

The Great Enterprise after Iraq

1. On Monday, 29 April 1946, Henri Laugier addressed the first meeting of the so-called nuclear Commission on Human Rights. Henri Laugier was the Assistant Secretary General for Social Affairs in the newly formed United Nations and as such the Senior UN official, whose duty it was to open the proceedings.

2. Henri Laugier was enthusiastic about the establishment of a Commission on Human Rights. The group that he was addressing on that day, - nine persons, of whom three were absent – had the responsibility of preparing the structure, format and modalities of operation of the new Commission on Human Rights.

3. His enthusiasm was understandable – he was about to launch the process that was to bring about the realisation of those provisions dealing with human rights, of the then brand new UN Charter. This was a bold new step in international law – the inclusion of the individual in the hitherto exclusive domain of states in international relations.

4. Laugier was to bring on board John Humphrey to head the Human Rights Secretariat, with equal enthusiasm. Humphrey was to play a key role in the drafting of the Universal Declaration of Human Rights.

5. Humphrey opens his memoirs, “Human Rights and the United Nations: a Great Adventure”, with a warm account of Laugier and of the call he got from him in June 1946, to urge him to join the United Nations’ fledgling Secretariat.

6. Laugier told the gathering: *“Ladies and gentlemen, it is a new thing and a great thing in the history of humanity that the international community ... has constituted an international mechanism to defend the human rights in the world ... you know also that all men of all the free peoples ... put in you their confidence and their hope, so that everywhere the authority of these rights, respect of which is the essential condition of the dignity of the human person, be respected. And, if we close our eyes, we can also imagine a welcome, grave and serious, from the other side, where the shadows of all the soldiers, sailors and aviators, all the fighters for the civilian resistance who died on all the battlefields of the world, hoping that right and liberty be re-established all over the world.*

“Do not measure the importance of your commission on the basis of its present dimensions. We are only at the starting point of a very great enterprise, the volume of which and the action of which will have to grow, day by day. You are the seed out of which great and beautiful harvests must come ... – you will first have to look for the methods to complete the constitution of a final commission sufficiently numerous, so that all the views of the thought of free men will be represented, but small enough so that its work will be quick and truthful – ... In the reconstruction of the world, the material tasks are more important, but the efforts of all town planners, of architects, or doctors, will only assume its real significance if

humanity starts again to have confidence in its destiny, if the human community gets together around a minimum of common principles. ... You will have to show that the political rights are the first condition of liberty but that today the progress of scientific and industrial civilisation has created economic organisations which are inflicting on politically free men intolerable servitude and that therefore, in the future, the declaration of the rights of man must be extended to the economic and social fields.... You will need to look for a basis for a fundamental declaration of human rights ... the acceptance of which will become the essential condition of the admission in the international community.”

“You will have before you the difficult but essential problem to define the violation of human rights within a nation, which would constitute a menace to the security and peace of the world and the existence of which is sufficient to put in movement the mechanism of the United Nations for the maintenance of internal peace and security. You will have to suggest the establishment of machinery of observation which will find and denounce the violations of the rights of man all over the world. Let us remember that if this machinery had existed a few years ago, if it had been powerful and if the universal support of public opinion had given it authority, international action would have been mobilised immediately against the first authors and supporters of Nazism and fascism...”

7. The nuclear Commission wound up its work within the following three months, and on 21 June 1946, the Economic and Social Council, formally established the full Commission, and the realisation of the Great Enterprise was under way.

8. Laugier’s statement makes some very important points that reside at the very core of the treatment of human rights by the international community.

9. In the first place, he underlines the dignity and the direct involvement of the individual as the common denominator in the traditional domain of States – public international law.

10. He also makes the following points:

- a. material progress is only possible when “the human community gets together around a minimum of common principles”
- b. a “declaration of the rights of man” should extend not only to civil and political rights, but also to economic and social rights
- c. “acceptance of a fundamental declaration of human rights [should become] the essential condition of the admission [of States] in the international community.”
- d. the Commission would have “the difficult but essential problem to define the violation of human rights within a nation, which would constitute a menace to the security and peace of the world ...” and,
- e. “the establishment of a machinery of observation which will find and denounce the violations of the rights of man all over the world...”

11. History has shown that most of Lauguer's tenets have been honoured – but not without much frustration and delay. It is also commonly held that there is yet far to go before the vision is realised.

12. Perhaps the biggest challenge has been for States to accept that in undertaking human rights obligations, they are not surrendering, but strengthening their sovereignty. There have been recurring instances in the history of the human rights evolution, where States have oscillated between acting collectively, in the common interest, and acting unilaterally, in regard to the protection of human rights.

