



PERSPECTIVES ON A DECADE OF ASIAN FOREIGN POLICY AT THE UN HUMAN RIGHTS COUNCIL

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ASIAN PERSPECTIVES ON INTERNATIONAL HUMAN RIGHTS LANDSCAPES

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Perspectives on a Decade of Asian Foreign Policy at the UN Human Rights Council

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About FORUM-ASIA

The Asian Forum for Human Rights and Development (FORUM-ASIA) is the largest membership-based human rights and development organisation in Asia with a network of 58 members in 19 countries across the region. FORUM-ASIA works to promote and protect all human rights for all, including the right to development, through collaboration and cooperation among human rights organisations and defenders in Asia and beyond. FORUM-ASIA seeks to strengthen international solidarity in partnership with organisations and networks in the global South.

FORUM-ASIA was founded in 1991, and established its Secretariat in Bangkok in 1992. Since then, other offices have been opened in Geneva, Jakarta, and Kathmandu. FORUM-ASIA has consultative status with the UN Economic and Social Council (ECOSOC Status) and a consultative relationship with the ASEAN Intergovernmental Commission on Human Rights (AICHR).

About FORUM-ASIA Working Paper Series

The FORUM-ASIA Working Paper Series is an effort to strengthen international research, knowledge, action and advocacy towards ensuring human rights and development for all. This working paper series aims to inform human rights and development practitioners about the latest trends and perspectives on human rights and development through regular research and analyses. It also seeks to build Asian perspectives on international human rights landscapes and open new vistas for discussion, debate, research and advocacy on a range of cross-cutting topics that touch on Asia, human rights and international political architectures. We welcome feedback from readers and ideas for further research or new research topics at una@forum-asia.org.

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Preface

Creation of the UN Human Rights Council in 2006 was welcomed with renewed hope for human rights and democracy around the world. Inevitably, the Human Rights Council is subject to global political exigencies. Nevertheless, it provided States from Asia and other regions of the global South a more equal voice in international discussions on human rights. It held the promise of moving away from the global human rights discourse that had often been criticised for having been led by the West. This working paper, the second in the FORUM-ASIA Working Paper Series, looks at how Asian States have used this position at the Council to advance human rights, including, the rights to freedom of opinion and expression, freedom of assembly and association, and protection of human rights defenders over the past ten years.

Voting and sponsorship records of Asian States on thematic resolutions on these three areas of human rights show that Asian States have often been reluctant to actively support positive initiatives to advance freedom of expression, freedom of assembly and association and protection of human rights defenders. Instead, disappointingly, they have been more supportive of attempts that could potentially rollback years of legal and normative developments on these areas. Majority of Asian States have also resisted country-specific scrutiny by the Council even in situations of grave human rights concerns with the same arguments of politicisation and selectivity that plagued the former Commission on Human Rights.

For the Human Rights Council to have any meaningful impact and relevance, its decisions and debates should reflect the realities on the ground – where fundamental rights are increasingly under strain from rising populist, extremist and ultranationalist tendencies. One of the fundamental objectives of the Asian Forum for Human Rights and Development (FORUM-ASIA) is to put voices of the people who are directly affected by human rights violations on the agenda of the Council, and to translate decisions of the Council to positive change on the ground. This paper is part of our work to better inform the Asian public, civil society, policymakers, analysts and observers who seek to examine and hold Asian governments accountable for the positions they take on human rights internationally.



John Samuel
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EXECUTIVE SUMMARY

The UN Human Rights Council was established to remedy the credibility deficit that its predecessor, the UN Commission on Human Rights was mired in. The most important change to the international human rights infrastructure with the creation of the Council is perhaps the composition of its members. While the distribution of seats between regional groups is not drastically different from that of the Commission on Human Rights, the new allocations appear more objective and balanced. The way seats are allocated for each region largely reflects the size of each region in terms of the number of States in each geographical region. This is intended to allow the Council to mitigate the most difficult issue related to the Commission on Human Rights and allow the highest international body on human rights to focus its attention on substantive issues rather than obsessing over who is debating or voting on them.

The composition of member States in the new Council essentially ensured that global South have a combined majority – Asian, African and Latin American States in the Council account for nearly three-quarters of the Council membership. Asian alone holds nearly one-third of the all Council seats. As a result, no decision of the Council could be made without the backing of the global South, in particular Asian and African States. In theory, this adds a certain degree of legitimacy to decisions taken by Human Rights Council in the sense that none of these decisions can be blatantly rejected as those of a small group of powerful States.

The Human Rights Council is indeed a political body, that is subject to political alliances and interests of States. Despite the inevitable implications of such political dynamics, Asia controls nearly one-third of the votes at the Council. 13 States, elected for three year terms by the UN General Assembly, represent Asia in the Council each year. During the first decade of the Council, only 22 Asian States, or only 41.5 percent of all Asian States as defined by the UN,¹ have been members of the Council for at least one year. In comparison with other four regional groups, fewer Asian States, in proportion of the total size of the region, have been members of the Council. Asian representation in the Council has rotated largely among the same group of relatively more influential Asian States like China, India, Indonesia, Republic of Korea and Saudi Arabia that have been members of the Human Rights Council in nine out of the first ten years of the Council.

Based on the publicly available official records of the regular sessions of the Council in its first ten years, this paper looks at the positions of Asian States on resolutions on the right to freedom of opinion and expression, the right to

¹ UN, (last update 9 May 2014), United Nations Regional Group of Member States, Department of General Assembly and Conference Management, available online <http://www.un.org/depts/DGACM/RegionalGroups.shtml>

freedom of peaceful assembly and of association, protection of human rights defenders as well as country-specific human rights situations. It is expected that this report will shed some light in to how Asian States have influenced the international debates on these fundamental human rights through the UN Human Rights Council. Asian peoples and civil society are often removed from international debates on human rights. Secrecy around foreign policy decisions in almost all Asian States mean citizens are usually not aware of the positions taken by their own governments at international platforms – allowing governments to often behave in manners that contradict their international positions. Alleviating such information deficit is one important aim of this paper.

Asian States positions on 10 resolutions on three different areas related to the right to freedom of opinion and expression suggests that Asian States have been invariably less supportive of these resolutions, despite joining consensus on all except one resolution adopted by vote. Sponsorship and voting records show significantly low Asian support for the resolutions on the mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression among Asian States. Asian States have accounted for the smallest share, in terms of regional distribution, of co-sponsors of these resolutions with only India, Indonesia, Japan, Republic of Korea, Maldives and Thailand co-sponsoring at least two out of the three resolutions on the topic.

Although, there was marginal increase in the number of Asian States that co-sponsored the resolutions on the safety of journalists over time, general support for these resolutions remain low among Asian States. Only Maldives and the Republic of Korea have co-sponsored all three resolutions while Qatar has led the two latest resolutions on the topic as part of the core group of States that leads the resolution. Japan, Kazakhstan, Lebanon, Timor-Leste and Yemen have co-sponsored two resolutions on the topic, while the resolution in September 2016 saw Mongolia and Philippines join as co-sponsors.

The Council's resolutions on human rights on the Internet have managed to garner comparatively more support from Asian States. While more Asian States joined as co-sponsors of the first two resolutions, the third resolution saw Asian support decrease. Despite the comparatively higher co-sponsorship of these resolutions by Asian States, several Asian States colluded with attempts to to weaken or undermine these resolutions through amendments. Majority of Asian States voted in favour all negative amendments to the two most recent resolutions on the topic.

Similar patterns of low Asian support coupled with greater support for attempts to undermine international standards typify Asian States' positions on the 11 resolutions on three separate thematic areas related to the right to freedom of peaceful assembly and association. Despite the role of Indonesia and Maldives as part of the cross-regional core-group of States that lead these resolutions, as

well as the consensus on all four resolutions, Asian States have been reluctant to actively support the resolutions on the mandate of the Special Rapporteur on the right to freedom of peaceful assembly and of association. Besides Indonesia and Maldives, only Japan and Republic of Korea have co-sponsored all four resolutions. The latest resolution saw, however, saw Asian support in terms of co-sponsorships increase with Afghanistan, Philippines and Mongolia joining as co-sponsors.

Asian positions on the resolutions on protection and promotion of human rights in the context of peaceful protests is marked by the support of the majority of Asian States to subversive attempts to under the work to lay out the principles for the promotion and protection of human rights in the context of protests. Although majority of Asian States voted in favour of the last two resolutions which were adopted by vote, Asian States' sponsorship and votes in favour of regressive amendments to these resolutions contributed significantly to the erosion of the consensus on these resolutions over time. The Republic of Korea was the only Asian State to co-sponsor all four resolutions on the topic, and Japan and Maldives co-sponsored two resolutions each. While Maldives failed to sponsor the latest, and perhaps the most controversial resolution on the basis on amendments, Indonesia joined as a co-sponsor of this resolution.

Human Rights Council resolutions on civil society space have become one of the most divisive initiatives at the Council. Opposition to, and regressive attempts to undermine the Council's work to promote a safe and enabling environment for civil society have been increasing year by year eroding the Council's consensus on these resolutions, and in the process subverting several already established international human rights principles. Asian States, actively or by omission, played an instrumental role in these increasing attempts to subterfuge the Council's work to promote civil society space as a human rights concern. Despite Japan's role as member of the core-group of States that lead the resolutions, Asian support for the resolutions expressed in terms of co-sponsorship has been minimal with only Cyprus and the Republic of Korea co-sponsoring the three resolutions on civil society space with Maldives and Timor-Leste co-sponsoring one resolutions each. Contrastingly, majority of Asian States have been more actively supportive of amendments through sponsorship and voting in favour of amendments.

Asian States' positions on the Council's resolutions related to human rights defenders are comparable to the pattern of their sponsorship and voting on thematic resolutions related to freedom of opinion and expression, and freedom of peaceful assembly and association. Asian States' positions on the six resolutions on two separate themes related to human rights defenders under consideration in this study show their reluctance to support the resolutions in particular through sponsorships while generously supporting restrictive amendments on many of these resolutions. The mandate of the Special Rapporteur on the situation of

human rights defenders remains one of the key special procedures mandates of the Human Rights Council, especially given the increasing, often fatal, attacks against human rights defenders. However, as one region that accounts for a large number of reports of attacks against human rights defenders, Asian States have been reluctant to support the resolutions on the mandate. Only Japan and Republic of Korea have co-sponsored all three resolutions while Cyprus, Indonesia, Thailand and Timor-Leste have supported the two latest instalments of the resolution. This increase in support, however, pales in comparison to Asian States' support for regressive amendments to the resolution each year where majority of Asian States voted in favour all the amendments voted on at the Council.

Similarly, Asian support for the resolutions that broadly address protection of human rights resembles their minimal support for the resolutions on the mandate of the Special Rapporteur on the situation of human rights defenders. Asian States make up for a negligible share of States that co-sponsored each of the three resolutions. Cyprus, Japan and the Republic of Korea were the only Asian States to co-sponsor the three resolutions on the topic, while Timor-Leste co-sponsored two, and Indonesia, Maldives and Sri Lanka sponsored one resolutions each. To be sure, Asian States are not alone in their reluctance to support these resolutions. African support for these three resolutions are comparable to that of Asian group. Resolutions on the protection of human rights defenders also remain highly contentious with repeated, and unprecedented, attempts to subvert these resolutions, with consistent support of the majority of Asian States. The only consistent feature of Asian States' positions on country-specific resolutions under items 2, 4, 7 and 8 of the Council's agenda during its first ten years has been inconsistency. Several Asian States have been critical of the scrutiny of country situations except to determine the needs for technical assistance and capacity building. Many States have argued that item 10 of the Council's agenda with the consent and the acknowledgement of the States concerned of the need for technical assistance and capacity building support is the only appropriate mechanism for the Council to engage in country-specific situations. They have been opposed, especially of, harsher scrutiny with condemnation and 'naming and shaming' under item 4 of the Council's agenda, rejecting such scrutiny as politicised attempts to interfere in the domestic affairs and infringe on the sovereignty of States concerned.

Asian States' positions however is more complicated and exposes the the fallibility of some of these arguments. Voting records on the 36 item 4 resolutions adopted by vote suggest that majority of Asian States are less inclined to vote in favour of country-specific scrutiny. However, Asian support for item resolutions on Syria goes against this general trend where, on average, 61 per cent of Asian States have consistently voted in favour of resolutions on Syria. Excluding the Asian vote on Syria, on average only 27 per cent of Asian States have regularly voted in favour of item 4 resolutions while 28 per cent have voted against and

45 per cent abstained. Statistics of Asian States records on sponsorship of Item 4 resolutions gives credence to this argument that Asian States are less likely to support item 4 resolutions. Even when considering sponsorship, Syria remains an exception. Resolutions on Syria has seen significant Asian support in terms of sponsorship. However, no other Asian State besides Cyprus, Japan, Maldives, Republic of Korea and Thailand have sponsored or co-sponsored an item 4 resolution other than the resolutions on Syria. Although Asian States' voting and sponsorship patterns suggest they are less likely to vote in favour of item 4 resolutions, the fact that they have joined the consensus on 30 item 4 resolutions including on Burma/Myanmar which is a close regional ally of many Asian States suggest that even the most vocal critics of country-specific scrutiny are malleable and open to compromise.

