Double Standards in UN Political Bodies: Is Impartiality Possible?

By:

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The decisions of the UN's political bodies would seem to represent the epitome of claims of double standards in the enforcement of international law. For even if we can accept that the members of the Security Council or the Human Rights Council (HRC) will choose to bring some situations to the attention of those bodies while leaving others off the agenda, or to pass some resolutions and reject others, such decisions seem quite suspect if we view those organizations as not merely making policy but enforcing international law. International lawyers have long identified this dilemma over enforcement: is it better to entrust the enforcement to international judges (e.g., the ICJ) or experts (e.g., the treaty bodies) who are more likely to treat like cases alike, but who lack the power to enforce their rulings (or whose decisions are not binding anyway); or to political bodies, who are more likely to pick favorites but whose rulings carry more bite vis-a-vis the target, either reputationally (because it comes from fellow states) or materially? Scholarly divides over this question are profound, with fans of international courts pitched against skeptics (like me) of judicial romanticism. My students love to debate this question because it has no

obvious answer unless one thinks that the solution is a fantasy world in which states on the receiving end of criticism from expert bodies just start complying.

This post examines this challenge for political organs and for international law through both a practical and theoretical lens. The practical side entails a recounting of the brief life of the UN's International Commission of Human Rights Experts on Ethiopia (ICHREE), a commission of inquiry of the Human Rights Council on which I served in 2022 and 2023. The theoretical side builds on this case study to ask what is realistic and still principled to expect of political bodies in enforcing international law in a way that reduces the prospects of double standards. Drawing on the concept of impartiality and the unavoidability of selectivity, I argue that HRC inquiries should proceed on the basis of the gravity of violations to avoid double standards (which are distinct from selectivity).

The ICHREE and Double Standards at the Human Rights Council

In November 2020, longstanding tensions between Tigrayan authorities and the central government erupted as Ethiopian Prime Minister Abiy Ahmed sent his military into Tigray. Ethiopia was aided in this effort by an Eritrean invasion from the north, and by 2021, the government imposed a devastating humanitarian blockade on Tigray that most of the world did not even notice. The European Union (EU) and United States called for a special session of the Human Rights Council in late 2021. It fairly quickly passed a resolution critical of Ethiopia and created ICHREE with a mandate to investigate violations of international human rights, humanitarian, and refugee law as well as provide "guidance" to the government on transitional justice. ICHREE's mandate was renewed in the fall of 2022. In both 2022 and 2023, we issued a number of well-received reports on the violations committed by various parties, the risks of future atrocities, and the government's plans for transitional justice. Indeed, our first report proved an important factor in galvanizing (or embarrassing) the African Union (AU) into pushing the two sides to a cease-fire in late 2022. Ethiopia, however, emphatically opposed our work, broke off communications with us early in our mandate, and refused to allow our investigators into the country (witnesses were interviewed remotely or outside Ethiopia).

Despite the ceasefire, by the spring and summer of 2023, violations continued in Tigray and fighting spread beyond it. ICHREE made clear to stakeholders that many more alleged atrocities required investigation and that the conflict needed to remain on the HRC's agenda. Yet it became clear to us at that time that political support for the renewal of our mandate was dropping. The reasons and outcome say much about double standards in the context of the dynamics of the Human Rights Council.

In particular, Ethiopia mounted an impressive diplomatic campaign to improve relations with the sponsors of the commission's mandate – principally the EU and United States. On the one hand, Ethiopia created some superficial and ineffective transitional justice processes to say they were making progress on the plight of victims – a carrot of sorts. On the other, it secured an invitation to join the BRICS in order to suggest they were open to closer ties with China and Russia – a threatened stick. The EU and others eventually decided that they were eager enough to improve the relationship that they would no longer push for ICHREE's renewal.

Moreover, Ethiopia worked hard to get African states in the HRC behind it. Those states had already been leery of UN investigations of its own members. In 2021, none of the 13 African states on the Council voted in favor of the resolution creating ICHREE, which passed by 21-15-11 (thus a plurality but not a majority of states). Yet they were also divided between seven opposing the ICHREE (Burkina Faso, Cameroun, Cote d'Ivoire, Eritrea, Gabon, Namibia, and Somalia) and six abstaining (Libya, Malawi, Mauritania, Senegal, Sudan, and Togo). In the fall of 2022, less than a year later – and before the cease-fire talks had even started – 12 of the 13 African states voted against renewal, only one (Malawi) abstained, and the renewal passed by only two votes, i.e., 21-19-7.

As a result of the loss of political support, in the fall of 2023, for the first time, the HRC closed down a mission in the middle of its mandate, despite worsening violence and the threat that it would spread, without creating any follow-on mechanism. Indeed, it passed no resolution on Ethiopia, which was completely dropped from the HRC's agenda.