13. The Commission was convened for the first time at Lake Success in New York, on Monday 27 January 1947 and set to work on an International Bill of Rights.

14. Step one in the Great Enterprise was the adoption, on 10 December 1948, of the Universal Declaration of Human Rights. Following this achievement, the Commission turned to drafting the rest of the International Bill of Human Rights which, in addition to the UDHR, was to consist of a (legally binding) Covenant and a mechanism for implementation.

15. The fundamental tenet underlying this 'new' human rights movement was the balance between the rights recognised as essential for the individual to live in dignity and peace, on one hand, and the exercise of those rights taking into account the responsibility to the wider community.

16. The UDHR enshrines this in Articles 1 and 29,

(Article 1: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood")

(Article 29: "1. Everyone has duties to the community in which alone the free and full development of his personality is possible. 2 In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society ...")

17. The International Bill took much longer to complete than the UDHR. Nevertheless, the momentum continued. Along the way, in 1952, the Covenant became two Covenants, and the mechanism for implementation was also divided into two distinct procedures. The split between economic and social rights on one hand and civil and political rights on the other, delayed and de-railed the unitary concept underlying the IBHR of addressing the dignity and rights of the individual as being "born free and equal in dignity and rights".

18. The 1952 split, among other consequences, generated a diversion in the years that followed, a diversion created by the search of ways and means to recognise the natural complementarity of these two sets of rights and above all their realisation.

19. This division was to characterise international action on human rights for decades thereafter, spinning off, among other things, the debate on the right to development as a human right (1977 – 1986) and other obstacles in the way of the realisation of the original intention of the IBHR, such as that of cultural relativism, and the notion of rights and responsibilities, among others.

20. It took another 11 years for the Covenants, adopted in, to get the 35 State ratifications to enable them to enter into force in 1976. The Great Enterprise had lost momentum.

21. Nevertheless, the Covenants did come into force and since then have gathered the ratification of the vast majority of Member States. The Commission continued its work and while standard setting continued in ever-increasing specialised domains, [such as the CERD, CEDAW, the Convention against Torture, the Convention on the Rights of the Child, the related Protocols, etc] the focus turned to implementation.

22. With the de-colonisation process and the consequent increase in membership of the UN, the Commission also expanded: from the original 18 members in 1946 to 21 in 1961, to 32 in 1966, to 43 in 1979 and to 53 in 1992. This increase in number of members generated a corresponding expansion in the number of Observer States, producing an exponential and dramatic enlargement of the field of the substantive coverage.

23. In 1967, the Commission in addition to its standard setting activities, took a crucial decision to undertake the investigation of situations of human rights violations on an *ad hoc* basis. The subject was the situation of human rights in southern Africa.

24. This decision opened up the so-called extra-conventional system, also known as “Special Procedures”. The decision was taken after a tough and acrimonious debate, spear-headed by the new members on the Commission, from the emergent States, mainly from Africa.

25. As a result of this milestone decision, the Great Enterprise opened up a sector of implementation activity which since then has become a part of the system of implementation – today there are 38 of such ‘procedures’. Nine of these procedures address situation of human rights in specific countries, while 29 address thematic issues. Among them these mandates cover most areas of human rights concerns, and potentially, could monitor such concerns in any country.

26. The 1980s saw another dramatic turn in this evolution. With the adoption of the Declaration on the Right to Development in 1986, the ground was laid for the reintegration of the two sets of rights which had been separated in 1952. The year after, the Commission decided to establish a Voluntary Fund to resource technical assistance projects in the field of human rights – an important breakthrough in the source of funding. In 1988, the General Assembly authorised the preparation of programmes and materials for human rights education and in 1989, the decision was taken to convene a World Conference on Human Rights, which took place in Vienna in 1993.

27. One may speak of four phases in the evolution of the Great Enterprise:

- the first, between 1946 and 1978
- the second between 1978 and 1988,
- the third between 1988 and 1994, and
- the fourth from 1994 on

28. This evolution was heavily influenced at various times by developments in relations between States and groups of States. Thus immediately after the adoption of the UDHR, the onset of the Cold War led to a slowing down in standard setting activities and the related elaboration of systems of implementation. With the arrival of the non-aligned movement in the sixties, came the shift towards other forms of implementation, and when the melt down in the international polarisation came in the late eighties, it opened the way to a new approach, largely reflected in the Vienna Declaration and Programme of Action of 1993.