A total of 81 out of 85 resolutions adopted under item 10 were adopted by consensus of the Council, signifying broader universal preference of technical assistance and capacity building approach to country situations. However, the three recent resolutions on Ukraine that required the Council to act by voting shows the inconsistencies in following the arguments made in favour of item 10 resolutions. In the case of the resolutions on Ukraine, the many States that have been arguing that country-specific debates should be held under agenda item 10 with the consent of the State concerned were ready to walk back on their arguments. On the surface, at least, many States including Asian States did not consider the fact that Ukraine led these resolutions as their consent and acknowledgement of the need for assistance. Instead, majority – 66 per cent – of Asian States consistently abstained on the three resolutions on Ukraine.

Analyses of both thematic and country-specific resolutions have revealed that Asia has not been able to articulate a collective regional position on any of these resolutions. Other regional groups, especially African, Latin American and European Union have collectively promoted initiatives. This is particularly visible in regional sponsorship of several country-specific resolutions by Africa, Latina America or European groups of States. However, some Asian States have joined with others as part of the Arab group or as States belonging to intergovernmental organisations such as the Organisation of Islamic Cooperation or the Non-Alignment Movement. This lack of a cohesive regional position on any key resolution is perhaps due to the absence of a pan Asian regional initiative or a regional human rights mechanism, in addition to the vast cultural and political differences between individual Asian States.

This study suggests that the number of Asian States that actively engage with the Council is relatively low. In terms of the membership of the Council, only 22 per cent of Asian States have been members of the Council over the past ten years compared to 55 per cent of African States, and 49 per cent of Latin American States. A small number of politically influential States have monopolised the seats allocated for Asian States in the Council. Another indicator of engagement

with the Council could be sponsorship of resolutions. Every State is entitled to sponsor or co-sponsor any resolution at the Council regardless of their membership status. Only 20 Asian States have sponsored at least one thematic resolution, while this number is significantly lower in case of country-specific resolutions. Coincidentally, many of these States that regularly sponsor or co-sponsor resolutions before the Council are also those that have been members of the Council. This could indicate either lower level of interest and awareness or lack of confidence in the Council among Asian States.

As much as the Council has made significant strides to promote and protect human rights worldwide, first ten years of the Council has also presented a number of serious challenges to international human rights architecture. None more so than the increasing attempts to rollback to established principles of international human rights. This has been particularly accentuated through the increasing number of regressive amendments proposed to resolutions on freedom of opinion and expression, freedom of assembly and association and human rights defenders. Worryingly, as this study has shown, majority of Asian States have either led or aligned themselves with States that are leading such amendments. Although many of these attempts have so far failed in the Council, majority of Asian States have consistently voted to accept these amendments.

INTRODUCTION

The establishment of the UN Human Rights Council (hereafter “the Council”) in 2006 as the world’s premier human rights body is perhaps the most significant step towards the promotion and protection of human rights in the past decade. The Council was a part of the larger United Nations reform proposed by former UN Secretary-General, Kofi Annan.

THE UN HUMAN RIGHTS COUNCIL

The Council was proposed as an antidote to the “credibility deficit” that plagued the Commission on Human Rights, which it was said “casts a shadow on the reputation of the United Nations system as a whole.”² In his final report to the UN General Assembly as Secretary-General, Annan, called on the UN member states to replace the Commission that had been undermined by declining credibility and professionalism with “a smaller standing Human Rights Council” if the UN intended “to take the cause of human rights as seriously as those of security and development.”³ Creation of the Council as a subsidiary body of the General Assembly elevated the position of human rights within the UN infrastructure, “corresponding to the primacy of human rights in the Charter of the United Nations.”⁴ This however was a relatively weak proposal compared to others made by Annan, which were not adopted by UN member States.

The UN General Assembly decided by consensus to establish the Council in March 2006⁵ as the highest political forum for the protection and promotion of human rights worldwide. It is mandated to protect and promote human rights, among others, through human rights education, learning, advisory services, technical assistance, and capacity building; dialogue on thematic issues on all human rights; recommendations for the development of international human rights law; prevention of human rights violations by responding to emergencies; and implementation of human rights obligations and commitments of States.

The Council’s action towards the implementation of this mandate is primarily manifest in its resolutions. Resolutions of the Council are in essence the global political decisions on matters related to human rights, be it thematic issues or human rights situations of concern. None of these resolutions

² UN Doc No A/59/2005 (21 March 2005), In larger freedom: towards development, security and human rights for all, available online http://www.un.org/en/ga/search/view_doc.asp?symbol=A/59/2005

³ Ibid

⁴ Ibid

⁵ UN Doc No A/RES/60/251 (15 March 2006)

are however legally binding on any of the States, not even on those who sponsor or vote for these resolutions. Binding effect of a resolution is limited to organisational matters related to the Human Rights Council itself or the entire UN system once the resolution receives recognition of the General Assembly – which routinely adopts Council decisions as the parent body. With its lack of legal authority on States, the primary utility of resolutions adopted by the Council lies in their contribution to the normative development of thematic aspects of human rights, and in triggering UN action in response to violations and human rights emergencies.

Creation of the Council gave Asia and other parts of the global South a stronger voice with more objective and equal representation in the Council. Asian States account for nearly one-third of the 47-member Council in contrast to 12 seats in the 53 member Commission on Human Rights. As a result votes and positions by Asian States are weightier and more consequential in the decisions of the Council. Theoretically, positions of the Asian States at the Council are representative of the view of all Asian States, since they are elected to represent Asia in the Council, and include the voice of Asian States in the decisions of the Human Rights Council.

Membership

One of the most important changes in the international human rights architecture with the creation of the Council in 2006 is perhaps the composition of its members. One of the main criticisms, or as the report of the High-Level Panel on Threats, Challenges and Changes⁶ concluded, “the most difficult and sensitive issue” related to the erstwhile Commission on Human Rights “is that of membership.”⁷ The Panel went as far as to imply that political tensions over the membership have in fact being detrimental to human rights. “[T]he issue of which States are elected to the Commission has become a source of heated international tension, with no positive impact on human rights and a negative impact on the work of the Commission,” the Panel Stated in its report.⁸ The Panel recommended that the membership of the Commission be expanded to universal membership arguing that proposals for membership criteria could further politicise the issue and entrench the current dynamics. Rather it argued that universal membership might help to “focus attention back on to substantive issues rather than who is debating and voting on them.”⁹

6 The High-Level Panel on Threats, Challenges and Changes is a panel of eminent persons convened by former Secretary General of the UN, Kofi Anan, to provide him with “a shared, comprehensive view about the way forward on the critical issues” necessary to make the UN more effective. The report of the Panel contained in the UN Doc No A/59/565 (2 December 2004) is available online at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/No4/602/31/PDF/No460231.pdf?OpenElement>

7 UN Doc No A/59/565 (2 December 2004), paragraph 285

8 Ibid

9 Ibid

However, when the UN eventually decided to replace the Commission on Human Rights with the Council in 2006 it did not follow the recommendation of the panel to expand the membership to universal membership. Instead the UN opted for a much smaller – smaller even than the 53-member Commission – body as the premier global institution in charge of the promotion and protection of human rights. The Human Rights Council consists of 47 States elected directly by the General Assembly for three years, with possible extension to a second term, by two-thirds majority of its members. The 47 seats of the Human Rights Council are distributed among the five geographic regions of the UN: Asia, Africa, Latin America, Eastern Europe, and Western Europe and Others. While the distribution of seats between regional groups is not drastically different from that of the Commission on Human Rights, the new allocations appear more objective and balanced. The way seats are allocated for each region largely reflects the size of each region in terms of the number of States in each region. Asia is allocated 13 seats or 28 percent of the total membership of the Council, which roughly reflects the proportion of total number of Asian States listed as UN members. Similarly, distribution of Human Rights Council seats between the remaining regions are largely representational of the proportion of the total number of States in each of these regions: Africa 13 seats, Latin America 8 seats, Eastern Europe 6 seats and Western Europe and Others 7 seats.

This essentially means States from the global South have a combined majority in the Human Rights Council. Asian, African and Latin America States in the Council account for nearly three-quarters of the Council membership. Asia alone holds nearly one-third of all Council seats. This follows that no decision of the Human Rights Council could be made without considerable support from the global South, in particular Asian and African States that alone account for more than half of the Council's membership. In theory, this adds a certain degree of legitimacy to decisions taken by Human Rights Council in the sense that none of these decisions can be blatantly rejected as those of a small group of powerful States.

However, this is not to ignore or negate the unequal power relations between the West, new emerging powers and the rest of the global South. This is indeed true when it comes to the Human Rights Council. Western States as well as certain large States from the global South hold significant sway over the decisions of smaller and less powerful or less privileged States from the South through their ostensibly superior economic and political power. A deeper study of how these political dynamics correlate to positions and voting behaviour of Asian and other global South States is necessary for a comprehensive understanding of the decisions at the Council and its implications for global human rights. Such a deeper study is beyond the scope of this paper although it attempts to offer some basic ideas to this end.

In spite of the implications of these political dynamics, in principle, Asia controls

nearly one-third of the votes at the Council. 13 States, elected for three year terms by the UN General Assembly, represent Asia in the Council each year. Each State can be elected for two consecutive terms of three years, After this the State will have to leave the membership for at least one year before it could stand for membership again.

country	Frequency	19 June 2006 - 18 June 2007	19 June 2007 - 18 June 2008	19 June 2008 - 18 June 2009	19 June 2009 - 18 June 2010	19 June 2010 - 18 June 2011	19 June 2009 - 18 June 2010	1 January - 31 December 2013	1 January - 31 December 2014	1 January - 31 December 2015	1 January - 31 December 2016
Bahrain	4										
Bangladesh	8										
China	9										
India	9										
Indonesia	9										
Japan	8										
Jordan	6										
Kazakhstan	3										
Kuwait	3										
Kyrgyzstan	4										
Malaysia	6										
Maldives	6										
Mongolia	1										
Pakistan	8										
Philippines	8										
Qatar	8										
Republic of Korea	9										
Saudi Arabia	9										
Sri Lanka	2										
Thailand	3										
United Arab Emirates	4										
Vietnam	3										

Table 1: Asian States that have been members of the Council (2006-2016)

Over the past ten years from the establishment of the Council in 2006 to the end of 2016, only 22 Asian States, or only 41.5 percent of all Asian States as defined by the UN,¹⁰ have been members of the Council for at least one year. In comparison with other four regional groups defined by the UN, fewer Asian States, in proportion of the total size of the region, have been members of the Council. This means the membership of Human Rights Council has rotated largely among the same group of relatively more influential Asian States. China, India, Indonesia, Republic of Korea and Saudi Arabia have been members of the Human Rights Council in nine out of the first ten years of the Council. Bangladesh, Japan, Pakistan, Philippines and Qatar have been in the Council eight out of the ten years being studied. This lack of diversity among Asian States represented in the Council perhaps accounts for some of the trends in voting and positions discussed later in the paper.

¹⁰ UN, (last update 9 May 2014), United Nations Regional Group of Member States, Department of General Assembly and Conference Management, available online <http://www.un.org/depts/DGACM/RegionalGroups.shtml>

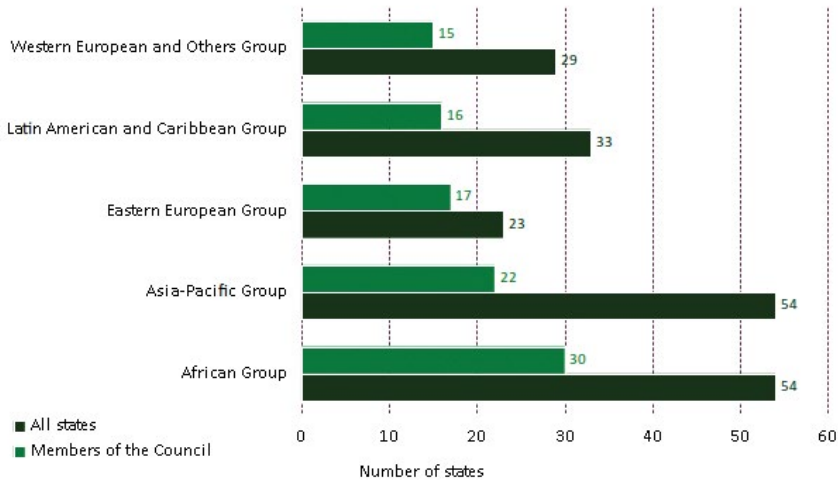


Figure 1: Number of States in each region vs. the total number of States that have been members of the Council from each region (2006 - 2016)

This paper looks at the positions of Asian States at the Human Rights Council during the first ten years of the Council. The study is limited to the positions taken by Asian States in relation to the right to freedom of opinion and expression, the right to freedom of peaceful assembly and of association, protection of human rights defenders as well as country-specific human rights situations. It is expected that this report will shed some light in to how Asian States have voted to promote and protect these fundamental human rights through the Council. Asian peoples and civil society are often removed from international debates on human rights. Secrecy around foreign policy decisions in almost all Asian States mean citizens are usually not aware of the positions taken by their own governments at international platforms – allowing governments to often behave in manners that contradict their international positions. This paper aims to alleviate such underlying information deficit.

