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UN Human Rights Council: Ten Years On

Panel 2 - Case Studies: UN Principles in Action

Chaired by Christopher Lamoureux, Student Conference Committee Member

Breaking the culture of impunity? Holding States accountable for human rights violations in the United Nations Human Rights Council: a case study of Sri Lanka

Thamil Venthan Ananthavinayagan, Irish Centre for Human Rights, NUI Galway

Mr Thamil Venthan Ananthavinayagan chose Sri Lanka as the focus of his doctoral thesis because of his family background. Sri Lanka is a country marked by ethnic conflict that has had three different colonisers over the past 400 years: the Portuguese, the Dutch and the British. Root causes of the conflict include ethnic politics, politics of language, identity formation, politics of education, employment and land.

Mr Ananthavinayagan listed the main war crimes allegations: shelling in safe zones, use of human shields, extra-judicial killings, sexual violence and enforced disappearances. The conflict was discussed at the Human Rights Council (HRC) which eventually led to an investigation by the Office of the High Commissioner for Human Rights (OHCHR). Mr Ananthavinayagan drew a parallel between hunger being used as a weapon in the ongoing Syrian crisis and the similar tactics being used in the Sri Lankan ethnic conflict.

A short video by the BBC was played, highlighting the extent of the damage caused by the ethnic conflict and the denial of the Sri Lankan government of its role in the conflict. Mr Ananthavinayagan explained that, in 2011, the then president set up a Lessons Learnt & Reconciliation Commission (LLRC) in an attempt to deflect international intervention, which acknowledged the human rights violations in its first report. An investigation was then launched by the UN. A panel of experts undertook this task finding substantial evidence that both sides of the divide were responsible for war crimes.

Mr Ananthavinayagan made two recommendations: (i) that an independent investigation into the war crimes be undertaken and (ii) that an internal investigation within the UN on why it had failed to prevent the war be established. He continued to explain that in 2009, shortly after the war, a resolution was adopted by the HRC which was initially meant to deal with the war crimes. However, this was hijacked by the Sri Lankan government who proceeded to successfully praise themselves.

Mr Ananthavinayagan observed that this resolution was considered by many observers to be the darkest chapter in the history of the UN and of the the HRC in particular.

The next resolution, outlined by Mr Ananthavinayagan, directed the Sri Lankan government to look at the LLRC report and to implement its recommendations. However, the Sri Lankan government refused to do so. A request from the High Commissioner followed to present a comprehensive report at the 25th session of the HRC. Shortly after that, the 2014 resolution came into being: it looked into the LLRC's recommendations and called for a comprehensive investigation into the ethnic conflict. Mr Ananthavinayagan submitted that it is because of this resolution, that the UN is compelled to set up a proper investigation for alleged war crimes.

Mr Ananthavinayagan further submitted that while accountability is a very broad concept, accountability in the context of the Sri Lankan conflict means that violations of international law by the state should be addressed. He then went on to discuss how the present government of Sri Lanka has been dealing with this issue. Shortly before and after the elections, the new government was more responsive to the allegations of war crimes. It had expressed the wish to settle this matter within its domestic system, unlike the previous government who refused to let the OHCHR conduct investigations on their soil.

In September 2015, an OHCHR report was published and this acknowledged that human rights violations had taken place in Sri Lanka. The report also assisted in the case building and information gathering on the conflict. In the same year, a resolution was adopted by HRC, affirming that the state of Sri Lanka wished to act on these allegations.

However Mr Ananthavinayagan explained that, soon after, the current President became less responsive: he did not want the UN involved in this matter nor did he want international involvement to set up a war crimes tribunal. Special Rapporteurs are still allowed into the country, but the President has continuously reiterated the aforementioned stance. On the other hand, Mr Ananthavinayagan noted, the current Foreign Minister expressed the view that Sri Lanka cannot completely rule out international involvement in the entire accountability process. As the crimes are unlikely to be brought before the International Criminal Court (ICC) due to politicisation, they will need to be handled in the domestic context.

Mr Ananthavinayagan concluded his presentation by stating that, accountability in this whole "fiasco" will be linked to memory and heavily relies on a credible investigation. After a very dark chapter in 2009, there was an evolution of the accountability process: human rights violations all over the world were exposed in Geneva. Mr Ananthavinayagan also submitted that the OHCHR report which assisted in information gathering and case building represented progress in bringing the perpetrators in Sri Lanka to account for the alleged violations.