29. As a consequence of the Vienna Conference, a number of significant developments occurred. In 1994, a High Commissioner for Human Rights was appointed, the process of codifying internal criminal law was accelerated and the ICC established in 1998 with jurisdiction also on human rights crimes or crimes against humanity. In 1999 the first overtures took place to involve the private sector in the implementation processes of international human rights standards, through the Global Compact.

30. The reform of the United Nations introduced by Kofi Annan in 1997 marked a high point in this evolution. As a consequence of this reform, the implementation of human rights was formally integrated into the work of the rest of the UN system in particular in development activities.

31. In 1994, the Rwanda genocide provided the entry point of human rights into the peace and security equation, and with it, the integration of human rights activities in peace missions and in humanitarian affairs.

32. The Great Enterprise had come along a considerable distance since Laugier made his statement on that Monday morning, on 29 April 1946. *"We are only at the starting point of a very great enterprise, the volume of which and the action of which will have to grow, day by day"*

33. In parallel to these developments, we witness an evolution in the search for enhancing the protection of civilians as a result of, or in time of conflict.

34. On 12 August 1949, the Geneva Conventions of 12 August 1949 were completed under the auspices of the International Committee of the Red Cross.

35. On 8 December 1949, following the Arab-Israeli conflict, the General Assembly established the UNRWA, the United Nations Relief and Works Agency for Palestine Refugees in the Near East. UNRWA currently provides basic services - education, health, relief and social services - to over 4.5 million registered Palestine refugees in the Middle East.

36. On 14 December 1950, the Office of the High Commissioner for Refugees was set up to protect refugees worldwide. Since its

establishment, UNHCR reports that it has assisted an estimated 50 million and currently operates in over 110 countries, assisting an estimated 32.9 million persons.

37. The United Nations Convention relating to the Status of Refugees was adopted on 28 July 1951.

38. Furthermore, as the nature of conflict changed, and war became what General Sir Rupert Smith calls “War amongst the People” in his landmark work, “The Utility of Force”, in 1977 two Additional Protocols to the Geneva Conventions were adopted to strengthen the protection of victims of international armed conflict (protocol I), and to provide for protection of victims of non-international armed conflict (protocol II).

39. Thus by 2003, when the invasion of Iraq took place, the Great Enterprise, in spite of the bumps and shocks of history, had developed into an impressive area of activity. A conventional system now is in place, comprising over 100 international instruments, ranging from the UDHR to the core conventions, to the other conventions, declarations, Standard Minimum Rules, Basic Principles, etc.

40. The special procedures had expanded and now cover a wide range of rights, economic and civil, as well as social and political etc.

41. International Humanitarian Law also had moved ahead and as the nature of armed conflict and military engagement changed, so did the rules of war.

42. The common purpose and objective of these developments is the protection of the individual. This international system is far from perfect, as we are reminded by the reports of the various international human rights bodies, and by the non-governmental community. In spite of these setbacks, the institutions have continued to function and in several aspects, States - although not always willingly – have responded positively.

43. The attacks on US targets on 11 September 2001 and the reaction to them brought about the biggest threat to the evolution that had taken place in the protection of the human rights over the preceding decades.

44. The ‘war on terror’ launched as a reaction to these attacks, followed by the intervention in Afghanistan and in 2003 by the invasion of Iraq, produced what may well be the greatest challenge to the further evolution of this Great Enterprise.

45. In the absence of an international balance or *rapport de force* among States or groups of States, a vacuum existed in which measures normally perceived as contrary to international human rights standards, were adopted.

46. The Charter mechanisms for the maintenance of international peace and security were by-passed and unilateral measures developed on the side of, and often contrary to, the established international standards .

47. A distinct trend emerged that supports the view that the protection of human rights, both in conflict and outside of conflict, as related to the Iraq invasion and its aftermath, is governed not by international law, as

developed in the evolution of the Great Enterprise, but by a kind of national law custom-made for the particular purposes of the invasion and its aftermath.

48. This historic challenge to the Great Enterprise may be identified in at least three sectors.

- i. The first are the measures taken in the context of the immediate reaction to the attacks on 11 September 2001. [These affected the international protection of civilians].
- ii. Second are those measures taken in the lead-up and conduct of the invasion and occupation of Iraq. [These affected the international system of protection, the protection of civilians under occupation, and the treatment of civilians in detention, among others]
- iii. Third, the measures taken in regard to the ‘improvement’ of the UN mechanisms for protection of human rights. [These include the extra-conventional procedures, the mandate of the Special Rapporteur] [the replacement of the ‘discredited’ Commission on Human Rights by a Human Rights Council.]