First part of the paper looks at the resolutions of the Human Rights Council on each of these thematic areas highlighting key features of the each of the resolutions. Focus on key features of these resolutions is aimed to provide an understanding of what each of these State are actually committing to by sponsoring or voting for these resolutions. Resolutions under each thematic area are grouped based on the specific human rights issue they address. The second part aims to analyze Asian States' voting on and sponsorship of country-specific resolutions. These resolutions are grouped based on the nature of each of these resolutions without going in to details of the contents of each of these resolutions. Their nature is determined based on the agenda item under which each of these resolutions are adopted.

METHODOLOGY

This paper is based on publicly available official records of Asian states' voting behavior in relation to the Council resolutions on the right to freedom of opinion and expression, freedom of peaceful assembly and association, human rights defenders and country-specific situations at the 33 regular sessions of the Human Rights Council between June 2006 and September 2016. The paper looks at 27 thematic resolutions and 206 country-specific resolutions adopted under items 2, 4, 7 and 8 of the Council's agenda are studied in a more general sense focusing on their voting on and sponsorship of country specific resolutions adopted with different agenda items of the Council. Data on sponsorship and voting are primarily extracted from the reports of the each regular session of the Human Rights Council. At the same time the databases¹¹ of the Council resolutions curated by other international non-governmental organisations are used for reference and verification of data. Deeper political debates around the resolutions as well as the wider discussions about the intersectionalities and overlaps between specific areas of human rights are beyond the scope of this paper.

¹¹ This paper benefited greatly from RightDocs (<https://www.right-docs.org/>) database of Human Rights Council resolutions created and maintained by HURIDOCS. We also referred to voting and sponsorship data available on UN Human Rights Resolutions Portal (<http://www.universal-rights.org/human-rights/human-rights-resolutions-portal/>) created and maintained by Universal Rights Group, primarily for verification purposes.

PART I: THEMATIC RESOLUTIONS

1. FREEDOM OF OPINION AND EXPRESSION

FREEDOM OF OPINION AND EXPRESSION IN THE INTERNATIONAL CONTEXT

Freedom of opinion and expression is one of the most contested areas of fundamental human rights. The Universal Declaration of Human Rights declares that “[e]veryone has the right to freedom of opinion and expression” including “freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” This has further been codified in international human rights law, in particular, in the International Covenant on Civil and Political Rights (ICCPR). Article 19 of the ICCPR stipulates that “everyone shall have the right to hold opinions without interference” and that “everyone shall have the right to freedom of expression” including the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

Right to freedom of opinion and expression is not absolute, unlike freedom from torture or from slavery and servitude. Article 19 of the ICCPR specifies that the exercise of the right to freedom of opinion and expression entails “special duties and responsibilities” and outlines circumstances under which restrictions on freedom of opinion and expression may be permissible. Restrictions may be imposed only if they are “necessary: (a) For respect of the rights or reputations of others; (b) For the protection of of national security or public order (ordre public), or of public health or morals.” In any of these circumstance restrictions are permissible only if they were “provided by law.” In conjunction with the right to freedom of opinion and expression, ICCPR also lays down forms of prohibited expression and opinions. Article 20 requires mandatory prohibition, by law, of “any propaganda of war” and “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

There appears to be wide global acceptance of these basic principles that form the basis of global discourse on freedom of opinion and expression. If the ratification of ICCPR were an indication of acceptance of these principles, over 80 per cent of all UN member States have ratified the ICCPR. States across political, social, economic and ideological spectrums, at least in principle, have acceded to the validity of these stipulations. Yet

the debate on freedom of expression rages on. International debate has in fact intensified over the past few years. Main point of contention appears to be legitimate limits and restrictions on freedom of opinion and expression enumerated in Articles 19(3) and 20 of the ICCPR. Each State seems to have adopted their own, at times arbitrary, definition of these limitations. A broad swathe of restrictions are being imposed as necessary steps to ensure national security, public order or safety of others in several States. Legitimate forms expression are being outlawed across the world as hate speech or incitement to violence and discrimination. There does not seem to be a broad consensus on what constitutes a legitimate restriction on free speech.

The Council remains the primary battleground of global political debate on international standards and legitimate limitations on the exercise of the right to freedom of opinion and expression. Increasingly, States are using the Human Rights Council as a platform to defend perverse restrictions on free speech which are as variegated as the States that impose and defend them. The Human Rights Council's regular debates on freedom of expression, regardless of the focus, have largely become a perpetual war of words between States to justify their own respective brands of restrictions on speech.

Debates of the Council around the right to freedom of opinion and expression generally revolve around periodic resolutions on topics pertinent to freedom of expression and regular reports of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. The Human Rights Council, since its inception in 2006, has adopted several resolutions on or related to the right to freedom of opinion and expression. This paper looks at ten resolutions adopted by the Human Rights Council between its first session in 2006 and thirty-third session in 2016 covering the mandate of the special rapporteur, protection of journalists, and promotion and protection of human rights on the Internet.

Human Rights Council discussions on freedom of expression have not been limited to these themes. Freedom of expression discussions have found their way into, among others, the Council debates on protecting human rights while combating terrorism, protection of the right to privacy in the digital age, or protection and promotion of the rights of the child. The sprawling array of discussions about human rights that are intertwined with debates about freedom of expression is an indication of interrelatedness of human rights. However, a study of all these discussions is beyond the scope of this paper.

1.1 Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression

The mandate of the special rapporteur on the promotion and protection of the rights to freedom of opinion and expression was created by the former Commission on Human Rights in 1993. Creation of a mandate that specifically addresses the right to freedom of opinion and expression foregrounds the centrality of the right as a fundamental human right in itself as well as a constitutive element of all other human rights. The resolution 1993/45¹² of the Commission on Human Rights that created the mandate of the Special Rapporteur emphasises the “fundamental importance” of freedom of opinion and expression “to the safeguarding of human dignity”, and that “the right to freedom of opinion and expression is interrelated with and enhances the exercise of all other human rights.”

Importantly, the creation of the mandate is also an indication of the growing recognition of attacks against those who exercise and undue restrictions on the right to freedom of opinion and expression. Resolution 1993/45 expresses concern at the “extensive occurrence of detention of, as well as discrimination, threats and acts of violence and harassment, including persecution and intimidation, directed at persons who exercise the right to freedom of opinion and expression,” as well as “the intrinsically linked rights to freedom of thought, conscience and religion, of peaceful assembly and freedom of association, and the right to take part in the conduct of public affairs.” The resolution also expresses concern at similar threats and restrictions against “persons who seek to promote and defend these rights and freedoms.”

Mandate of the Special Rapporteur builds on years of work at the Commission on Human Rights as well as its sub-committees, most notably the studies¹³ on freedom of expression between 1990 and 1992 under the auspices of the Sub-Committee on Prevention of Discrimination and Protection of Minorities. The original mandate of the Special Rapporteur was outlined in the resolution 1993/45. This remained largely unchanged until the mandate was fully integrated in to the work of the newly created Council in 2008. The Council’s focus on institution building following the transition from the Commission on Human Rights largely meant that the Council did not consider dedicated resolutions, among others, on freedom of opinion and expression in 2006 and 2007.

The Human Rights Council resolution 7/36¹⁴ on the mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression adopted on 28 March 2008 is the first resolution on freedom of

¹² UN Doc No. E/CN.4/RES/1993/45, adopted on 5 March 1993

¹⁴ UN Doc No A/HRC/RES/7/36 (Adopted on 28 March 2008)

opinion and expression adopted by the Human Rights Council. The resolution led by Canada with 64 additional co-sponsors including India, Japan, Republic of Korea from Asia is essentially reflective of the resolution 1993/45 of the Commission in its recognition of the centrality of freedom of opinion and expression as a right in its own right and as an essential foundation of a democratic society. The resolution goes further recognising “that the effective exercise of the right to freedom of opinion and expression is an important indicator of the level of protection of other human rights and freedoms.” And, in the context of violations of the right, the resolution attempts to address some of the root causes of these violations such as the “invocation of national security, including counter-terrorism.”

As the title suggests, the primary purpose of the resolution 7/36 is to continue and extend the mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression within the frameworks of the Human Rights Council. Key functions of the mandate of the Special Rapporteur remained largely unchanged from the original mandate assigned to the Special Rapporteur by the Commission on Human Rights resolution 1993/45 in 1993. Functions¹⁵ of the Special Rapporteur outlined in the Human Rights Council resolution include: gathering information “relating to violations of the right to freedom of opinion and expression, discrimination against, threats or use of violence, harassment, persecution or intimidation directed at persons seeking to exercise or promote the exercise of the right to freedom of opinion and expression”; seeking, receiving and responding to “credible and reliable information...of these cases”; making recommendations and providing suggestions on ways and means to promote and protect the right to freedom of opinion and expression; and contributing “to the provision of technical assistance or advisory services by the [OHCHR] to better promote and protect the right to freedom of opinion and expression.”

The resolution also adds a list of supplementary functions “within the framework of [the Special Rapporteur’s] mandate.”¹⁶ These include drawing attention of the Council and the OHCHR to particularly serious cases of violations of the right to freedom of opinion and expression; integrating human rights of women and gender perspectives throughout the work of the mandate; cooperating with other UN bodies, regional intergovernmental organisations and their mechanisms, national human rights institutions, and developing and extending the Special Rapporteur’s network of non-governmental organisations to enhance the efficiency and effectiveness in promoting and protecting the right; reporting instances of abuse of the right to freedom of opinion and expression which constitute acts of racial and religious discrimination; sharing best practices in access to information; and providing views on the advantages and challenges of new information and communication technologies for the exercise of the right to freedom of opinion and expression.

¹⁵ UN Doc No A/HRC/RES/7/36, operation paragraph 3

¹⁶ UN Doc No A/HRC/RES/7/36 Operational paragraph 4

Despite the large number of co-sponsors of the resolution from across the globe, indicating broader support, the adoption process of the resolution was far from smooth. An amendment to the resolution proposed by the Organisation of the Islamic Cooperation (OIC), Arab Group and the African Group sparked off a contentious debate that led Canada and European Union to withdraw their sponsorship of the resolution.¹⁷ The OIC and the African Group proposed to insert additional functions within the mandate of the Special Rapporteur “to report on instances in which the abuse of the right to freedom of expression constitutes an act of racial or religious discrimination.”¹⁸ This amendment was potentially a geopolitical response to printing of caricatures and producing documentaries derogatory towards Islam in the lead up to the Human Rights Council session.

Those who opposed the amendment argued that reporting on acts of racial or religious discrimination as a violation of freedom of opinion and expression is beyond the mandate of the Special Rapporteur and would only duplicate the work done by Special Rapporteurs on racism and freedom of religion or belief. They argued that issues of racial or religious discrimination, to the extent they relate to freedom of opinion and expression, are already covered by the mandate, and the amendment would seriously weaken and undermine and fundamentally change the mandate’s focus forcing the Special Rapporteur to police the exercise of the right instead of promoting it.¹⁹

Despite the objections from the main sponsors of the resolution, the Council accepted the amendment with 27 votes in favour, 17 against and three abstentions. All States that belong to Western Europe and other States, and most of Eastern European States and Latin American and Caribbean States voted against the amendment. Majority of Asian States voted in favour of the amendment along with African States. From Asian group, only India voted against the amendment while Japan and Republic of Korea abstained. The rest of the Asian States in the Council – Bangladesh, China, Indonesia, Jordan, Malaysia, Pakistan, Philippines, Qatar, Saudi Arabia and Sri Lanka – voted in favour of the amendment.

Adoption of this resolution was further tested by a controversial oral amendment introduced by Cuba following the adoption of the amendment by OIC, African and Arab States. Cuba with the support of China proposed to add language that emphasises the “importance of all forms of media to report and to deliver information in a fair and impartial manner”²⁰ in the preambular paragraph 10 which recognises the plurality of forms of media and their importance for the exercise,

¹⁷ UN Doc No A/HRC/7/78 (4 July 2008), paragraph 312

¹⁸ UN Doc No A/HRC/7/L.39 (28 March 2008)

¹⁹ Explanation of the vote before the vote on A/HRC/7/L.39 by Canada at the 7th regular session of the UN Human Rights Council, 28 March 2008, available on the Human Rights Council Extranet

²⁰ With oral amendment, the preambular paragraph 10 reads as : “Recognising the importance of all forms of media, including the print media, radio, television and the Internet, in the exercise, promotion and protection of the right to opinion and expression, and ***also the importance of all forms of media to report and to deliver information in a fair and impartial manner***” [text proposed by Cuba in bold italics]

promotion and protection of the right to freedom of opinion and expression. This oral amendment is seen as an attempt to restrict the parameters of free speech by imposing subjective conditions on free and independent media.²¹

This oral amendment was adopted by the Council's majority vote. 29 States voted in favour and 15 voted against the amendment while 3 abstained. Geographical distribution of votes are similar to that of the vote on the previous amendment by OIC, African and Arab States. India, which voted against the previous amendment, voted in favour of this oral amendment by Cuba along with Bangladesh, China, Indonesia, Jordan, Malaysia, Pakistan, Qatar, Saudi Arabia and Sri Lanka. Japan and Republic of Korea voted against the amendment and the Philippines abstained.

