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South Africa's first five years on the United Nations Human Rights Council

Eduard Jordaan *

Introduction

In June 2011, the United Nations Human Rights Council (HRC) adopted its first resolution on sexual orientation and human rights. Resolution 17/19 expressed grave concern at violence and discrimination committed against people because of their sexual orientation and tasked the UN High Commissioner for Human Rights to report on such abuses. In a body marred by regional bloc voting, Resolution 17/19 passed with support from states in all five of the official regions of the UN. South Africa was widely praised for leading such a progressive resolution through the Council, especially in the face of considerable pressure from African and Islamic states.

South Africa's leadership on Resolution 17/19 was a surprise because a few months earlier South Africa was still obstructing the Council's ability to address the human rights aspects of sexual orientation. In March 2011, South Africa presented a draft resolution to create a committee to define 'sexual orientation' and to investigate the concept's fit in international human rights law. The need to define 'sexual orientation' seems to have been in response to claims by Nigeria and others that the concept was ill-defined. South Africa's draft resolution sought to confine discussion of sexual orientation to the proposed committee. Thus, while appearing to support a progressive cause, South Africa was in fact trying to stall action on the issue, because adoption of the draft resolution would have meant that no wider discussion on matters related to sexual orientation would be permitted until the meaning and application of sexual orientation had been defined. In response, the United States

threatened to present its own draft, yet it was mostly due to pressure from civil society that South Africa changed course and presented a much improved resolution in June 2011.

South Africa's role in the final sexual orientation resolution was also surprising when viewed against the wider background of the country's participation in the HRC. During the four years South Africa spent as a member of the Council (2006-10) as well as during its subsequent participation as an observer state, South Africa's actions on the Council ranged from a selective insistence on human rights to the downright obstruction of the human rights cause. The purpose of this analysis is to briefly present evidence of South Africa's alleged partiality and obstructiveness.

Institution-building

The Human Rights Council began its work in July 2006. The Council's first year was set aside to finalise institutional issues. The Council was created to replace and build on the strengths of the delegitimised UN Commission on Human Rights. However, it soon became clear that the main struggle during the Council's institution-building period was not over how to improve on the Commission, but over how to prevent the Council from being made into something weaker than its predecessor. The membership structure of the Council meant the threat was grave: western states had only seven of the 47 seats while Africa and Asia had thirteen each. The Non-Aligned Movement (NAM) and the Organisation of the Islamic Conference (OIC) further formed powerful cross-regional blocs. South Africa was

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firmly among the numerically superior group who advanced a 'negative reform agenda', a group that included China, Cuba, Indonesia, Malaysia, Russia, and the OIC states⁽¹⁾. South Africa's priorities during the institution-building phase reflected little consistent for the victims of human rights violations, but lay with how states were to be treated. South Africa's constant impulse was to give states as much room as possible to evade scrutiny of their human rights records.

The Council inherited from the Commission a set of 'special procedures' that former UN Secretary-General Kofi Annan has called the 'crown jewel' of the UN human rights machinery. Under the special procedures mechanism, experts would be given mandates to undertake fact-finding missions to study the human rights situation in specific countries or under certain themes. Former UN High Commissioner for Human Rights, Louise Arbour, described these experts as 'the frontline human rights troops that we turn to for early warning and protection,' persons who have 'given a voice to the often silenced victims of human rights abuses'.⁽²⁾ However, South Africa and the rest of the African group did their utmost to weaken the special procedures mechanism. These efforts included giving member states more control over the way mandate holders were appointed and argued that no country should be singled out for an investigation into its human rights record. Most cynically, South Africa supported subjecting mandate holders to a 'code of conduct', ostensibly to increase 'mutual trust' between states and mandate holders, but in reality to limit the independence of special procedures.

A major difference between the Council and the former Commission was that the new body would include a peer review component, the exact nature of which was left to the Council to decide. In discussions about what came to be known as the Universal Periodic Review (UPR), to which all

UN members would be subject, South Africa was prominent in efforts to make the process as unthreatening as possible for states. South Africa emphasised the cooperative and consensual nature of the UPR. South Africa further insisted that the assessment process should be state-led, which translated into putting each state in charge of writing its own report, making state consultation with local NGOs optional, and excluding NGOs from the review at the international level.

Country-specific human rights issues

During its four years as a member of the Council, South Africa repeatedly shielded the governments of Sudan, the Democratic Republic of Congo (DRC) and Sri Lanka from stronger Council scrutiny. With regard to North Korea, South Africa abstained during the three times it had to vote on whether to express deep concern about the human rights problems in North Korea; regret at the country's unwillingness to cooperate with the Council, and to continue the mandate of the Special Rapporteur on human rights in the country. Burkina Faso, Cameroon, Djibouti, Ghana, Madagascar, Mauritius and Zambia all voted in favour of the North Korea resolution on at least one occasion. South Africa claimed that its unwillingness to criticize the aforementioned regimes flowed from a principled opposition to the singling out of specific countries over their human rights records, which, presumably, is also the African Group's position. This reason, however, does not hold water.

In addition to the North Korea example above, there have been numerous instances of split voting among African states on country-specific situations (e.g. over Darfur, the DRC and Sri Lanka). Moreover, when it comes to Israel, South Africa suddenly forgets its dislike for 'naming and shaming'. The Council has a particular obsession with Israel – during South Africa's membership of the Council, 27 of the 61 country-specific

resolutions dealt with Israel. These resolutions on Israel are typically scathing and one-sided, yet South Africa has voted for them all. Israel's treatment of the Palestinians is indeed a disgrace, but it comes nowhere near the crimes of the Sudanese regime.