49. The first casualty was International Humanitarian Law, and the Geneva Conventions in particular. Already in 2002, *Newsweek* quotes the January 25, 2002 ‘draft’ memo by then White House counsel Alberto Gonzales (later Attorney-General) to President Bush, advocating scrapping the Geneva Conventions so as to shield US officials from prosecution for war crimes during the “war on terror.” Gonzales wrote: “As you have said, the war on terrorism is a new kind of war. [...] In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.”

50. Subsequently, the Conventions, were declared to be “too vague” and therefore not really applicable. Other criteria needed to be developed or applied – developed unilaterally and oblivious of the existing international mechanisms designed for that purpose.

51. This led to the discussion on what constitutes torture and/or cruel and inhuman treatment, independently of the existing international, regional and national jurisprudence on the subject.

52. The resort to private contractors, to the private military industry – given immunity from Iraqi law under an order issued by Paul Bremer the day before he left Baghdad and wound up the Coalition Provisional Authority – created further complications in the respect for and application of IHL.

53. According to the Congressional Budget Office, by the end of this year, the US would have spent \$100bn between 2003 and the end of this year, on contractors, the majority on contracts in Iraq (estimated at between \$6bn to \$19bn, reported by BBC on 13 August 2008).

54. The various statements and opinions on the nature and extent of acts which may be considered as constituting torture were dramatically – if not tragically – and grimly affirmed by the measures adopted in the same

context, including Abu Ghraib, the setting up of [Camp X-Ray, Guantanamo] and “Military Commissions” and the related measures attempting to by pass the measures of protection to which individuals are entitled, and the so-called extraordinary rendition by which people were shipped to countries for the purpose of obtaining confession.

55. The invasion and the conduct of the occupation created a chaotic situation in which the civilian, contrary to the protection under HR and IHL, became the target and the victim of violations of human rights across the board. The slaughter of civilians, the arbitrary detention of thousands over indefinite periods (there are some 50,000 Iraqis in detention, 21,000 of which are in US custody, most held without charge) the absence of fair trial, - continuing as we speak – created a grim picture of a failure of the international system to provide the protection underlying the foundations the IBHR.

56. The situation of economic and social rights, already heavily eroded under the sanctions against Iraq, was and remains as negative.

57. The Great Enterprise, whose foundation was laid on the need for solidarity, was threatened by lawlessness by those seeking to combat terror and by those seeking to oppose them.

58. These measures taken in the “war against terror” provoked reaction both nationally and internationally. One notable casualty was Mary Robinson, the UN High Commissioner for Human Rights whose appointment came to an end in 2002; her departure is widely known to have been the result of her insistence on the protection of the rule of law and generally of all individuals caught up or captured in the aftermath to the attack on Afghanistan against the Taliban.

59. When in December 2005 Louise Arbour, (whose term of office expires on 31 August 2008) issued a statement in which she said that the "absolute ban on torture, a cornerstone of the international human rights edifice, is under attack. The principle once believed to be unassailable ... is becoming a casualty of the so-called war on terror" she was criticized by the U.S. Ambassador to the UN, John Bolton. Bolton said that it was "inappropriate and illegitimate for an international civil servant to second-guess the conduct that we're engaged in, in the war on terror."

60. The abuse of human rights in Iraq and the massive violations to which the people of Iraq were subjected under Saddam Hussein was a matter of record, and described in detail in the reports of the Special Rapporteur of the Commission on Human Rights, Max van der Stoep presented regularly since 1992. The savagery of the repression of the uprising in the south, after the debacle of the Kuwait invasion is matched by the repression of the Kurds in the north. Mass graves, containing untold thousands of remains of mass executions, victims of repression remain the witnesses of the horrors of that regime.

61. Yet recent history confirms that removing Saddam Hussein as a result of invasion and occupation has not improved the situation of human rights in the country. Moreover, additional violations took place as a result of the

non-respect by the occupying forces, of international human rights and humanitarian standards.

62. The mandate of the Special Rapporteur was terminated in 2004 upon the invasion, and therefore the Commission no longer had the benefit of a report on the situation of human rights in Iraq – the expectation being that, upon the invasion and the removal of the Saddam Hussein regime, the situation of human rights was expected to improve. An effort to fill that void by the Office of the High Commissioner for Human Rights in June 2004 turned out to be a one-off, and not to be repeated. In July 2005, the Human Rights Office of the UN mission in Baghdad started to produce reports of the human rights situation in Iraq; but these reports were never intended for and therefore never reached the Commission on Human Rights.