Following the successful adoption of the two amendments that significantly changed the focus of the original draft, 58 of the 64 original co-sponsors withdrew their sponsorship of the resolution. India, Japan and Republic of Korea, the only three Asian co-sponsors of the resolution, were among the States to withdraw their sponsorship along with Canada, European Union and others.²²

The resolution, as amended, was eventually adopted by 32 votes in favour 15 abstentions. India, despite having withdrawn its sponsorship of the resolution in response to the adoption of two regressive amendments, voted in favour of the resolution along with Bangladesh, China, Indonesia, Jordan, Malaysia, Pakistan, Qatar, Saudi Arabia and Sri Lanka. Japan, Philippines and Republic of Korea abstained with the Western European and Other States and majority of Eastern European States.

Since this initial resolution (A/HRC/RES/7/36), the Human Rights Council has renewed the mandate of the Special Rapporteur twice over the past ten years, in March 2011 and March 2014. Canada relinquished its traditional role of leading the resolution which then passed to the United States of America following its renewed engagement with the Council after 2009.

Second resolution of the Human Rights Council on the mandate of the Special Rapporteur (A/HRC/RES/16/4)²³ was adopted in March 2011. After the contentious resolution in 2008, no attempt was made at improvements with the main sponsors of this resolution keeping the text²⁴ procedurally focused only on the extension of the mandate for three years. This means the contentious addition to the mandate that requires the Special Rapporteur to report on acts of racial and religious discrimination remains part of the Special Rapporteur's

²¹ Explanation of the vote after the vote on A/HRC/7/L.24 by Canada at the 7th regular session of the UN Human Rights Council, 28 March 2008, available on the Human Rights Council Extranet

²² Report of the Human Rights Council on its Seventh Session, UN Doc No A/HRC/7/78 (14 July 2008), paragraph 312

²³ UN Doc No A/HRC/RES/16/4 (Adopted on 24 March 2011)

²⁴ UN Doc No A/HRC/16/L.10 (submitted by USA and Egypt on 17 March 2011)

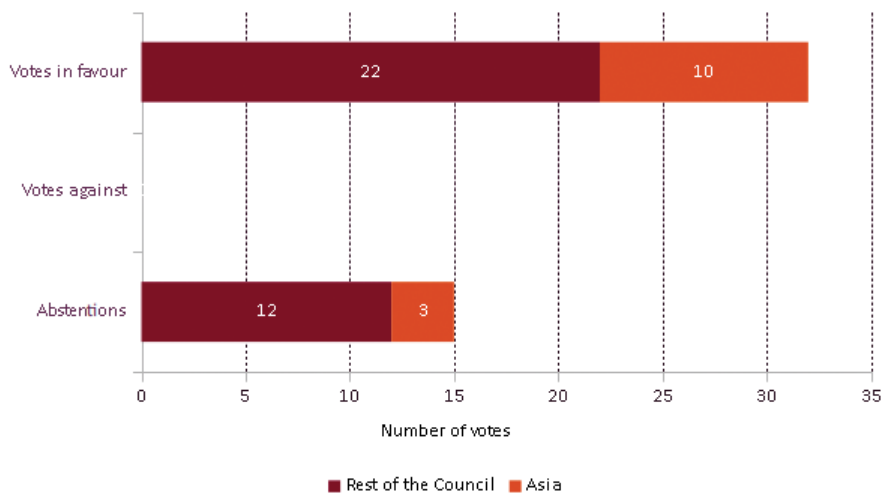


Figure 2: Voting on the Council resolution A/HRC/RES/7/36 (28 March 2008) on the mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, adopted by 32 votes to none, with 15 abstentions. Voting by Asian states in favour: Bangladesh, China, India, Indonesia, Jordan, Malaysia, Pakistan, Qatar, Saudi Arabia and Sri Lanka; and abstentions: Japan, Philippines and Republic of Korea

mandate. The resolution 16/4 was adopted by consensus and without much debate. Many States that withdrew their sponsorship protesting the adoption of the regressive amendments in 2008, including Canada and European Union co-sponsored the resolution led by the United States and Egypt. India, Indonesia, Japan, Jordan, Malaysia, Maldives, Qatar, Republic of Korea and Thailand from Asia co-sponsored the resolution along with a total of 72 other States.

Similarly the mandate was extended for three more years in March 2014 with another procedural resolution (A/HRC/RES/25/2)²⁵ led by the USA with the co-sponsorship of 73 other States, including Indonesia, Japan, Maldives, Republic of Korea and Thailand. India, which co-sponsored the two previous resolutions on the topic and played an active role in opposing one of the regressive amendments in 2008, did not join the co-sponsors in 2014.

Sponsorship and voting records suggest significantly low support for the resolutions on the mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression among Asian States. Comparably fewer Asian States have co-sponsored these resolutions. Asian States account for the smallest share, in terms of regional distribution, of co-sponsors. Only India, Indonesia, Japan, Republic of Korea, Maldives and Thailand have co-sponsored at least two out of the three resolutions on the topic. This clearly contrasts with the Asian support for regressive amendments led by OIC, African and Arab groups, and Cuba and China in 2008, when majority of Asian States voted in favour of these amendments.

²⁵ UN Doc No A/HRC/RES/25/2 (Adopted on 27 March 2014)

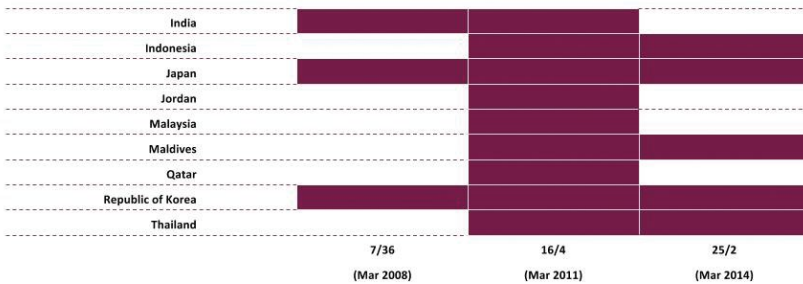


Figure 3: How Asian states sponsored each of the three resolutions of the Council on the mandate of the Special Rapporteur of the promotion and protection of the right to freedom of opinion and expression

1.2 The Safety of Journalists

Safety of journalists and media professionals, and freedom of the press or media have been one of the primary subjects of focus in debate related to freedom of opinion and expression. Even before the creation of the mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, different UN bodies including the Commission on Human Rights debated safety of journalists and media as a key aspect linked to the promotion and protection of freedom of opinion and expression. One of the main underlying premises for the creation of the mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression is the global recognition of the threats faced by journalists and media professionals as a result of their work. Building on years of debate and reports, the Commission on Human Rights, in its resolution²⁶ that created the mandate of the Special Rapporteur recognises the gravity of the risks faced by journalists and media professionals. The resolution asserts that the Commission was “deeply concerned by numerous reports of detention of, as well as discrimination, threats and acts of violence and harassment, including persecution and intimidation, against professionals in the field of information, including journalists, editors, writers and authors, publishers and printers.”²⁷

Based on this, the first Special Rapporteur declared that “the protection of the rights and freedoms of professionals in the field of information” was “a major concern” and that this will be a “matter of high priority” for the Special Rapporteur.²⁸ Since then all successive Special Rapporteurs have continued to monitor and report on the protection of journalists, media professionals and freedom of the press as part of their mandate,²⁹ as well as specific thematic studies focused on the protection of journalists and media freedom.³⁰

²⁶ Commission on Human Rights Resolution 1993/45 (Adopted on 5 march 1993)

²⁷ Commission on Human Rights Resolution 1993/45, preambular paragraph 11

²⁸ UN Doc No E/CN.4/1994/33, dated 26 January 1994

²⁹ UN Docs No E/CN.4/2005/64 (17 December 2004); E/CN.4/2006/55 (2006); A/HRC/4/27 (2 January 2007); A/HRC/7/14 (28 February 2008); A/HRC/11/14 (30 April 2009); A/HRC/14/23 (20 April 2010)

³⁰ UN Doc No A/HRC20/17 (4 June 2012)

Against this background of long engagement of the Human Rights Council, and earlier the Commission on Human Rights, on the issue of the safety of journalists, the first resolution of the Human Rights Council specifically focusing on the topic was adopted in March 2010. The Human Rights Council resolution 13/24 on the protection of journalists in situations of armed conflict³¹ led by Bangladesh, Egypt and Mexico is purely a procedural text aimed at convening a panel discussion at the Human Rights Council on the issue of protection of journalists in armed conflict. The resolution, co-sponsored by 20 additional co-sponsors, was adopted by the consensus of the Council. No Asian State besides Bangladesh joined co-sponsors of the resolution. This first resolution was a weak reaction given the Council's inaction on increasing and pervasive attacks against journalists and media professionals all across the globe. Some saw this as an attempt to limit the context within which attacks against journalists occur to situations of armed conflicts while others saw this as a first step towards more systematic engagement of the Council on the issue of safety of journalists.

Since this first attempt to discuss the issue of protection of journalists, the Human Rights Council has adopted three substantial resolutions focusing specifically on the safety of journalists. First of the three resolutions led by a cross-regional core group consisting of Austria, Brazil, Morocco, Switzerland and Tunisia with the support of additional 61 co-sponsors was adopted at the 21st regular session of the Human Rights Council in September 2012.³² Among the 61 co-sponsors of the resolution adopted by consensus of the Council were only three Asian States: Maldives, Qatar and the Republic of Korea.

As the first substantive resolution on the safety of journalists, the resolution firmly situates safety of journalists as a constitutive element of promotion and protection of the right freedom of opinion and expression as stipulated in Article 19 of the ICCPR, and attacks against and killings of journalists as a clear violation the right. Besides this, the primary objective of this first substantive resolution on the safety of journalists appear to be acknowledging the gravity and ubiquity of violence against journalists – be it physical attacks, torture, extrajudicial killings, enforced disappearances, arbitrary detention or just intimidation and harassment. The resolution decries the impunity and lack of accountability for such violence. Most importantly, the resolution foregrounds the responsibility of States to guarantee the safety of journalists. It calls on States “to promote a safe and enabling environment for journalists to perform their work independently and without undue interference” and suggests means to ensure a safe and enabling environment for journalists.³³ As a tangible outcome, the resolution asks the OHCHR to compile good practices in the protection of journalists and the prevention of attacks and impunity for attacks against journalists.

³¹ UN Doc No A/HRC/RES/13/24 (adopted on 26 March 2010)

³² UN Doc No A/HRC/RES/21/12 (adopted on 27 September 2012)

³³ UN Doc No A/HRC/RES/21/12 (27 September 2012), operative paragraph 8

The compilation³⁴ was presented to the Council at its 24th regular session in September 2013, as stipulated in the resolution.

The second installment of the resolution on safety of journalists, A/HRC/RES/27/5 (25 September 2014),³⁵ garnered greater support from Asia. The resolution led by cross-regional group consisting of Austria, Brazil, France, Greece, Morocco, Qatar and Tunisia was co-sponsored by 84 additional States including 7 Asian States: Japan, Kazakhstan, Lebanon, Maldives, the Republic of Korea, Timor-Leste and Yemen. The resolution was adopted by the Council's consensus with essentially no debate on the floor.

Building on the previous resolution, the resolution 27/5 on the safety of journalists recognises that the work of journalists puts them at specific risk of violence, and that this violence is often more acutely experienced by women journalists. The main focus of the resolution, however, appears to be the compilation of good practices³⁶ by the OHCHR at the Council's request. The resolution calls on States to develop and implement strategies for combating impunity and violence against journalists, including by using, among others, the good practices identified in the OHCHR compilation. It highlights six key strategies identified in the OHCHR compilation: creating special investigative units or independent institutions; appointing a special prosecutor; adopting specific protocols and methods of investigation and prosecution; training prosecutors and judiciary on the safety of journalists; establishing information gathering mechanisms to gather verified information about threats and attacks against journalists; and establishing early warning and rapid response systems to provide protective measures for journalists under threat.³⁷

The third biennial resolution of the Human Rights Council on the safety of journalists was adopted at the 33rd session of the Council in September 2016. Resolution 33/2³⁸ led by the same core group of States³⁹ that led the preceding resolution on the topic was co-sponsored by 84 additional States, out of which 10 were Asian States: Cyprus, Japan, Kazakhstan, Lebanon, Maldives, Mongolia, Philippines, Republic of Korea, Timor-Leste, and Yemen. Like all previous resolutions on the topic, the resolution 33/2 was adopted by the consensus of the Council.

