shews ’em, like th’ Instructive Tree,
Those Crimes, which they’re asham’d to see;
Which now in Silence they confess,
By blushing at their Ugliness:
Like Children, that would hide their Faults,
And by their Colour own their Thoughts:
Imag’ning, when they’re look’d upon,
That others see, what they have done’.
—Mandeville, *The Grumbling Hive*¹⁰⁰⁵

With the unprecedented expansion of human rights law since the creation of the United Nations in 1945, all states have committed to a myriad of human rights obligations, ranging from civil and political to social, economic and cultural rights. This is revolutionary in and of itself. It should not be taken for granted for the recognition of these rights seemed impossible until it became possible. Irrespective of whether they are negative or positive rights, however, they are impossible to achieve. Often they impose conflicting obligations that can never be reconciled, exemplified by tensions between national sovereignty and supranational order, the principle of non-interference implied in the principle of national self-determination, and the necessary violation of both principles implied in the universality of human rights and international organization. That states created the Treaty Bodies, the Special Procedures, and the Universal Periodic Review, giving rise to and consolidating the universal scrutiny of universal rights, makes this development even more remarkable. For in creating institutions to scrutinise all human rights in all countries at all times, states have introduced and consolidated a new practice that most states have resisted and tried to undermine most of the

¹⁰⁰⁵ Mandeville, *The Fable of the Bees*, 27–28 [Emphasis in original].

time. Irrespective of their intentions, however, they have brought about fundamental normative and institutional change in world society.

The creation of human rights institutions, the thesis argued, is a necessary consequence of the universal recognition of human rights and of the strategic invocation by state and nonstate actors to justify radically different and antithetical goals and practices. In appealing to universal principles to justify their particular goals and practices, they have constructed a universal horizon that forces them to act in ways that reflect more closely the spirit of these universal principles, rather than their particularist intentions for invoking them. The Treaty Bodies, the Special Procedures and the Universal Periodic Review are elements that the struggle over inconsistency with the universal has elevated beyond and above normal struggle; they are a tangible manifestation of the autonomous force of the universal: states cannot get rid of international scrutiny without negating the universal. States remain the relevant agents yet the universal horizon they have created, transforms their agency into a force that is sufficiently autonomous to undermine their particular intentions and compel them to collectively accept what they individually reject. The universal horizon has its own logic and moves in ways that might coincide but do not correspond with any individual notion of interests, values, utilities, path dependencies. The force that causes and directs this movement is the logic of consistency.

In supporting or opposing particular practices of human rights state and nonstate actors actively, but perhaps unwittingly, assess the consistency of particular practices in light of the universal spirit they manifestly represent. Irrespective of their intentions, they render consistency with the universal the ultimate force that constitutes shared notions of right and wrong and the measure of adherence to them. The practices and goals they articulate in

universal terms aim to consolidate or neutralise the practical effect of the universal principles or their spirit. Even if they invoke the universal to stifle indignation over violations of basic universal principles, they nevertheless sow the seeds of self-subversion; they leave traces of recognition that rival forces can reanimate into precedents through the logic of consistency, compelling the originator of the universal appeal to act in accordance with its spirit. Distance from the universal emerges as the defining source of unending strife among rival forces that seek to defend or attack particular practices in relation to the universal. Proximity to the universal determines the movement and direction of the struggle of antithetical forces that seek to disrupt or deny the ineluctable inconsistency of particular practices with the universal whose spirit they manifestly embody.

The Treaty Bodies, the Special Procedures and the Universal Periodic Review represent the systematic effects of the efforts of states to balance rights and responsibilities, their attempt to cope with inconsistency between particular invocations of the universal and its spirit or substantive implications. This dialectic accounts for the rise and structure of these institutions as well as their operation and development. The Treaty Bodies represent a feeble but vital precedent in establishing the norm and elementary practice of international scrutiny of national human rights practices. They rest on three revolutionary developments: the recognition of the principle of universal rights in 1945, the construction of a shared or *universal* universal in 1948, and the construction of the principle of universal external scrutiny in their aftermath. These developments took place in spite of, and because of, the firm resistance of the majority of states, not least from the United States and the Soviet Union, even as this resistance had deleterious effects. In response to the staggering inadequacy of the Treaty Bodies, aggrieved states harnessed the force of the universal to institute a radical break with them, giving rise to a new institution—the Special Procedures. In