More than an ignorant bystander: the accountability of People's Republic of China for North Korea's human rights violations

Wing Yee Kwan, University of Nottingham

Ms Wing Yee Kwan began her presentation by giving a brief overview of the political landscape in North Korea. She explained that North Korea, as a totalitarian country, is ruled by a single party, led

by a single family. From Kim Il-sung, Kim Jong-il to Kim Jong-un, those in power seek to ensure their absolute control over its people by controlling freedom of thought and suppressing all political and religious views. For North Koreans, the official ideology - Juche ideology, usually translated as 'self-reliance' - has a strong emphasis on individuals. However, individuals are placed under the control of their leader, who is the head of the body, and without him, the body cannot function. The leader is also the people's father- as a child should obey the absolute leadership of their father, every North Korean should submit their unconditional love and loyalty to the leader.

She went on to argue that this power structure uses discrimination to maintain a rigid social structure that is less likely to challenge the political system. This system is known as "songbun". She explained that, it classifies people on the basis of state-assigned social class which determines their fates. She submitted that it will have an impact on a person's education, occupation, residence and even decide to whom he/she can marry and the amount of food that he/she will get.

She asserted that in, North Korea, access to food is 100% controlled by the state as an important mean to enforce political loyalty. The complete dependence on the state led to one of the worst famines in history, causing between two and three million deaths in the late 90s, making up 10% of the total population.

Ms Kwan further submitted that the only way most people in the lower classes could survive is by escaping the country. However, the government imposes an absolute ban on ordinary citizens travelling abroad resulting in their only choice being to illegally flee North Korea. Geographically, she explained, there are two ways to leave North Korea: one is to go down across the border into South Korea, where one can apply for citizenship right away but this route is blocked by the Korean Demilitarized Zone (DMZ). There have been various incidents in and around the DMZ, with military and civilian casualties on both sides. Hence, the only real chance to escape is to go north into China, where the individual would be considered illegal. If unlucky, someone fleeing may end up caught on the way by the Chinese police and be sent back to North Korea where they would face detention, torture or even execution.

Ms Kwan added that, according to the findings of the UN Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (Commission of Inquiry), most Chinese officials are fully aware of the gross human rights violations awaiting forcibly returned persons in North Korea. Nevertheless, the Chinese government continues its rigorous policy, justifying it on the following reasons:

1. North Koreans are entering China for economic reasons. Therefore, they are not refugees.
2. Many North Koreans have repeatedly attempted to enter the Chinese border demonstrating the falsity that repatriated North Koreans will face torture.
3. Under Article 4 of the Mutual Cooperation Protocol 1986 signed between China and North Korea, both sides have agreed to cooperate to prevent the illegal border crossing of residents. Therefore, from China's point of view, it is simply fulfilling its obligations under the bilateral agreement by handling 'criminals'.

Ms Kwan submitted that the above arguments were insufficient justifications for the treatment of those escaping North Korea by Chinese officials, rather, North Korean defectors should be recognized as refugees "sur place". As defined by the UN High Commissioner for Refugees (the UNHCR), refugees sur place are persons who might not have been refugees when they left their country but become refugees at a later date because they have a valid fear of persecution upon return. Accordingly Ms Kwan argued that North Korean defectors who have valid reasons for fearing punishment upon return should thereby be entitled to full international protection.

Turning to China's second argument, Ms Kwan expressed the opinion that the fact that so many North Koreans have repeatedly risked their lives to escape can be nothing but strong proof to China on how desperate they are to leave North Korea. It does not mean, she noted, that they have not been tortured but instead, for those defectors, living a life in their country is even worse than being physically tortured. Ms Kwan recalled attending an event where a North Korean defector shared her testimony, saying "even if I die trying, I want freedom".

Ms Kwan outlined a clause under Article 4 of the Mutual Protocol, that states "any person ...who enters the boundaries of one side due to any kind of calamity or unavoidable factors shall not be considered an illegal border crosser". However, the treaty does not define what constitutes "calamity" or "unavoidable factors". Ms Kwan submitted that the hunger faced by most North Koreans in their country is sufficient to fulfil this criterion. More importantly, she stated, regardless of whether or not a "calamity" or "unavoidable factors" claim can be established, the clause has in effect imposed an implied obligation on China to assess an individual's situation before making any repatriation order: the core problem concerning China's policy is not repatriating North Koreans but rather it is their practice of repatriation without even offering the individual a reasonable opportunity to have their status determined.

The UNHCR has an office in China which aims to conduct refugee status determination as a temporary measure. Ms Kwan noted however that the Commission of Inquiry has unfortunately found that the Chinese government has disregarded its agreement to ensure UNHCR staff are given unimpeded access to asylum seekers.