There are not significant differences in focus between resolution 33/2 and previous resolutions on the topic. Like all previous resolutions, recognising the gravity of violence against journalists and associated impunity remains the central theme of the resolution. The resolution unequivocally condemns

34 UN Doc No A/HRC/24/23 (1 July 2013)

35 UN Doc No A/HRC/RES/27/5 (adopted on 25 September 2014)

36 UN Doc No A/HRC/24/23 (1 July 2013)

37 UN Doc No A/HRC/RES/27/5 (25 September 2014), operative paragraph 5

38 UN Doc No A/HRC/RES/33/2 (Adopted on 29 September 2016)

39 Austria, Brazil, France, Greece, Morocco, Qatar and Tunisia

attacks against, journalists, prevailing impunity for attacks against journalists and calls for the immediate and unconditional release of journalists who have been arbitrarily arrested or detained, taken hostage or have become victims of enforced disappearances. This resolution for the first time recognises the growing threat of non-State actors to journalists, and arbitrary and undue hindrances to the work and safety of journalists as a result of measures to combat terrorism and preserve national security. The resolution calls on States to do their utmost to prevent violence, threats and attacks against journalists including by creating and maintaining a safe and enabling environment for journalists through means proposed in resolution 21/12 as well as by developing and implementing strategies to combating impunity for attacks and violence against journalists as outlined in resolution 27/5.

But perhaps the most striking feature of the resolution 33/2 is its conscious attempts for balance amid increasing clamour for the affirmation of the supremacy of national laws over international standards in Council decisions (this trend is discussed in detail in the forthcoming sections of the paper). In an attempt to concede to this growing demand, the resolution explicitly states that a safe and enabling environment for journalists is essentially conditional upon consistency between national laws and States' international obligations and commitments.⁴⁰ At the same time, the resolution also took States to task over "the misuse of national laws, policies and practices to hinder or limit the ability of journalists to perform their work independently and without undue interference",⁴¹ calling on States to "bring their laws, policies and practices fully into compliance with their obligations and commitments under international human rights law."⁴²

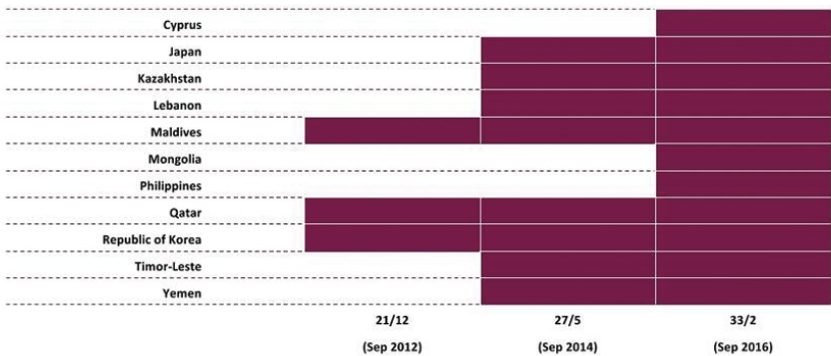


Figure 4: How Asian states sponsored each of the three resolutions of the Council on the safety of journalists

40 UN Doc No A/HRC/RES/33/2 (29 September 2016), preambular paragraph 9
 41 Ibid
 42 UN Doc No A/HRC/RES/33/2 (29 September 2016), operative paragraph 8

While there has been marginal increase in the number of Asian States that co-sponsored the resolutions on the safety of journalists between the first and third resolution on the topic, general support for these resolutions remain low among Asian States. In September 2012, only 3 out of 61 co-sponsors were Asian, in September 2014, only 7 out of 84 were Asian, and in September 2016, 10 out of 84 were from Asia region. Only Maldives and the Republic of Korea have co-sponsored all three resolutions with Qatar joining once as a co-sponsor in 2012 and twice since then as part of the core group of States that leads the resolution. Japan, Kazakhstan, Lebanon, Timor-Leste and Yemen have co-sponsored two resolutions on the topic, while the resolution in September 2016 saw Mongolia and Philippines joining co-sponsors.

1.3 Human Rights on the Internet

Advancements in information and communication technologies over the past couple of decades have had enormous implications for the exercise of the rights to freedom of opinion and expression. New information and communication tools have opened up new frontiers to seek, receive, access and impart information. These tools have also created new challenges and threats to realisation of basic human rights, in particular the right to freedom of opinion and expression. It has opened up new avenues for dissemination of information as well as dissent. Just as these technologies allow more people to exchange information with larger audiences across borders, they provide an ever increasing array of tools for governments and those who want to control or take advantage of this mass exchange of information.

Governments have attempted to counter the exponential growth in the use of the Internet and other information and communications technologies with new measures – or reconditioning of existing measures to the digital age – to control and repress views and opinions expressed online. Governments appear to be fearful of the possibilities the Internet and new communications technologies provide for dissenters and at the same time thrilled by the possibilities it provides for governments to keep track of its critics and opposition. Legislative and policy measures are regularly being invented and updated to suppress criticism and dissent while expanding government powers to constantly monitor and surveil entire populations in the name of national security or public order.

UN debate on new information and communication technologies is nothing new. Different UN platforms, including the World Summit on the Information Society (WSIS) have debated the growth and impact of new information and communication technologies for development and communication, among others. However, the debate on their implications on human rights and fundamental freedoms is relatively new. The Council adopted the its first resolution focusing specifically on human rights on the Internet in July 2012.⁴³ At the heart of this resolution as well as all the Human Rights Council debates before and after this is the recognition of the Internet's potential as a tool to promote and protect, or

suppress and restrict fundamental human rights.

Prior to the adoption of a resolution that focuses solely on the promotion and protection of human rights on the Internet, the Human Rights Council recognised the importance of the Internet for freedom of opinion and expression. The Human Rights Council resolution 7/36⁴⁴ on the mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the resolution 12/16⁴⁵ on freedom of opinion and expression recognise the importance of the Internet, among other forms of media, in the exercise, promotion and protection of the right to freedom of opinion and expression.

The first resolution of the Human Rights Council on the promotion, protection and enjoyment of human rights on the Internet (A/HRC/RES/20/8) adopted on 5 July 2012 builds on these resolutions. Cornerstone of the resolution led by Brazil, Nigeria, Sweden, Tunisia, Turkey and USA with the support of 79 other States is its affirmation of the principle that human rights, in particular the right to freedom of opinion and expression, must be protected online just as offline, and that this, in accordance with Article 19 of the ICCPR, is applicable regardless of frontiers and choice of media.⁴⁶ Crucially, the resolution also appears to have attempted to balance its focus between civil and political rights, and economic, social and cultural rights, which might explain the cross-regional support. The resolution recognises the role of the Internet in accelerating progress towards development in various forms.

This first resolution of the Council on human rights on the Internet was adopted by the consensus of the Council with relatively greater support from Asian States. The 79 co-sponsors of the resolution included 11 Asian States – Cyprus, India, Indonesia, Japan, Jordan, Maldives, Mongolia, the Philippines, Qatar, Republic of Korea, and Timor-Leste.

The second resolution on the promotion, protection and enjoyment of human rights on the Internet (A/HRC/RES/26/13)⁴⁷ was adopted in June 2014. The basic premise of this second resolution remains largely the same as its predecessor, the resolution 20/8 of July 2012. As in the first resolution on the topic, this second resolution reaffirms that the human rights people have offline must also be protected online. Building on resolution 20/8, this second resolution expands on the utility and applicability of the Internet for the promotion and protection of fundamental freedoms, in particular the right to freedom of expression, and realisation of economic, social and cultural rights – especially the enormous potential of the Internet to promote the right to education and development.

43 UN Doc No A/HRC/RES/20/8 (Adopted on 5 July 2012)

44 UN Doc No A/HRC/RES/7/36 (adopted on 28 March 2008), preambular paragraph 10

45 UN Doc No A/HRC/RES/12/16 (adopted on 2 October 2009), preambular paragraph 7

46 UN Doc No A/HRC/RES/20/8 (Adopted on 5 July 2012), operative paragraph 1

47 UN Doc No A/HRC/RES/26/13 (Adopted on 26 June 2014)

Additionally, in contrast to the initial resolution, this resolution alludes to challenges posed by the increasing use of the Internet. Calling on States to take into account their international human rights obligations in addressing security concerns on the Internet, the resolution implies not only the security vulnerabilities linked to the Internet but also the imposition of restrictions by States on the use of the Internet in the name of ensuring security. Similarly, it recognises the increasing use of the Internet to advocate hatred that constitutes incitement to discrimination or violence, stressing the importance of promoting tolerance and dialogue instead of restrictions to combat such advocacy of hatred. The resolution explicitly recognises the imperative to strictly adhere to States' international human rights obligations, in particular the rights to freedom of expression, freedom of association and privacy, in addressing security concerns "for the Internet to remain global, open and interoperable."⁴⁸ Importantly, it reiterates the indivisibility and interdependence of rights asserting that freedom and security on the Internet is necessary to achieve potential economic, social and cultural development that the Internet holds.

The resolution was led by the same core group of States – Brazil, Nigeria, Sweden, Tunisia, Turkey and the USA – that initiated the resolution in 2012 with the support of 80 additional co-sponsors that included 11 Asian States – Cyprus, Indonesia, Japan, Jordan, Kazakhstan, Lebanon, Maldives, Mongolia, Qatar, Republic of Korea and Timor Leste. Before the resolution was adopted by consensus, the Council faced a negative amendment led by China to undermine the resolution. During the debate on the resolution, China proposed an oral amendment to add a paragraph to the draft emphasising "the importance of combating racial discrimination, derogatory stereotyping, negative profiling, religious hatred, extremism or terrorist views and incitement to discrimination, hostility or violence by use of hate speech or its advocacy on the Internet."⁴⁹ The amendment that was outrightly rejected by main proponents of the resolution aims essentially to justify restrictions on the use of Internet that are overly broad and beyond the purview of international human rights standards. The amendment was eventually rejected by the Council's vote of 15 in favour, 28 against and 4 abstentions. 7 Asian States – China, Kazakhstan, Kuwait, Pakistan, Saudi Arabia, UAE and Vietnam – voted in favour of the amendment. Japan, Maldives and Republic of Korea voted against while India, Indonesia and the Philippines abstained.

The third installment of the resolutions on the promotion, protection and enjoyment of human rights on the Internet (A/HRC/RES/32/13)⁵⁰ was adopted at the 32nd session of the Human Rights Council in June 2016. Like the all previous resolutions on the topic, this resolution was also led by Brazil, Nigeria, Sweden, Tunisia, Turkey and the USA, with 75 additional co-sponsors. This resolution saw a

48 UN Doc No A/HRC/RES/26/13 (Adopted on 26 June 2014), preambular paragraph 8

49 Oral amendment proposed by China to A/HRC/26/L.24, on 26 June 2014, available on the UN Human Rights Council extranet.

50 UN Doc No A/HRC/RES/32/13 (Adopted on 1 July 2016)

lower support from Asian States. Only 7 Asian States – Cyprus, Fiji, Japan, Maldives, Mongolia, Republic of Korea and Timor-Leste – co-sponsored the resolution compared to 11 Asian States that supported the past two resolutions.

The third resolution of the Human Rights Council on human rights on the Internet advances along the same trajectory of the two previous resolutions. At the center of the resolution lie the principle that rights people have same rights and same protections online as well as offline, and the increasing importance of the Internet for the exercise of human rights, especially the right to freedom of opinion and expression. It foregrounds the interdependence of rights and the necessity of protecting these fundamental freedoms and rights, in particular the rights to freedom of expression, freedom of peaceful assembly and association and privacy, to ensure that promise of economic, social and cultural development that the Internet holds is realised.

This third resolution exhibits signs increasing acceptance and consolidation of the agenda to address the implications of the Internet on broader human rights issues. In addition to laying out fundamental principles related to human rights on the Internet, as reiterated in this resolution as well as the past two resolutions, the resolution 32/13 appears to sortie in to other issues pertinent to ensuring human rights on the Internet. The resolution delves in to specific dimensions of digital divide focusing on the gender gap in the use of and access to the Internet and new information and communication technologies. The resolution calls on States to bridge the gender digital divide and to enhance the use of information and communication technology to promote the empowerment of all women and girls. The resolution requests the OHCHR to prepare a report on ways to bridge the gender digital divide from a human rights perspective. Moreover, the resolution also touches on the importance of ensuring access for persons with disabilities to the Internet and other new communication technologies.

In a clear break from past resolutions, resolution 32/13 condemns increasing human rights violations and abuses against persons for exercising their rights and freedoms on the Internet, and the impunity for those violations and abuses. Moreover, it also condemns the growing use of measures by States to intentionally prevent or disrupt access to and dissemination of information on the Internet. Importantly, the resolution explicitly categorises such measures as a violation of international human rights law and calls on States to refrain from resorting to these measures and to adopt a human right based approach to address security concerns on the Internet.

Despite the growing acceptance of the relevance of the Internet within the realm of human rights signified by consistent cross-regional sponsorship and consensus on the resolution, the Council was forced to weather several subversive amendments to the resolution led by China and the Russian Federation. China and the Russian Federation led a total of four amendments to the resolution with

the support of Belarus, Cuba and Venezuela and Iran (Iran co-sponsored two out of four amendments while Belarus, Cuba and Venezuela co-sponsored all four amendments).