creating the Special Procedures, the Soviet Union and Third World countries subverted not only the carefully-tailored exceptions they had secured under the emasculated design of the Treaty Bodies, but they also exposed themselves to majoritarian scrutiny of national practices in relation to human rights standards they had not explicitly consented to. They placed themselves under the gaze of the universal without defence from the inevitable exposure of inconsistency of any human rights practice in relation to the universal spirit they purported to embody. This is extraordinary normative and institutional change. Even as its protagonists sought to limit its application to *sui generis* situations only, offering enormous resistance to *erga omnes* purview of the Special Procedures, they nevertheless caused a radical departure from the Treaty Bodies. The struggle over inconsistency of particular uses of the Special Procedures with the universal, even if intended to stifle scrutiny, generated demand for greater universalisation of the new institution. The universalization process of the Special Procedures provoked massive resistance and constant attempts to undermine them, giving rise to yet another institution—the Universal Periodic Review. The Periodic Review had to remedy the supposed politicisation of the Special Procedures by taking back control of the scrutiny of human rights. The prevailing case for the Periodic Review was not its proper or added value, but rather its relation to the operation of rival institutions—it was intended as an *anti*-institution. Not an institution *for* something, but *against* something. The positive value of the institution remains conspicuously absent in the negotiations, especially among its proponents, that is the states who demanded drastic change to rescue human rights from political instrumentalization. Yet they refer to the same universal—competing and poor representations of the universal, but inseparably tied to the universal, nevertheless. Or put otherwise, the Periodic Review is the result of competitive universalisms, reaching ever higher *for*, and generating ever higher expectations *of* the universal.

Being sequential responses to the same problem—the imperative of states to balance rights and responsibilities to enhance their position in world society—these institutions are intimately related, revealing striking similarities and differences. States have, collectively, caused a shift that, individually, they sought to abort and derail, and in many cases have succeeded. Whenever they could, they sought to minimise and obfuscate their obligations, which is visible in the design of all these human rights institutions, as shown in **Table 5**, drawing from the three empirical chapters of the thesis as well as expanding on the criteria that Alston and Goodman provide to highlight core features of the Treaty Bodies.¹⁰⁰⁶

¹⁰⁰⁶ Philip Alston and Ryan Goodman, *International Human Rights* (Oxford: Oxford University Press, 2013), 693.

Table 5. Relational institutions

	Treaty Bodies	Special Procedures	Periodic Review
Scope	State parties	Universal	Universal
Mandate	Limited	Extensive	Universal
Activation	Consensual	Majoritarian	Automatic
Instruments	Minimal	Wide-ranging	Minimal
Operation	Dialogue	Adversarial	Dialogue
Information	Self-reporting	Experts	State-driven
Examination	Experts	Experts	State-driven
Civil Society	Minimal	Substantive	Substantive
Publicity	Minimal	Extensive	Limited
Decisions	Politically binding	Politically binding	Politically binding

The variation in the level of provision of various monitoring procedures can be explained by the degree to which the states involved could deny them without appearing inconsistent. The strength of these procedures is inversely related to the capacity of states to deny them. The less space they have to deny them, the stronger the monitoring procedure (e.g. individual petitions); the greater the space of deniability, the weaker the type and level of the monitoring procedure (e.g. state-to-state complaints). None of these tendencies is random or a result of accidents or path dependency, coercion or utility-maximising behaviour, persuasion, or socialisation, but rather a reflection of the deeper operation of the logic of consistency, irrespective of whether the agents involved are aware of it or not.

6.1. The range of the logic of consistency

The logic of consistency can elucidate many of the central questions in IR, reaching far beyond the question of the rise and development of human rights institutions. The force that is here theorised as the logic of consistency has been recognised at least since Thucydides, and informs, mostly implicitly and sometimes explicitly, contemporary approaches to core questions in IR. This does not mean that there are no dissenting voices, such as Krasner's, who asserts that political organizations 'win support not by being consistent but by satisfying the demands of different interests'.¹⁰⁰⁷ But here he mistakes hypocrisy for absence of consistency, when hypocrisy becomes problematic only in light of a commitment not to be hypocritical. Or as David Runciman points out: '[i]t is the prior commitment not to be inconsistent, rather than the fact of inconsistency, that generates the condition of hypocrisy'.¹⁰⁰⁸ This is a subtle but crucial distinction. Nils Brunsson's discovery of the organization of hypocrisy as a necessary condition for the survival of organizations,¹⁰⁰⁹ which Krasner conceptualised as 'organized hypocrisy' when introducing it to IR, does not make such a claim; in fact, in his later work, Brunsson makes the consistency requirement quite explicit.¹⁰¹⁰ Krasner's assertion also suggests that organizations would not require consistency to satisfy 'demands of different interests', which is unwarranted. Yet Krasner himself relies on the language of consistency—in over seventy instances throughout his book—to make his case that hypocrisy rules, and consistency is irrelevant. If that were to be the case, why does he rely on the idea of consistency to make that point? It only goes to show that consistency is inescapable even for those who try to deny or break free from it. This might be because scholars value consistency in their quest for rigour in their work, something

¹⁰⁰⁷ Krasner, *Sovereignty*, 65.