A video clip from a documentary called "The Seoul Train" was shown: it follows a family who went all the way from North Korea, crossed China's border and were on the way to their final destination - the Japanese embassy. The family was told that they would finally be safe after passing the gate but Chinese officials managed to stop the family from reaching their final destination. Ms Kwan submitted that video evidence such as this suggests that, instead of being an ignorant bystander, China has taken active measures to ensure that North Koreans cannot access foreign embassies or seek asylum protection. Ms Kwan further submitted that, by forcibly returning North Korean defectors, China has violated its obligation to respect the principle of non-refoulement under Article 33 of the Convention Relating to the Status of Refugees- a convention that was ratified by China in 1982.

Ms Kwan quoted Article 1 of the International Law Commission (ILC) Draft Articles on State Responsibility which states that "every internationally wrongful act of a State entails the international responsibility of that State". She went on to explain that, while technically not binding, the ILC Draft Articles have been exceedingly well received, and are often cited by the International Court of Justice (ICJ) as well as many arbitral tribunals in investor-State disputes. Under Article 2, she explained, an internationally wrongful act means either an action or omission that is (a) attributable to a State and (b) constitutes a breach of an international obligation. The breach is determined by the primary rules of international treaty law and the test of attribution is governed by Article 4. By applying the test into the present situation, Ms Kwan argued that repatriations carried out by Chinese officials should be considered an act of the Chinese government because they exercise executive functions under the instructions of the government.

Ms Kwan submitted that, in the Barcelona Traction case before the ICJ, the court drew the distinction between obligation between two States and obligations towards "the international community as a whole". She explained how the court described 'community obligation' as deriving "...from the principles and rules concerning the basic rights of the human person". Turning to the

principle of non-refoulement, Ms Kwan stated that it is a right that has acquired the status of a peremptory norm in which no derogation is permitted. This means, she explained, that every State in the world is in theory entitled to demand the compliance of China with the obligation of non-refoulement or to even take active remedial actions designed to cease its wrongdoing and to make reparation.

Ms Kwan then turned to how to resolve the problem. In terms of judicial actions, she highlighted that the Commission of Inquiry called upon the Security Council to refer the North Korea to the International Criminal Court (ICC). Ms Kwan explained that since North Korea is not a party to the ICC Statute, a Security Council referral is essential. In this regard, China has spoken against such a referral and is likely to turn it down by using its permanent five veto power. As for the ICJ, Ms Kwan argued that it is extremely- if not, impossible- for the Court to obtain North Korea's consent to exercise its jurisdiction.

However, States have been encouraged to lend support to the UNHCR's proposal for a special humanitarian status for North Koreans. Such status will not just enable defectors to obtain temporary documentation and protection from forced return but, at the same time, resolve China's fear of opening the refugee floodgates by making sure that the North Koreans will end up staying in South Korea instead of China. According to South Korea's Constitution, North Koreans are entitled to citizenship. In the meantime, Ms Kwan submitted that the international community must call on China by name to respect the principle of non-refoulement and at the very minimum, to set up an effective screening programme to assess each individual case.

Ms Kwan concluded her presentation by reiterating her position that China has violated its obligations by forcibly returning North Koreans to conditions of danger. However, when it comes to the road ahead, Ms Kwan felt that the more fundamental question concerning the Chinese government is whether it will ever see a need to modify its policies towards the regime. She noted that, in his letter to the Commission of Inquiry, the Chinese representative made it clear that "China opposes the politicisation of human rights issues". Ms Kwan submitted that saying such a thing is paradoxical as the human rights violations committed by China are all done out of political concern - to maintain a stable relationship with its historical ally, North Korea.

Instead of rigidly refusing to face reality, Ms Kwan submitted that it is time for China to reconsider its stance. If it can commit human rights violations for political reasons, it can also stop committing them for the same reason. Although human rights should be about moral consensus, they are also about politics. Ms Kwan hopes that by encouraging China to uphold international human rights obligations which it has already decided to undertake, light can be shed on North Korea and bring its people out from the darkness.

The need for judicial approach: a case for a World Court of Human Rights

Ms Silvia Lorenzo Perez, Brunel University, London

Ms Silvia Lorenzo Perez began her presentation by stating that a World Court of Human Rights was one of the major institutional proposals put forward by the Australian government in 1947 during the formative years of the human rights regime. Although the proposal was rejected outright, the debate has been rekindled by Professor Manfred Nowak and Professor Martin Scheinin since 2000.

She explained that when the Court was first proposed, the Australian Government argued for it on the basis that, if international instruments were to recognize the rights of the individuals, it was

necessary to establish a Court that could hear complaints from individuals and enforce the provisions of the law. The Australian delegation rejected political remedies as a valid mechanism to redress violations since, in its view, national governments could not be trusted with the task of protecting human rights. She explained that, the idea of the Court was proposed not only as the appropriate mechanism to provide the victims with effective remedy, but also as a deterrent for potential offenders.