Several non-governmental organisations protested the amendments arguing that, if adopted, the amendments by China and the Russian Federation would “significantly weaken the resolution.”⁵¹ Many of these amendments sought to undermine the language on fundamental principles that underpin the resolution and enjoyed the consensus of the Council in the past two resolutions. One of the four proposed amendments were withdrawn after the main sponsors agreed to include the proposal.⁵² The other three amendments were rejected by the Council before the adoption of the resolution by consensus. These amendments included, among others, proposals to delete references to the language in UDHR and ICCPR on the applicability of freedom of expression “regardless of frontiers” and “any media of one’s choice;”⁵³ delete the emphasis on a “human rights based approach” in providing and expanding access to the Internet;⁵⁴ and subvert the focus of the resolution from protecting human rights online with unnecessary and restrictive language on hate speech that dilutes already existing language in the resolution that stresses the need for dialogue and tolerance to combat hate speech online.⁵⁵

Majority of Asian States voted in favour of all three amendments that were rejected by the Council. Only Maldives and Republic of Korea from the Asian group voted against all three amendments while Mongolia and Philippines voted against two out of three amendments. China, India, Indonesia, Qatar, Saudi Arabia, United Arab Emirates and Vietnam voted in favour of all three amendments while Bangladesh voted in favour two and abstained on one amendment.

Resolutions of the Council on human rights on the Internet have managed to garner broader support from Asian States compared to resolutions on other two areas related to freedom of opinion and expression covered in this paper. While more Asian States joined as co-sponsors of the first two resolutions, the third resolution saw Asian support decrease. This may also account for the decrease in the total number of co-sponsors of the third resolution compared to the two previous resolutions. Despite the comparatively higher co-sponsorship of these resolutions by Asian States, several Asian States colluded with attempts to weaken or undermine these resolutions through amendments. Majority of Asian States voted in favour all negative amendments to resolutions 26/13 and 32/13.

51 Article 19 (30 June 2016), UNHRC: Reject attempts to weaken the resolution on Human Rights and the Internet, available online at <https://www.article19.org/resources.php/resource/38428/en/unhrc-reject-attempts-to-weaken-resolution-on-human-rights-and-the-internet>

52 UN Doc No A/HRC/32/L.85 (28 June 2016)

53 UN Doc No A/HRC/32/L.86 (28 June 2016)

54 UN Doc No A/HRC/32/L.87 (28 June 2016)

55 UN Doc No A/HRC/32/L.88 (28 June 2016)

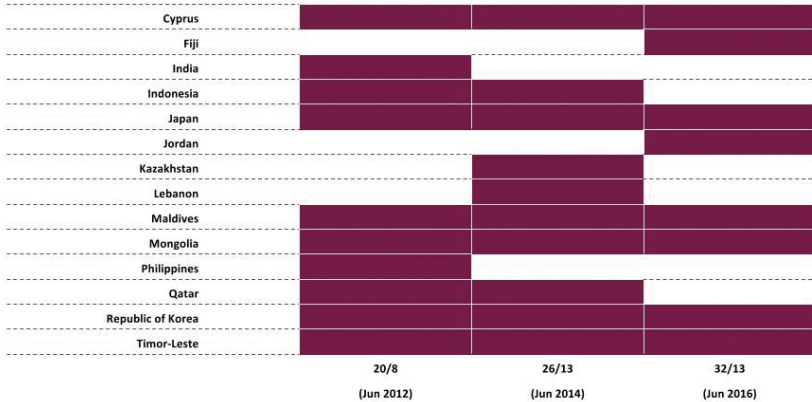


Figure 5: How Asian states the resolutions of the Council on the promotion, protection and enjoyment of human rights on the Internet

2. FREEDOM OF ASSEMBLY AND ASSOCIATION

Freedom of assembly and association is a thematic area where the Council has made significant progress within a relatively short period of time. Thematic debates on freedom of assembly and association are comparatively new additions to agenda of Charter based UN human rights mechanisms, particularly the Council. In contrast, other thematic debates investigated in this paper – freedom of opinion and expression, and protection of human rights defenders – were inherited by the Council from its predecessor, the UN Commission on Human Rights.

FREEDOM OF ASSEMBLY AND ASSOCIATION IN THE INTERNATIONAL CONTEXT

Rights to freedom peaceful assembly and association are key human rights guaranteed in international human rights law. Everyone’s right to freedom of peaceful assembly and association are enshrined in Article 20 of the Universal Declaration of Human Rights. The International Covenant on Civil and Political Rights gives legal force to these rights. Article 21 of the ICCPR recognises the right to peaceful assembly while Article 22 States that “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his [or her] interests.” ICCPR explicitly stipulates circumstances under which these rights could be restricted. Articles 21 and 22 of ICCPR prohibits any restriction that is not prescribed by law – or arbitrary restrictions. The two articles further stipulate that all such restrictions prescribed by law should be “necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

Despite these explicit provisions in international human rights instruments, international debate on freedom of assembly and association has been largely muted. Lack of debate on these themes appears to have stunted the normative and juridical development of this area of rights. Freedom of assembly and association has generally been discussed within the realm of labour rights. International Labour Organisation's (ILO) recognition – and legal protection – of these rights in its binding documents predate the international bill of rights. The Constitution of ILO⁵⁶ affirms the centrality of freedom of association to improve conditions of labour. ILO's documents, in particular the Convention No. 87 (1948) concerning Freedom of Association and Protection of the Right to Organise, have contributed to significant normative and legal developments around freedom of assembly and association in the context of labour rights. These developments, to a large extent, inform contents and application of freedom of assembly and association as a fundamental human right. International bill of rights recognises these advancements. Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), for instance, reflects this expansion especially of freedom of association of workers, recognised as the rights of labour to form or join trade unions of their choice and their right to strike. Moreover, ICCPR and ICESCR explicitly prohibit restrictions on freedom of assembly or association in a manner that could prejudice the ILO Convention 87.

Establishment of the Council has significantly invigorated the international debate on this critical area of human rights. To be sure, the first attempt at launching a debate on freedom of assembly and association was made in the erstwhile UN Commission on Human Rights in 2005, at its penultimate session, with a resolution⁵⁷ specifically focusing on the theme. The resolution indicated the desire of the Commission on Human Rights to begin a debate on the topic by scheduling a follow up resolution on the topic for its sixty-third session. However, the topic remained largely moribund until September 2010 when the Council, at its 15th regular session, adopted the resolution 15/21 on the rights to freedom of peaceful assembly and of association.⁵⁸ Most notably, resolution created the mandate of a Special Rapporteur on the rights to freedom of peaceful assembly and of association, which significantly shaped the subsequent international discourse on freedom of assembly and association and helped to clear the haze over the constitutive, foundational elements of these rights.

⁵⁶ http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO

⁵⁷ UN Doc. No. E/CN.4/RES/2005/37 (19 April 2005) http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-37.doc

⁵⁸ UN Doc. No. A/HRC/RES/15/21 (30 September 2010)

Since then the debate on freedom of assembly and association at the Council has progressed – and evolved – significantly. To date, the Council has adopted a total of eleven resolutions focusing on topics concerning freedom of assembly and association. These resolutions follow three separate areas of debate on freedom of assembly and association: the mandate of the special rapporteur, peaceful protest, and civil society. As the special rapporteur on the rights to freedom of peaceful assembly and of association underlined in his first report to the Council in June 2012, the rights to freedom of peaceful assembly and of association are two separate rights that are governed by two different types of legislation and they face different challenges.⁵⁹ The resolutions on the rights to freedom of assembly and of association primarily govern the mandate of the special rapporteur. Resolutions on peaceful protests and civil society space allow substantive discussions on these two separate, yet interrelated, interdependent and mutually reinforcing rights, right to peaceful assembly and right to association respectively.

2.1 Mandate of the Special Rapporteur on the rights to freedom of peaceful assembly and of association

The Council adopted its first thematic resolution on freedom of assembly and association in September 2010, almost five years after the Commission on Human Rights attempted to initiate debate on the topic. Building on the resolution 2005/37 of the Commission on Human Rights in September 2005, this resolution affirmed everyone's right to freedom of peaceful assembly and association and the essential role of these rights to the full enjoyment of all the other civil, political, economic, social and cultural rights, as well as to democracy. The resolution called on States to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, and to ensure that any restriction on these rights are in accordance with their obligations under international human rights law. Another key aspect of the resolution is the recognition of the role of civil society in facilitating the achievement of the aims and principles of the United Nations.

One of the main intent of the resolution 15/21 was the creation of a special rapporteur on the rights to freedom of peaceful assembly and of association empowered "to report on violations...of the rights to freedom of peaceful assembly and of association, as well as discrimination, threats or use of violence, harassment, persecution, intimidation or reprisals directed at persons exercising these rights, and to draw the attention of the Council...to situations of particularly serious concern."⁶⁰ Other key functions of the special rapporteur, outlined in the resolution, include gathering information, studying challenges, trends and developments relating to the promotion, protection and exercise of freedom of

⁵⁹ UN Doc. No. A/HRC/20/27 (21 May 2012), paragraph 4.

⁶⁰ UN Doc. No. A/HRC/RES/15/21 (30 September 2010), Operative paragraph 5(f)

assembly and association, and making recommendations on ways and means to ensure promotion and protection of these rights in their manifestations.⁶¹

The resolution that put the freedom of assembly and association on the Council agenda was spearheaded by a cross-regional group of States that consists of two Asian States – Indonesia and Maldives – along with Czech Republic, Lithuania, Mexico, Nigeria and the United States of America. Introducing the draft of the resolution at the 15th regular session of the Council in September 2010, main proponents touted freedom of assembly and association as the “foundation” or a “basic pillar” of functional democracy that is “integral to one’s fundamental human rights.”⁶² Maldives claimed that this is a fact it “understood better than most countries as only a few years back, the rights to freedom of assembly and association had been seriously curtailed”, and hence the aim of the resolution was to help protect these rights.⁶³ The United States, introducing the resolution, recognised the “gap in the Council” on this issue, and that “this was an important issue that need to be addressed more actively by the Human Rights Council.”⁶⁴

The cross-regional core group of States that proposed the resolution for adoption by consensus of the Council may seem to indicate broad support for the resolution, including within Asia. However, a look for example at statements by Bangladesh and Pakistan to explain their position on the resolution reveal underlying tensions in the Council about the resolution and the creation of the mandate of a special rapporteur. Both countries asserted their commitment to ensure the right to freedom of assembly and association of all their citizens on the account that their constitutions guarantee these rights. However, both countries questioned the need for a special rapporteur to work specifically on the theme calling for ‘rationalisation’ of the process of creating new mandates. Pakistan’s key concerns were what it called the “proliferation mandates in the Council” and “the overlap with the work of other United Nations bodies and agencies.”⁶⁵ Bangladesh alleged that the draft resolution was not balanced, nevertheless decided not to “block the spirit of consensus” considering its constitutional commitments to ensure freedom of assembly and association. Pakistan went further and disassociated itself from the resolution.

Bangladesh and Pakistan were not alone in opposing the creation of a new special procedure mandate on rights to freedom of assembly and association. They were joined by China, Cuba, Libya and Russian Federation in opposing the creation of the new mandate – cross-regional support for the resolution was matched, in equal measure, by cross-regional disapproval of the proposal. Although they did not

61 UN Doc. No. A/HRC/RES/15/21 (30 September 2010)

62 OHCHR (30 September 2010), Council establishes mandate on Freedom of Peaceful Assembly and Association, extends mandates on Arbitrary Detention, Cambodia and Health, available at <http://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10401&LangID=E>

63 Ibid

64 Ibid

65 Ibid

jeopardize the consensus by calling for a vote on the resolution, they made sure their objections were registered. Their arguments against the creation of a new special procedure mandate is similar to those by Bangladesh and Pakistan. One of their main concerns was that a new Council mandate on freedom of assembly and association could overlap or duplicate the work on the issue by other United Nations human rights mechanisms, in particular, the ILO. Similarly, Bangladesh's assertion that the resolution was not balanced were reiterated by others, in particular by Russian Federation and China. They argued that the resolution did not adequately reflect the fact that the rights to freedom of assembly and association are not absolute rights and that they could be restricted by national laws to protect the rights of others, preserve national security, public order or morals.

Notwithstanding the key role of two Asian States – Indonesia and Maldives – in the core group of States that fronted the resolution, support for the resolution among Asian States is relatively low compared to other regions. Out of 57 States that co-sponsored the resolution, only 4 States are from Asia – India, Japan, Republic of Korea and Mongolia. Even with two Asian countries in the core-group, total number of Asian States that overtly supported the resolution is six. This puts Asian group behind the other four regional groups in the Council.