¹⁰⁰⁸ David Runciman, *Political Hypocrisy: The Mask of Power, from Hobbes to Orwell and Beyond* (Princeton: Princeton University Press, 2010), 9.

¹⁰⁰⁹ Brunsson, *The Organization of Hypocrisy*.

¹⁰¹⁰ Brunsson, *The Consequences of Decision-Making*, Chapters 7 and 8.

that is rarely the case for decision-makers, Robert Jervis suggests.¹⁰¹¹ Yet Jervis, too, overlooks the structural, and therefore deeper, workings of the logic of consistency, which forces decision-makers and everyone else to behave in a certain way rather than another, irrespective of their beliefs.

Indeed, the logic of consistency can be observed even in least likely situations. Take for example deterrence. Consistent behaviour is critical for rival powers to convey resolve and issue credible counter-threats.¹⁰¹² Not only is consistency necessary for deterrence to work, but it can be so powerful that it may compel states to follow through with threats that would not be in their best interest to implement, if deterrence fails. It is what Scott Sagan calls the ‘commitment trap’; inability to get out of it could cause incalculable destruction.¹⁰¹³ The same holds for credibility. Whether it concerns making credible threats or promises, predictable behaviour is crucial. It may be tempting to adopt unpredictable behaviour for tactical short-term gains, as Donald Trump’s words and actions suggest, but this is disastrous for long-term relationships, to build relations that require trust. No country is likely to trust the United States when it makes commitments or sign treaties, especially for agreements that require implementation over several years, with benefits spread over a long period of time. This is because there is no guarantee that the United States will deliver on the promises that make agreements possible. This amplifies the more structural commitment problem that the United States face due to their institutional set-up and the requirement of bipartisan collaboration to make credible commitments.

¹⁰¹¹ Jervis, *How Statesmen Think*, 23.

¹⁰¹² Anne E. Sartori, *Deterrence by Diplomacy* (Princeton: Princeton University Press, 2007).

¹⁰¹³ Scott D. Sagan, ‘The Commitment Trap: Why the United States Should Not Use Nuclear Threats to Deter Biological and Chemical Weapons Attacks’, *International Security* 24, no. 4 (1 April 2000): 85–115.

More generally, the same logic applies to cooperation where trust is crucial, regardless of whether it comes before or after.¹⁰¹⁴ Whilst decentralised cooperation can emerge on a *do ut des* basis, it is vulnerable to defection and can quickly dissolve into conflict.¹⁰¹⁵ Cooperation can become stable and durable if embedded within an institutional structure that permits actors to develop stable expectations about each other's behaviour.¹⁰¹⁶ These institutional elements are so powerful that they constrain even the hegemonic powers that created them, if their interest diverges from their original intent.¹⁰¹⁷ Whatever one makes of the 'audience costs', they depend on whether or not publics are likely or not to punish their leaders for being inconsistent in external relations.¹⁰¹⁸ Whether implicit or explicit, all these elements find their source in the logic of consistency and are impossible without it.

In other cases, the idea of consistency is more explicit even as it remains in the background. The most obvious example is reputation, whose positive value depends on past behaviour for not cheating or bluffing. It is part of the composite notion of 'honour' which Thucydides

¹⁰¹⁴ Brian C. Rathbun, 'Before Hegemony: Generalized Trust and the Creation and Design of International Security Organizations', *International Organization* 65, no. 2 (April 2011): 243–73.

¹⁰¹⁵ Robert Axelrod, *The Evolution of Cooperation*, Revised edition (New York: Basic Books, 2006).

¹⁰¹⁶ Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984).

¹⁰¹⁷ Robert Gilpin, *War and Change in World Politics* (Cambridge: Cambridge University Press, 1981); Bull, *The Anarchical Society*.