The decision to drop the Ethiopia inquiry could be seen as merely the flip side of the HRC's selectivity regarding Israel's policies in the OPT (e.g., through

multiple overlapping mechanisms, including the only current commission of inquiry whose mandate does not require renewal), so in a certain sense this result is not surprising. However, this politically motivated decision not to investigate has, in my view, far greater implications than the singling out of one state or situation for open-ended investigations. It suggests that the group of states opposed to all mandates under so-called Item 4 (concerning country-specific violations), including commissions of inquiry -- China, Cuba, Pakistan, Venezuela, Eritrea, Iran, and others – is now large and influential, and that every commission will face headwinds in renewal. Without any irony, when Cuba and Iran argued in their oral interventions opposing the renewal of ICHREE, they spoke in terms of avoiding double standards and promoting non-selectivity. And for them, avoidance of double standards meant no Item 4 investigations – though investigations under Item 7, which concerns only Palestine, are not apparently considered part of the problem.

The rhetorical and political move – avoidance-of-double-standards-through-non-action – finds fertile ground in the Council's practice of voting based on regional solidarity. Under this practice in Africa, even countries with respected human rights records or a desire to be leaders – e.g., South Africa, Gambia, or Kenya – oppose international scrutiny of other African states' violations. Their public argument is that we should respect "African solutions to African problems" – a reasonable idea based on subsidiarity, except that the African "solution" is typically to defer completely to the state. Of course, African countries did not hesitate to reach beyond Africa when it came to South African apartheid. As for the African approach to the atrocities in Tigray, Ethiopia succeeded in persuading the AU to close down its own nascent, ineffective, and unpublicized investigation of Tigray as well.

Thus, in 2024, not one African country voted to extend the mandate of the Special Rapporteur on Eritrea (which passed by 20-8-19, again with a majority not in favor of extension). Beyond Africa, only Japan among Asian states voted to renew the mandate of the Special Rapporteur on Iran. At the same time, there are a few exceptions, notably the Special Rapporteurs on Afghanistan, DPRK, and Myanmar, whose mandates were renewed without a vote. It appears that for investigating certain country situations, the stars – or rather national interests – are aligned, and even states in the target country's region are willing to go along with renewal of a mandate.

Double standards are, then, a systemic issue now in the Council, not isolated to the Palestine issue. While my experience regarding the Council is focused on Ethiopia – though I heard similar arguments in response to the work of panels created by the Secretary-General on which I served concerning Sri Lanka and Cambodia – the phenomenon now includes many states that seek to protect their friends from investigations. And if we see the Council as a method for the enforcement of human rights -- as stated in the 2005 UNGA resolution that created it – this is a big problem. Without external official (e.g., UN or AU) investigations, the less likely the government will respond to violations – whether helping the victims, admitting wrong-doing, institutionalizing change, or even some kind of accountability. If a state is not kept on the HRC's agenda, we have what Radhika Coomaraswamy has called "wars without witnesses" – not a problem where one side wants international media (like Ukraine), but certainly one where the government can keep them out.

It might be argued that this phenomenon is no different from the knee-jerk opposition that states allegedly committing abuses have always had to any UN inquiry, whether the United States regarding Iraq or Afghanistan, Russia regarding Ukraine, or China regarding Xinjiang. In those cases, they used their influence to marshal supporters and block any inquiry. Yet my sense is that the opposition is now entrenched and not opportunistic or situational. It makes non-action – argued in the rhetoric of double standards -- more of the rule than the exception, a paradox of sorts.

Can Political Bodies Ever Achieve Impartiality?

As Rosalyn Higgins observed long ago, most of the powers of international organizations provided under international legal instruments are mere authorizations, not duties. Thus, the organization enjoys discretion as to whether it will act or not act – what she called "political operation within the law, rather than decision according to the law." The HRC's mandate has a bit of an obligatory tone -- e.g., it "shall be responsible for promoting universal respect" and "should address violations of human rights" -- but it nonetheless does not require specific action in response to specific abuses. Many years ago, I deployed the concept of impartiality from moral philosophy as a tool to evaluate the membership, decisionmaking procedures, and outcomes of international organizations. Under that basic concept, any difference in

treatment between two states that seemed to play favorites (e.g., in admission to membership, or participation in decisionmaking) – what might be called first-order partiality -- had to be justifiable from a second-order impartial perspective, i.e., a justification based on some larger deontological or utilitarian claim permitting or requiring the differential treatment. When it came to the outcomes of IO decisionmaking, the best I could come up with (at pp. 262-263) was that impartiality meant that they should treat like cases alike. This idea simply restates the obvious view that selectivity cannot be equated with double standards.