Since this first resolution in September 2010, the Council has adopted 3 more resolutions on the same topic – in September 2012, September 2013 and June 2016. The second Council resolution on the rights to freedom of peaceful assembly and of association (A/HRC/RES/21/16, adopted at the 21st regular session),⁶⁶ although it was just a procedural text, pushed the envelope further affirming that same protections accorded to freedom of assembly and association offline should also be protected online as well. The resolution “[r]eminds States of their obligation to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, online as well as offline.”⁶⁷

This resolution was sponsored by a total of 65 States. Only 5 Asian States – Cyprus, Indonesia, Japan, Maldives and the Republic of Korea – sponsored or co-sponsored the resolution. Asia represented the the lowest number of sponsorships in comparison with all the other regional groups. Asian sponsorship accounted for only 8 per cent of all while African and Latin American States accounted for 9 per cent and 15 per cent respectively. Most significantly, India, which joined the co-sponsors of the first resolution on the topic in September 2010, withdrew its support in 2012. This was the first indication of India's later open negativity towards all subsequent resolutions related to freedom of assembly and association at the Council.

The third installment of the resolutions on the rights to freedom of peaceful assembly and of association (A/HRC/RES/24/5) was adopted at the 24th regular

66 UN Doc. No. A/HRC/RES/21/16 (adopted on 27 September 2012).

67 UN Doc. No. A/HRC/RES/21/16 (27 September 2012), Operative paragraph 1, emphasis added.

session of the Council in September 2013.⁶⁸ The primary purpose of the resolution 24/5 presented by the 7 States in the original core-group (that spearheaded the creation of the mandate of the special rapporteur in September 2010) – Czech Republic, Indonesia, Lithuania, Maldives, Mexico, Nigeria and the United States of America – was to extend the mandate of the special rapporteur for further three years. 63 additional States co-sponsored the resolution and only 3 of these States are from Asian region – Cyprus, Japan and the Republic of Korea.

In addition to the extension of the mandate of the special rapporteur, the resolution builds on the special rapporteur's annual report (A/HRC/23/39) to the Council during its 23rd regular session in May 2013. The resolution attempted to capture the special rapporteur's recommendation, in particular, on the ability of associations to access financial resources. The initial draft of the resolution included language commensurate to the special rapporteur's conclusion that the ability of associations to access financial resources was vital to the full realisation of freedom of association and that undue barriers to funding are increasingly imposed on civil society organisations.⁶⁹ The draft acknowledged that "ability to seek, secure and use resources is essential to the existence of and sustainable operations of associations."⁷⁰ This language also reflects the plight of civil society organisation in several countries around the world facing restrictions – including criminalisation – in their attempts to access to resources. However, this language fell victim to political negotiations to ensure consensus on the resolution resulting significantly weaker language in the final text of the resolution. Several States including China, India and Pakistan from Asia, led by Russian Federation tabled two amendments to the resolution. One proposal was to remove the paragraph on the necessity of ability to "seek, secure and use resources" for the existence and sustainable operations of civil society.⁷¹ The final compromise language merely acknowledged that "resources are necessary for the existence and sustainable operations of associations."⁷² Other compromises in response to amendments included lessening the value of reports of the special rapporteur, and diluting the language on the obligations of States to respect and protect rights of all individuals, particularly the most marginalised groups and persons belonging to minorities.⁷³ Similarly, the core group agreed to remove the operative paragraph that invited the special rapporteur to focus his next report on challenges faced by women and persons belonging to vulnerable groups in their exercise of right to assembly and association.⁷⁴ These compromises ensured that proposed amendments were withdrawn and the resolution was adopted by consensus.

The latest resolution on the topic, adopted by the Council on 1 July 2016 at its

68 UN Doc. No. A/HRC/RES/24/5 (adopted on 26 September 2013).

69 UN Doc. No. A/HRC/23/39 (24 April 2013), paragraph 7970 Ibid

70 UN Doc. No. A/HRC/24/L.7 (20 September 2013), preambular paragraph 7.

71 UN Doc. No. A/HRC/24/L.55 (24 September 2013).

72 UN Doc. No. A/HRC/RES/24/5 (26 September 2013), preambular paragraph 7.

73 UN Doc. No. A/HRC/24/L.55 (24 September 2013).

74 UN Doc. No. A/HRC/24/L.56 (24 September 2013).

32nd regular session, once again renewed the mandate of the special rapporteur for another three years.⁷⁵ While Indonesia and Maldives remained in the core-group, 6 more Asian States joined as co-sponsors – Afghanistan, Cyprus, Japan, Mongolia, Philippines, and Republic of Korea. Although the number of Asian States that sponsored the resolution increased slightly, overt support for the resolution among Asian States still remains relatively low.

A number of amendments led by the Russian Federation with the backing of Belarus, China, Cuba, Iran and South Africa forced the core-group to make a number of concessions on the original draft to maintain the fragile consensus on the resolution. Three out of the four amendments proposed by the Russian Federation ahead of the debate on the resolution responded to the introduction of a vague concept of “professional associations” introduced in the original draft. All the proposed amendments were withdrawn after the core group agreed to remove all language that referred to the professional associations from the original draft to accommodate the amendments.

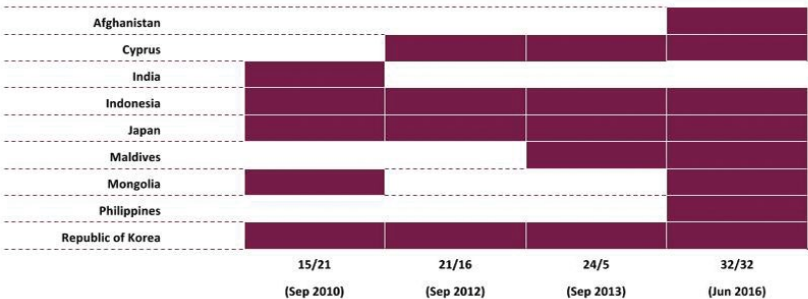


Figure 6: How Asian states sponsored each of the four resolutions of the Council on the rights to freedom of peaceful assembly and of association

Despite the role of Indonesia and Maldives as part of the cross-regional core-group of States that lead these resolutions, as well as the consensus adoption of the all four resolutions, Asian States have been reluctant to overtly support these resolutions. In addition to these countries, only Japan and Republic of Korea have co-sponsored all four resolutions. The latest resolution saw, however, saw Asian support in terms of co-sponsorships increase with Afghanistan, Philippines and Mongolia joining as co-sponsors.

⁷⁵ UN Doc. No. A/HRC/RES/32/32 (adopted on 1 July 2016).

2.2 Promotion and protection of human rights in the context of peaceful protest

Periodic Council resolutions on protection of human rights in the context of peaceful protests are another significant development that contributed to the development of international discourse on freedom of assembly and association. These resolutions recognise the need for focused, substantive attention on the right to peaceful assembly. A decision of the 17th regular session of the Council in June 2011 paved way for the first substantial debate on the right to peaceful assembly (decision 17/120). The decision sponsored by 46 States including Japan, Jordan, Maldives, Republic of Korea and Timor-Leste called for a panel discussion on the promotion and protection of human rights in the context of peaceful protests to be held at 18th session of the Council.⁷⁶ The decision appear to have been a direct response to the widespread protests that started sweeping across the Middle East in early 2011.

At the 19th regular session in March 2012, the Council followed up its June 2011 decision and the subsequent panel discussion in September 2011 with a resolution on the promotion and protection of human rights in the context of peaceful protest.⁷⁷ Costa Rica, Switzerland and Turkey led this resolution as well as the three successive resolutions on the promotion and protection of human rights in the context of peaceful protest in March 2013,⁷⁸ March 2014⁷⁹ and March 2016.⁸⁰

Setting and elaborating on basic normative and protective principles necessary for the creation of an enabling environment for peaceful protests appears to be the central objective of these resolutions. These resolutions recognise public protest not as a threat but as a legitimate means of expressing grievances and aspirations, and that participation in peaceful protest, without fear of being injured, beaten, arbitrarily arrested and detained, tortured, killed or subjected to enforced disappearance, can contribute to full enjoyment of civil, political, economic, social and cultural rights. They stress State obligation to prevent violations of any of these rights, and ensure full accountability for human rights violations and abuses in the context of protests. They emphasise the centrality of the rights to freedom of assembly, association and expression to exercise the right to peaceful assembly, and explicitly acknowledge “that peaceful protests can be a form of exercising the rights to freedom of peaceful assembly and of association, freedom of expression and of participation in the conduct of public affairs.”⁸¹ This implies that restrictions on protests could constitute a violation of all or any of these fundamental rights. However, these resolutions recognise that these rights are not absolute rights, and that they may be subject to restrictions, in accordance with States’ international

76 UN Doc. No. A/HRC/17/2 (24 May 2012), page 87.

77 UN Doc. No. A/HRC/RES/19/35 (adopted on 23 March 2012)

78 UN Doc. No. A/HRC/RES/22/10 (adopted on 21 March 2013)

79 UN Doc. No. A/HRC/RES/25/38 (adopted on 28 March 2014)

80 UN Doc. No. A/HRC/RES/31/37 (adopted on 24 March 2016)

81 UN Doc. No. A/HRC/RES/19/35 (23 March 2012), preambular paragraph 6.

obligations. Similarly, avoidance of use of force during protest, and the need to ensure that no one is subject to excessive or indiscriminate use of force was recognised as central to creating an enabling environment for peaceful protest. In this regard, these resolutions highlight the importance of training of law enforcement officials on the use of protective equipment and less lethal weapons to create an enabling environment for peaceful protests.

The Human Rights Council's first resolution on the promotion and protection of human rights in the context of peaceful protests (A/HRC/RES/19/35), adopted in March 2012, merely outlines and affirms basic principles related to peaceful protests. It encapsulates the fundamental human rights principles necessary to enable peaceful protests and manage protests. As a tangible outcome, the resolution asks the UN High Commissioner for Human Rights to prepare and submit a thematic report to the Council on measures and best practices to ensure effective promotion and protection of human rights in the context of peaceful protest. Asian States appear reluctant to overtly support the resolution. Although none of the Asian States objected to the Council's consensus on the resolution, only Japan, Maldives and Republic of Korea from Asia are among the 49 co-sponsors of the resolution led by Costa Rica, Switzerland and Turkey.

A year later, in March 2013, the Council adopted its second resolution on peaceful protest (A/HRC/RES/22/10) building on the first resolution and further elaborating the basic principles on creating an enabling environment for peaceful protest. This second resolution more substantively addresses challenges faced by peaceful protesters. The resolution places significant emphasis on the need to ensure that domestic legislation and procedures related to the rights to freedom of peaceful assembly, of expression and of association are consistent with international human rights law, as a prerequisite to promoting a safe and enabling environment for peaceful protest. It also calls on States to ensure that national legislation and procedures on use of force by law enforcement officials are consistent with international principles of law enforcement, and that law enforcement officials and military personnel are adequately trained and equipped to manage peaceful protests in accordance with international human rights and humanitarian law. Expressing concern at human rights violations and abuses, especially attacks targeting journalists in the context of protests, the resolution calls on States to ensure investigations into and accountability for such violations, and to pay particular attention to the protection of women and women human rights defenders from gender-based violence and sexual assault in the context of protests. Like the first resolution of the Council on peaceful protest, this second resolution was adopted by the consensus of the Council. And as in the first resolution, Asian support for the resolution stayed low despite a marginal increase in the total number of co-sponsors to 56. Only Cyprus, Maldives and Republic of Korea joined the co-sponsors from the Asian group.

Unlike the first two resolutions of the Council, the two subsequent resolutions on

peaceful protest in 2014 and 2016, despite being comparable to their two antecedent resolutions, faced significant backlash from several States, consequently losing consensus of the Council. The resolution A/HRC/RES/25/38⁸² is arguably the most comprehensive resolution to date on the promotion and protection of human rights in the context of peaceful protests. Building on the two previous resolutions, the third resolution on peaceful protest expands on prerequisite principles for the creation of a safe and enabling environment for peaceful protests. It reaffirms the responsibility of States, including in the context of protest, to prevent human rights violations, and protect fundamental human rights. The resolution urges States to facilitate peaceful protests by providing protesters with access to public spaces, and protecting them, without discrimination, from all forms of threats and harassment, with particular attention on the safety and protection of women and women human rights defenders, children and journalists and media workers, as well as on accountability for any violations and abuses in the context of protests.

The most prominent aspect of the resolution, however, appears to be its emphasis on proper management of protests with significant focus on the further elaboration of principles and procedures related to use of force against peaceful protesters. It highlights the absolute prohibition of use of excessive force and indiscriminate lethal force, and the necessity of aligning national laws and procedures on the use of force and law enforcement with international human rights and humanitarian law. States are required to provide independently and scientifically tested non-lethal weapons and protective equipment to law enforcement officials, and adequate training, where necessary with international cooperation on the proper use of such weapons and management of protests in conformity with international human rights law.