¹⁰¹⁸ James D. Fearon, 'Domestic Political Audiences and the Escalation of International Disputes', *The American Political Science Review* 88, no. 3 (1994): 577–92; Kenneth A. Schultz, 'Why We Needed Audience Costs and What We Need Now', *Security Studies* 21, no. 3 (1 July 2012): 369–75; Roseanne W McManus, 'Fighting Words: The Effectiveness of Statements of Resolve in International Conflict', *Journal of Peace Research* 51, no. 6 (1 November 2014): 726–40; Jack S. Levy et al., 'Backing Out or Backing In? Commitment and Consistency in Audience Costs Theory', *American Journal of Political Science* 59, no. 4 (1 October 2015): 988–1001; Chungshik Moon and Mark Souva, 'Audience Costs, Information, and Credible Commitment Problems', *Journal of Conflict Resolution* 60, no. 3 (1 April 2016): 434–58; Joshua D. Kertzer and Ryan Brutger, 'Decomposing Audience Costs: Bringing the Audience Back into Audience Cost Theory', *American Journal of Political Science* 60, no. 1 (1 January 2016): 234–49.

conceives as encompassing glory, standing, and reputation—all of which he saw as fuelling Athens’ imperial ambitions. Actors need to show consistency to be believable. In fact, as Anne Sartori points out, ‘the desire to avoid a reputation for bluffing or to maintain a reputation for honesty, induces states to use their diplomacy honestly much of the time’.¹⁰¹⁹ States gain their reputation either by having behaved consistently in the past or in having bluffed without being found out.¹⁰²⁰ There is deep disagreement about whether and how much reputation matters, but at bottom it is a discussion about a how and when consistent behaviour matters.¹⁰²¹

Likewise, legitimacy depends on the capacity of agents vested with authority to conceal arbitrariness either in the acquisition or exercise of power. Whatever justification they rely on to render their power legitimate in the eyes of the relevant audience, they need to show consistency with it.¹⁰²² Failure of what Reus-Smit views as ‘legitimacy claims’ have their

¹⁰¹⁹ Sartori, *Deterrence by Diplomacy*, 13–14.

¹⁰²⁰ Anne E. Sartori, ‘The Might of the Pen: A Reputational Theory of Communication in International Disputes’, *International Organization* 56, no. 01 (December 2002): 121–22.

¹⁰²¹ Alexandra Guisinger and Alastair Smith, ‘Honest Threats: The Interaction of Reputation and Political Institutions in International Crises’, *The Journal of Conflict Resolution* 46, no. 2 (2002): 175–200; Allan Dafoe, Jonathan Renshon, and Paul Huth, ‘Reputation and Status as Motives for War’, *Annual Review of Political Science* 17, no. 1 (2014): 371–93; Alex Weisiger and Keren Yarhi-Milo, ‘Revisiting Reputation: How Past Actions Matter in International Politics’, *International Organization* 69, no. 2 (ed 2015): 473–95; George W. Downs and Michael A. Jones, ‘Reputation, Compliance, and International Law’, *The Journal of Legal Studies* 31, no. S1 (2002): S95–114; Mark Gersovitz, ‘A Review of Michael Tomz’s “Reputation and International Cooperation: Sovereign Debt across Three Centuries”’, ed. Michael Tomz, *Journal of Economic Literature* 47, no. 2 (2009): 475–81.

¹⁰²² David Beetham, *The Legitimation of Power*, 2nd ed. (Houndmills: Palgrave MacMillan, 2003); Inis L. Claude Jr., ‘Collective Legitimization as a Political Function of the United Nations’, *International Organization* 20, no. 3 (1 July 1966): 367–79; Ian Clark, *International Legitimacy and World Society* (Oxford: Oxford University Press, 2007); Clark, *Legitimacy in International Society*; Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton: Princeton University Press, 2008); Christian Reus-Smit, ‘International Crises of Legitimacy’, *International Politics* 44, no. 2 (1 March 2007): 157–74; Christian Reus-Smit, ‘Power, Legitimacy, and Order’, *The Chinese Journal of International Politics* 7, no. 3 (1 September 2014): 341–59.

root in the inability of actors to conform to the idea of consistency, where lack of ‘impartiality’ is deemed as the major fault.¹⁰²³ Institutional change aimed at repairing legitimacy claims, here expressed in terms of ‘congruence’,¹⁰²⁴ is at core a provision of consistency. In the absence of the idea of consistency, legitimacy would be neither needed nor possible whenever claimed. Furthermore, whilst it is difficult to distinguish empirically whether a specific concern relates to legitimacy, reputation, prestige, standing or all of them together, it becomes clear that, to the extent that any of the above matter, they stem from the logic of consistency.

Related to, but distinct from legitimacy, are accounts of the role of normative pressure, which fundamentally rest on some conception of appropriateness.¹⁰²⁵ What unites diverse approaches on this theme is the question of whether and how social pressure can be mobilized to force recalcitrant states to behave in a way that is consistent with their own terms or some international standard.¹⁰²⁶ Consistency here is seen as the final *stage* of a process driven by other concerns – be they instrumental or normative – and not as something that is *always* present. It is seen as a measure of compliance. The notion of acculturation is a more specific claim about social pressure but even here pressure comes from

¹⁰²³ Reus-Smit, ‘International Crises of Legitimacy’; Hurrell, *On Global Order*, 77–93; Reus-Smit, ‘Power, Legitimacy, and Order’; Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford: Oxford University Press, 2018), Chapter 3.