She went on to discuss the fact that the recognition of the right of the victims to an effective remedy for the wrongdoings of States constitutes a well-established general principle of international law and a rule of international customary law. Turning to international instruments, she noted that this is explicitly reflected, *inter alia*, in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). She further noted that, in 2005, the General Assembly recognized the rights of the victims to an effective redress with the adoption of the Basic Principles and Guidelines on the Right to Remedy and Reparation, which imposed an obligation on States to provide effective access to justice and reparation to the victims of violations as part of their obligation to respect, ensure respect for and implement international human rights law.

Ms Lopez also noted that the right entails the principle that, if human rights are to be recognized as inherent to the individuals, they then become legal claims with normative force. Therefore, she explained, rights-holders that have suffered an impairment of their rights must be afforded a remedy in order to hold the duty bearer (the State) accountable for breaking their legally binding human rights obligations and get reparation. This means, she concluded, that the rights-holder can sue the duty-bearer before an independent neutral body - usually a court- which has the power to decide in a binding manner whether or not the duty-bearer violated his or her obligations.

Ms Lopez asserted that, it immediately becomes clear that the establishment of the World Court is a pressing social need from the perspective of victims and their right to an effective remedy. She also argued that it is only reasonable that a system that advocates so strongly for the rights of victims to an effective remedy at a domestic level should also provide for a supervisory judicial mechanism to which victims can recourse in cases where national justice has been denied.

Ms Lopez highlighted that one of the criticisms of such a system is its weak enforceability. The UN human rights regime endures a considerably limited enforcement capacity that contributes to undermining the credibility and overall effectiveness of the system. It does not, she stated, require States to recognise direct enforceability of their human rights obligations within domestic institutions. Rather, it relies heavily upon the idea that governments shall wilfully and faithfully comply with international human rights standards at a domestic level and redress the victims accordingly. 'Final views' are legally authoritative, but not legally binding. Therefore, she argued, Governments could completely disregard their obligations and pronouncements of the competent bodies due to the absence of immediate consequences, which clearly demonstrates that the system is becoming dysfunctional in terms of remedial justice for victims.

She went on to highlight scholarly thought that is sceptical about the judicial approach to human rights. They support more cooperative and non-confrontational methods based on constructive dialogue with States. This is precisely the approach taken by the Universal Periodic Review (UPR), which is the most recent peer review mechanism introduced to monitor the fulfilment by each State of its human rights obligations. Ms Lopez argued that, although the success of the UPR in terms of States' participation must be acknowledged, the potential of the mechanism to overcome the weaknesses of the UN human rights regime has been strongly disputed by some scholars. In particular, main concerns point to the high risk of politicisation of the proceedings. The fact that the

review of every Member State of the UN is carried out by other States, can hardly be deemed objective. In her opinion, for it to be really objective, such an evaluation should be undertaken by independent experts i.e. the World Court.

Ms Lopez then outlined that the idea of such a court has also been cited as “neither desirable, nor necessary, nor probable”. Proponents of this idea, she explained, have said that it is not desirable for States, because they are aware that by establishing such a court they could be publicly accused of having violated their human rights obligations. It is not necessary considering the long list of existing human rights mechanisms already operating within the framework of the UN. States that are already party to a regional system of human rights protection may see little purpose in joining another court with global powers. Considering the cost of the project, the unlikelihood to gather enough support from States and the inadequacy of a court to contribute to international peace, the project is improbable.

In light of all the above criticisms, Ms Lopez submitted that critics seem to be missing a very important point. They undertake the assessment from the perspective of the political interest of the States, but fail to take into account the interests of the victims whose rights have been violated. In this respect, it is necessary to recall that the purpose underlying the creation of the human rights regime was the need to reaffirm faith in the dignity of the individual. Human beings, she stated, must be placed at the centre of any decision, since they are the ultimate beneficiaries of human rights as legal claims.

Therefore, in order to assess the necessity, desirability and suitability of the Court, Ms Lopez held that it is imperative to shift to a victim-oriented approach, rather than holding on to a politically loaded argument which is misplaced and contradictory with respect to the real scope of the UN human rights regime. The proposal of the Court, she argued, is a visionary idea with the potential to restore the credibility of the UN human rights regime. Therefore she recommended that, the General Assembly should devote more effort to clarify the feasibility of the Court in order to determine the potential of the idea in practical terms, in the strengthening of the UN human rights system.

Ms Lopez concluded her presentation by stating that, many present day human rights bodies of the UN faced similar criticisms i.e. the Human Rights Commission. She submitted that the time for the establishment of the World Court of Human Rights is now.

Report by Cassandra Chung, LLB Candidate.