63. A similar fate characterised the mandate of the Commission's Independent Expert on Afghanistan, Cherif Bassiouni, whose reports were explicit in attributing responsibilities for human rights violations also by the post-Taliban government. That mandate was also terminated. Reports prepared by the High Commissioner were significantly different in their approach.

64. Finally, in the process of establishing a Human Rights Council to succeed the Commission on Human Rights, the configuration of membership of the new Council was "adapted", by reducing the membership of the Council to 47 States whilst inserting criteria aimed at keeping out of the Council, States deemed to be "violators", thus introducing an element of elitism that was bound to fail, if anything because of the impossibility of determining the elements that qualify a State a 'violateur'.

65. In the two years of its existence, the Council has concentrated on setting its own parameters. In so doing, the delicate balance between States and individuals has been seriously affected, as States seek to group themselves in a kind of defence reflex against perceived aggression by others, mainly the Western States. Non-governmental organisations, who had made notable progress in voicing human rights concerns in the Commission and in other bodies, find themselves under pressure which considerably limits their efficiency. In other words, the basic tenet of complementarity of concern and action to address the causes and effects of human rights violations disintegrated into confrontation between groups of States, to the detriment of the priority to be given to protection of the individual.

66. It would seem that States are constantly seeking a new era of confrontation (after that of the Cold War) in which the individual has been relegated to secondary place.

67. There is therefore an urgent need for the international community to arrest this process and to switch its approach so as to put the individual first. Current situations in Palestine, Darfur, Burma, to mention a few provide eloquent proof of this need.

68. To some this may seem as an insurmountable challenge, as it implies major policy changes by strong and powerful states – who continue to labour under the illusion that might gives right.

69. In reality, there is little choice but to face this challenge. Situations that at the time seemed impossible to address, in recent past, have been reversed. The end of apartheid is one, as is the end of the repressive regimes of the communist era, as is the end of the military dictatorships of Latin America as exemplified by the evolution of the situation in Chile.

70. But the commitment of States cannot be brought about unless the other actors are involved. These are the actors that governments do not represent. They are civil society at large, the corporate sector, the non-governmental community – all these must adapt their current approaches in the same direction.

71. There is room for hope, as this process has started, even though on modest and uncertain terms. The focus on the role of the private sector in the promotion and protection of human rights has grown since the launching of the Global Compact by Kofi Annan in Davos in 1999, and will continue to do so in the coming years. The work of the Special Representative of the Secretary-General for Business and Human Rights, Professor John Ruggie, deserves special mention in this regard. Some notable work has also been done by the UNDP with the Human Development Reports and the related HDI, as well as by OECD with its Guidelines for Multinational Enterprises.

72. There is therefore a need for serious and profound reflection /re-thinking, in order to restore to the GE its essence, that is to reinforce the identity of the individual (as defined in Article 1 UDHR) as the subject/target of the efforts of the international community.

73. There is a need to hone our GE to meet the challenges and circumstances of the times that we live in. The 1993 Vienna Declaration was eloquent when, in adopting that Declaration it invoked *“the spirit of our age and the realities of our time [which call upon the peoples of the world and all States Members of the United Nations to rededicate themselves to the global task of promoting and protecting all human rights and fundamental freedoms so as to secure full and universal enjoyment of these rights].”*

74. The Vienna Conference, which took place 47 years from the day that Laugier delivered that speech to the six members of the core Commission, brought together 171 States and over 800 ngos. Thousands participated in that Conference, not to mention the extensive participation in the two and a half years of its preparation, by States and ngos alike.

75. The question remains, especially after what we have seen in the past 9 years – is this all rhetoric? Or is it a manifestation of the real spirit, which as we have seen, is challenged from time to time by illusions of power and misconceptions of the true nature of mankind? Do we still have that Grand Enterprise?

76. In his compelling work, “Identity and Violence, the Illusion of Destiny” Amartya Sen states: *“... the point is often made, with evident*

justice, that it is impossible to have, in the foreseeable future, a democratic global state. That is indeed so, and yet if democracy is seen ... in terms of public reasoning, ... there is a strong case for advancing widespread public discussion, even when there would remain many inescapable limitations ... Many institutions can be invoked in this exercise of global identity, including of course the United Nations, but there is also the possibility of committed work, which has already begun, by citizens' organisations, many non-government institutions, and independent parts of the news media."

77. As Laugier said on that day in 1946 as he launched the international human rights movement, *"Let us remember that if this machinery had existed a few years ago, if it had been powerful and if the universal support of public opinion had given it authority, international action would have been mobilised immediately against the first authors and supporters of Nazism and fascism..."*

78. Is it not time for us to get our (human rights) act together?

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