In the case of the HRC, this idea of impartiality would translate into similar responses based on the severity of violations of human rights. Ethiopia, which suffered more casualties during this period than any other war, was an obvious candidate for condemnation and investigation, as the Council had done in situations like Myanmar, the DPRK, and Syria. Indeed, the perspective of impartiality shows that those states invoking double standards in the HRC's debates are prescribing a solution that is plagued by the same problem. For their response is to treat unlike cases alike – through non-inquiry in all cases, regardless of the seriousness of the violations (except for the Palestine mandate). Such a dynamic can also be seen in the General Assembly, as Tatjana Papić shows in her article in EJIL:Talk!.

A test for HRC inquiry based on the gravity of violations is not without its shortcomings, as the Council's members will need to appraise different sorts of rights violations. Violations of economic, social, and cultural rights can be equally grave as those of civil and political rights. However, the HRC itself has clearly put a priority on certain egregious violations – summary executions, starvation, ethnic cleansing, systematic torture, expulsions – as meriting inquiries, so we have significant practice on what levels of violations should trigger responses. And the General Assembly resolution establishing R2P offers a set of authoritative indicators of grave violations for which member states have, as a general matter, accepted in principle some level of responsibility to stop.

Even if the Council deploys a test based on severity, the Council's members will still need, in drafting and passing resolutions, to consider factors such as OHCHR's institutional capacity for follow-up, the prospects for success of

Council involvement, the added value of UN condemnation or examination compared to other institutions, and the possible downsides to Council involvement (e.g., making the situation worse). The result, then, would not be perfect consistency according to gravity, but the selectivity would be based on some objective factors and thus not, in my view, representing a double standard.

An alternative way to address the problem of double standards without falling prey to across-the-board non-enforcement is through an emphasis on procedural fairness in the enforcement of the law. From this perspective, certain attributes of the enforcement process affect the prospects for impartial enforcement. Decisions to enforce in some cases and not enforce in others are likely to be more justifiable and legitimate – objectively and to an external audience – if the process by which they are determined is somehow fair. Three particular elements are (a) inclusiveness of participation by affected actors, (b) transparency of deliberations, and (c) accountability of actors for their decision. These of course are ideals – nobody expects a prosecutor to open up a decision on whom to prosecute to cameras.

The problem with deploying these criteria to criticize or improve the HRC is that in a certain sense, it is procedurally fair. It includes members from all over the world; its debates and votes are public; and members are subject to election or re-election that can, in theory, take account of their record. But on further examination, one can see that the HRC is only superficially representative because each regional grouping makes a political bargain among its members on whom to nominate (thus allowing Eritrea to be part of the Africa Group on the Council); that it is not transparent because the bargaining over sponsorship and language takes place behind the scenes; and that it is not accountable because most regional groups do not seem to care much about their candidates' human rights views. Moreover, the General Assembly elections are, more often than not, uncontested within each bloc.

Moving from superficial to thicker procedural fairness represents one avenue to avoid double standards. International human rights NGOs and some states deploy this very strategy. Regarding inclusiveness, they have argued against the inclusion of certain states on the Council in favor of others. Their arguments have a strong legal foundation, as the resolution creating the HRC states that

“Member States shall take into account [in selecting Council members] the contribution of candidates to the promotion and protection of human rights.” So, inclusiveness has a caveat -- it is not supposed to include serious human rights violators. (For excellent analyses of the effect of Council membership on its work, see these studies of the Universal Rights Group). Regarding transparency, they have exposed the process by which the Council considers issues. Certainly, NGOs were aware of the diplomatic efforts by Ethiopia to shut down ICHREE and lobbied member states to keep it alive in order to investigate the ongoing conflict. And as for accountability, civil society actors have publicized states’ votes in the hope that naming and shaming might cause states to view the problem of double standards as something other than an argument for non-action.

Were these procedural aspects of the Council significantly improved, member states might be more inclined to treat like cases alike, which would involve more condemnations and investigations. However, as of today, these strategies have been unsuccessful, and indeed the momentum is the other way. A group of states has effectively used the rhetoric of double standards as a tool to transform the HRC into a body that mostly provides only technical cooperation to states and not true appraisals of and responses to human rights violations. We can judge this behavior as failing both the substantive and procedural markers of fairness.

Two questions thus remain for further reflection: First, can international lawyers and others develop new strategies to encourage either the substantive impartiality that is needed within political bodies (even if it is never going to be fully achieved) or at least more procedural fairness? Second, do we need to rethink what it means for a political body to deploy double standards and develop a new concept that might be more – or less – demanding on them?

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