¹⁰²⁴ Tobias Lenz and Lora Anne Viola, ‘Legitimacy and Institutional Change in International Organisations: A Cognitive Approach’, *Review of International Studies* 43, no. 5 (December 2017): 939–61; Zürn, *A Theory of Global Governance*.

¹⁰²⁵ John W. Meyer and Brian Rowan, ‘Institutionalized Organizations: Formal Structure as Myth and Ceremony’, *American Journal of Sociology* 83, no. 2 (1 September 1977): 340–63; James G. March and Johan P. Olsen, ‘The Institutional Dynamics of International Political Orders’, *International Organization* 52, no. 04 (1998): 943–69; John W. Meyer and Ronald L. Jepperson, ‘The “Actors” of Modern Society: The Cultural Construction of Social Agency’, *Sociological Theory* 18, no. 1 (March 2000): 100–120.

¹⁰²⁶ Risse, Ropp, and Sikkink, *The Persistent Power of Human Rights*; Grigorescu, *Democratic Intergovernmental Organizations? Normative Pressures and Decision-Making Rules*.

internationalisation of prevailing norms, the conditions under which that would take place remain a mystery.¹⁰²⁷ These are static approaches of normativity that explain neither change nor stability, nor do they explain variation in behaviour or institutional choices.

The old question of which type of regime—the rule of one or the many—have been better at ensuring continuity in the face of historical contingencies,¹⁰²⁸ is inseparable from the idea of consistency. The design and behaviour of law,¹⁰²⁹ constitutions,¹⁰³⁰ courts,¹⁰³¹ bureaucracy¹⁰³² are all expressions of the need for consistency in that they aim to generate predictability and continuity in coping with manifold contingencies and majority rule. It is essential to emphasise that it is not the force of law that explains such behaviour. States can invoke law strategically to justify any behaviour, as Koskenniemi shows, but the strategic context is socially determined and the strategic use of law has constraints, under the conditions specified in the zone of recognition and negation, but also in the zone of toleration. The logic of consistency is a structural force that moves beyond law, which emphasises consistency with rules or fidelity with the law. The force of consistency does not derive from the force of jurisprudence—it precedes law, lends law force, and supersedes it. The force of consistency is purely political, not legal. Whilst consistency is inherent to legal claims, it moves beyond it, even as its force becomes more prominent in the realm of law.

¹⁰²⁷ Goodman and Jinks, *Socializing States*.

¹⁰²⁸ Alan Ryan, *On Politics* (New York: Penguin, 2013).

¹⁰²⁹ Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969); Donald Black, *The Behavior of Law*, Special Edition (United Kingdom: Emerald Group Publishing, 2010).

¹⁰³⁰ Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge: Cambridge University Press, 2011).

¹⁰³¹ Bruce Ackerman, *We the People: Foundations*, vol. 1 (Cambridge, Massachusetts: Harvard University Press, 1993); Michael Freeden, *Ideologies and Political Theory: A Conceptual Approach* (Oxford: Oxford University Press, 1998), 272–75.

¹⁰³² Max Weber, *Economy and Society* (Berkeley: University of California Press, 1978), Chapter 11.

Even more generally, the question of political order¹⁰³³ and by extension, global order,¹⁰³⁴ cannot be raised without consideration of the idea of consistency. In other words, it is hard to imagine any attribute or objective that depends on continuity that does not rest on the logic of consistency. The range of the logic of consistency is so wide that it is hard to identify social norms and institutions not shaped by it—indeed, the social world is unthinkable without it.

¹⁰³³ Eric Voegelin, *Order and History: In Search of Order*, ed. Ellis Sandoz, vol. 5 (Columbia: University of Missouri Press, 1999), Chapter 1; Eric Voegelin, *Order and History: Israel and Revelation*, ed. Maurice P. Hogan, vol. 1 (Columbia: University of Missouri, 2001), Preface and Introduction.

¹⁰³⁴ Bull, *The Anarchical Society*; Onuf, *World Of Our Making*; James N. Rosenau, *Governance without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992); T. V. Paul, *International Order and the Future of World Politics* (Cambridge: Cambridge University Press, 1999); R. B. J. Walker, *Inside/Outside: International Relations As Political Theory* (Cambridge: Cambridge University Press, 1992).

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