As mentioned, South Africa and the African Group tried to ensure that the Council's peer review process, would give states maximum control and reduce the potential for criticism as far as possible. Although the African Group did not fully achieve its aims, the UPR remains unthreatening. Nevertheless, the UPR process creates the opportunity to ask tough questions of all countries when they appear before the Council once every four years. When Western states have come up for review, South Africa indeed used the opportunity to tersely and directly address what appears to be the biggest human rights problems in these societies, raising issues related to racism, xenophobia, immigration, indigenous peoples, sexism, and sexual orientation. However, when developing countries appeared for review, South Africa almost always went easy on them. South Africa's usual approach has been to lay the gratitude and praise on thick, and then make a few timid observations which typically steer clear of suggestions that the regime under review might be violating political or civil rights.

Thematic human rights issues

South Africa has been much more willing to speak for victims of human rights abuses when the matter is organised under a theme than when it is country-specific. However, South Africa's interventions are tainted by various problems, many of which stem from its loyalty to values that find expression through the present-day NAM, particularly the organisation's emphasis on national sovereignty and its tendency to see

the world as engaged in a battle between North and South.

South Africa has been vocal on matters related to racial and religious discrimination. South Africa has, for instance, raised important points about the discrimination that Muslims in Western societies experience. However, South Africa has followed the OIC into support for deep restrictions on free speech. The most notorious of these efforts have the OIC's presentation of its 'defamation of religion' resolutions, which, while acknowledging the right to freedom of expression, insists that this rights should be used responsibly and that they may limited for the sake of public order or out of respect for religions and beliefs. Critics have questioned the idea that *religions* can be defamed, and have pointed out that these resolutions are open to abuse and would remove protections for non-believers, religious minorities and political dissidents. The defamation resolutions gradually lost support and were not presented again in 2011. South Africa, however, continued to support the resolution until it was discontinued. Apart from Indonesia, an OIC member, South Africa was the only Council member classified as 'free' by Freedom House to do so.

South Africa has also been a vocal supporter of the right to development and of various economic rights. In South Africa's view, economic rights are on a par with political rights. Nevertheless, assertions of the right to development and the equal status of economic and political rights are not unproblematic. If rights entail claims against an agent, then who should satisfy the right to development? Which political and economic rights are we talking about? Is there are a trade-off? South Africa seems to accept that there is a trade-off. Economic development somehow entitles a state to ignore political rights. In its comments on Singapore's UPR presentation, for example, South Africa noted Singapore's socio-

economic achievements, but kept quiet about the curtailment of political freedoms in the city-state. In fact, South Africa encouraged Singapore to maintain its course⁽³⁾. Furthermore, while better-off states certainly have a duty towards the world's poor, governments of poor countries should also govern better. However, South Africa seems to place responsibility for realising the economic rights of the poor squarely on the shoulders of the international community. So, during South Africa's comments on Zimbabwe's UPR presentation, South Africa noted that Zimbabwe faces many obstacles to improving its human rights situation, among which South Africa singled out economic sanctions, rather than the repression and disastrous economic policies of the Mugabe regime.

Conclusions

South Africa's support for Resolution 17/19 on sexual orientation has been the country's only act on the Council that is unambiguously pro-human rights. On the Council, South Africa has often obstructed the promotion of human rights, but even when it seems to act for human rights, such as on issues related to Israel, race, religion or socio-economic rights, the country's stances are marred by partiality and selectivity.

Four concluding points flow from the above. First, the ability of civil society pressure to get South Africa to change its stance on the issue of sexual orientation is encouraging. Not many South Africans are familiar with what their representatives have been doing at the Council. This gives the country's diplomats considerable autonomy. Greater dissemination of information about South Africa's actions at the Council and more pressure from civil society are likely to improve the country's behaviour at the Council. One area of particular embarrassment is South Africa's siding with the Islamic bloc in support of

various resolutions and endeavours to deeply limit free speech.

Second, South Africa should retreat from its loyalty to the NAM. The fact that the organisation's last three chairs have come from Cuba, Egypt and Iran suggest that the promotion of human rights is not high on this body's list of priorities.

Third, at the Council, South Africa seems to interpret African solidarity as shielding all regimes, irrespective of how they treat their citizens. At the Council, Burkina Faso, Ghana, Mauritius and especially Zambia have shown that African solidarity could also mean loyalty to the ordinary people of Africa, and not necessarily their governments. This latter understanding of African solidarity is the morally correct one to adopt.

Fourth, there was a time when South Africa was seen as an independent voice in international relations, which allowed it to 'punch above its weight'. At the Council, the sexual orientation resolution was the only time South Africa acted with real independence – on other occasions it clings to what the conservative positions in the African Group or the NAM. For instance, during South Africa's four years as member of the Council, it never once voted with the bulk of the European states on an issue that was substantially split (defined as two or more members abstaining or voting against a resolution). South Africa's lack of independence undermines its credibility in international affairs.

Footnotes

1. Meghna Abraham (2007), *Building the new Human Rights Council: Outcome and analysis of the institution-building year*, Friedrich Ebert Stiftung Occasional Paper No. 33, August, p.

24.

2. Louise Arbour (2006) 'Statement by the High Commissioner for Human Rights', *United Nations Press Release*, 27 March, <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/5A23A835EEF0F7F5C125713E00541659?opendocument>
3. South Africa's statement during the eleventh session of the UPR, 6 May 2011.

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