As in the two previous resolutions, this resolution was also led by Costa Rica, Switzerland and Turkey with 55 additional co-sponsors that included four Asian countries – Cyprus, Japan, Maldives and Republic of Korea. But unlike the two previous resolutions, this third resolution was confronted with attempts to water down the resolution led by South Africa on behalf of the 'like-minded group' of States. These amendments would have effectively lowered the minimum normative and protective elements contained in the draft resolution as well as in the previous resolutions that enjoyed the Council's consensus.⁸³ These include adding reference to unrelated UN documents such as the UN General Assembly Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States,⁸⁴ which would, as several non-governmental organisations contended, overly portrays protests as not being driven by local constituencies.⁸⁵

82 UN Doc No A/HRC/RES/25/38 (Adopted on 28 March 2014)

83 Open letter to the member states of the UN Human Rights Council, 'Civil society urges States to oppose proposed amendments that would weaken the Human Rights Council resolution on the promotion and protection of human rights in the context of peaceful protests (HRC/25/L.20)', 26 March 2014, available online at http://www.forum-asia.org/uploads/openletter/2014/March/HRC25/140326_letter_council_25_protest_oppose_amendments.pdf

84 UN Doc No A/HRC/25/L.48 (25 March 2014)

Other proposals include adding language on potential impact of protests national security and stability of the State,⁸⁶ and duties and responsibility of protesters and organisers⁸⁷ in a manner that may be inconsistent with international law, and open to subjective or arbitrary interpretation and application undermining the protection of the rights of protesters. Another amendment attempts to subvert the language on State obligation to align its domestic legislation and policies with international human rights standards, including on management of peaceful protests.⁸⁸

Asian States' support for these amendments demonstrated through their sponsorship of and votes in favour of these amendments stands in stark contrast to their support for their co-sponsorship of the draft and all previous resolutions. Seven Asian States – Bangladesh, Bahrain, China, India, Saudi Arabia, United Arab Emirates and Sri Lanka – were among the 'like-minded group' of States that proposed the amendments. This is significant in comparison with the number of Asian States that have co-sponsored this resolution or the past two resolutions. Four Asian States co-sponsored this third resolution and three Asian States joined co-sponsors in each of the two previous resolutions.

Votes on the amendments show similar opposition to the resolution from Asian States. Majority of Asian States consistently voted in favour of all the amendments that were voted on at the Council and Asian States make up for nearly half the votes in favour of each of the four amendments. China, India, Kazakhstan, Kuwait, Pakistan, Saudi Arabia, United Arab Emirates and Vietnam voted in favour of all four amendments, and Indonesia voted in favour of three and abstained on one amendment. Japan, Maldives and Republic of Korea were the only Asian States to vote against all the amendments while Philippines showed reluctance to outrightly reject the amendments instead choosing to abstain on three and voting in favour of one amendment.

Following the rejection of all the amendments, the whole resolution was adopted by 31 votes to 9, with 7 abstentions. This marks a significant step backwards on these resolutions as the resolution lost the consensus the two previous resolutions on the topic enjoyed. Less than half of the Asian States in the Council voted in favour of the resolution while the rest either voted against or abstained. Indonesia and Kazakhstan that voted in favour of all or most of the amendments chose to vote in favour of the whole resolution despite the rejection of the amendments they supported. Other States that voted in favour of the resolution are Japan, Maldives, Philippines and Republic of Korea. Out of the Asian States that supported all the amendments, China, India, Pakistan and Vietnam voted against the resolution whereas Kuwait, Saudi Arabia and United Arab Emirates decided to abstain.

85 Open letter to the member states of the UN Human Rights Council, 26 March 2014, http://www.forum-asia.org/uploads/openletter/2014/March/HRC25/140326_letter_council_25_protest_oppose_amendments.pdf

86 UN Doc No A/HRC/25/L.50 (25 March 2014)

87 UN Doc No A/HRC/25/L.52 (25 March 2014)

88 UN Doc No A/HRC/25/L.49 (25 March 2014)

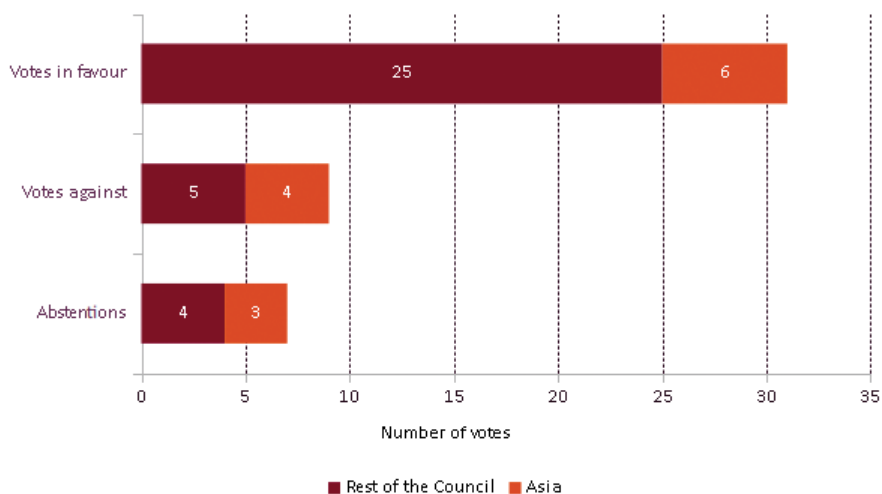


Figure 7: Voting on the resolution A/HRC/RES/25/38 (28 March 2014) on the promotion and protection of human rights in the context of peaceful protest, adopted by 31 votes to 9, with 7 abstentions. Asian votes in favour: Indonesia, Japan, Kazakhstan, Maldives, Philippines, and Republic of Korea; against: China, India, Pakistan and Vietnam; and abstentions: Kuwait, Saudi Arabia and United Arab Emirates

Similar, general backlash and considerable Asian opposition was on display during the adoption of the fourth installment of the Council resolution on the promotion and protection of human rights in the context of peaceful protests (A/HRC/RES/31/37) at the 31st regular session of the Human Rights Council in March 2016.⁸⁹ While the resolution saw marginal growth in support, in terms of co-sponsorship, with 64 co-sponsors, overt support from Asian States remained largely same with only four Asian co-sponsors. Only Cyprus, Indonesia, Japan and Republic of Korea from Asia co-sponsored the resolution led by Costa Rica, Switzerland and Turkey.

The fourth installment of the resolution was significantly scaled-down in comparison to the previous resolution in March 2014, retaining only the minimum normative and protective elements of the first two resolutions on the topic. The principal purpose of the resolution is follow up and implementation of the joint compilation report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on practical recommendations for the proper management of assemblies, based on best practices and lessons learned,⁹⁰ prepared in accordance with the previous resolution on the topic.⁹¹ The resolution encourages States to give due consideration to the compilation, and its recommendations to operationalise the tools it contained on fulfilling the obligations of States to promote and protect human rights in the context of assemblies. It also asks the two Special Rapporteurs to address management of assemblies and promotion

89 UN Doc No A/HRC/RES/31/37 (Adopted on 24 March 2016)

90 UN Doc No A/HRC/31/66 (4 February 2016)

91 UN Doc No A/HRC/RES/25/38 (28 March 2014), operative paragraph 20

and protection of human rights in the context of assemblies within the framework of their mandates.

Much of the objections at the Council against the resolution, however, sought to dilute or delete references to practical recommendations on proper management of assemblies, and weaken the focus on follow up and implementation of these recommendations,⁹² despite it being commissioned by the Council.⁹³ Such attempts to undermine the work and mechanisms of the Council are also seen in proposals to delete reference to previous initiatives of the Council to protect and promote human rights in the context of peaceful protests,⁹⁴ and the work of specific special procedures of the Council.⁹⁵ Several amendments based on previous failed attempts were once again revived against this resolution. This includes proposals to emphasise the duties and responsibilities of protesters and protest organisers in a manner that detracts from the main focus of the resolution on State responsibility to promote and protect human rights during peaceful protests.⁹⁶ Similarly, previous attempts to distort the already accepted principle that international human rights standards should underpin domestic legislation and practices,⁹⁷ as well as, proposals repeatedly made against several other Council resolutions to delete all 'human rights defenders'⁹⁸ were deployed against this resolution. Several amendments also sought to replace terms and language in previous consensus resolutions on peaceful protests with narrower and restrictive language. These include adding narrower terms such as "right to freedom of peaceful assembly" in place of "peaceful protest"⁹⁹ which encompasses a broader set of rights including rights to peaceful assembly, expression and association, and captures the existing rights of people to individually and collectively criticise the government or others.¹⁰⁰ In addition, several draft amendments proposed to altogether remove reference to a broad range of human rights and issues recognised in all previous resolutions on the topic as relevant in the context of peaceful protest.¹⁰¹

Adoption of this resolution once again exposed Asian States' consistent opposition to the Council resolutions on the promotion and protection of human rights in the context of peaceful protests. While China and Iran were among the countries that propagated all the amendments, Bangladesh, Bahrain, Pakistan, Saudi Arabia and United Arab Emirates supported all or most of these amendments. During the voting on the six out of the eight proposals (two were withdrawn before the

92 UN Docs No A/HRC/31/L.76, L.77, L.78, and L.79 (21 March 2016)

93 UN Doc No A/HRC/RES/25/38 (28 March 2014)

94 UN Doc No A/HRC/31/L.72 (21 March 2016)

95 UN Doc No A/HRC/31/L.79 (21 March 2016)

96 UN Doc No A/HRC/31/L.75 (21 March 2016)

97 UN Doc No A/HRC/31/L.73 (21 March 2016)

98 UN Doc No A/HRC/31/L.78 (21 March 2016)

99 UN Docs No A/HRC/31/L.74 and L.79 (21 March 2016)

100 Open Letter to Members of the UN Human Rights Council, 'Re: Civil society organisations urge States to reject amendments to Human Rights Council resolution on "the promotion and protection of human rights in the context of peaceful protests" (HRC/31/L.21)', (22 March 2016), available online at https://www.forum-asia.org/?p=20429#_ftn4

101 UN Docs No A/HRC/31/L.74, L.76 and L.77 (21 March 2016)

vote), Bangladesh, China, India, Saudi Arabia and United Arab Emirates voted in favour of all six amendments. Only Maldives and Republic of Korea were the Asian States to vote against all six amendments while Philippines voted against four and for two amendments. Indonesia abstained on five and voted for one amendment. Vietnam voted for five amendments. While all the amendments were defeated by vote, these votes from Asian States in favour of the amendments account for nearly half of all the votes in favour of each of the six amendments. Mongolia, which was a new member serving in its first session of the Council as member did not take part in the votes on any of the amendments.

In the vote on the whole resolution, at the request of China following the rejection of all the amendments, the resolution received 31 votes in favour, with five votes against, and ten abstentions. Seven out of 13 Asian States voted in favour of the whole resolution. These include India, which voted for all the amendments, Indonesia, Kyrgyzstan, Maldives, Mongolia, Philippines, and Republic of Korea. China,, was the only Asian country to vote against the resolution, while Bangladesh, Qatar, Saudi Arabia, United Arab Emirates and Vietnam abstained.

Many Asian States backed proposals that sought to undermine the Council’s work to promote and protect human rights in the context of peaceful protests. While Asian States remained reluctant to support the resolution through co-sponsorship, their sponsorship and votes in favour of regressive amendments designed to undermine these resolutions contributed significantly to the erosion of the consensus on these resolutions. Asian States’ failure to co-sponsor the resolutions stand in stark contrast to their support for amendments to the two latest resolutions on the topic.

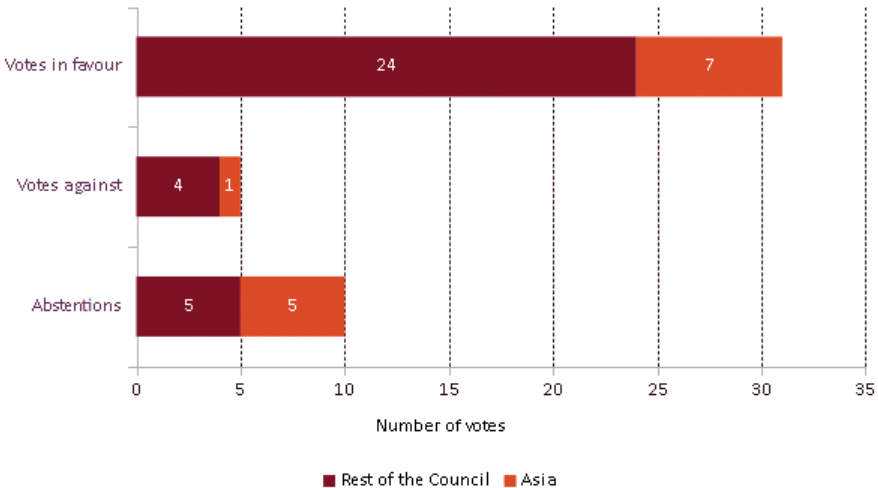


Figure 8: Voting on the resolution A/HRC/RES/31/37 (24 march 2016) on the promotion and protection of human rights in the context of peaceful protest, adopted by 31 votes to 5, with 10 abstentions. Asian votes in favour: India, Indonesia, Kyrgyzstan, Maldives, Mongolia, Philippines, and Republic of Korea; against: China; and abstentions: Bangladesh, Qatar, Saudi Arabia, United Arab Emirates, and Vietnam

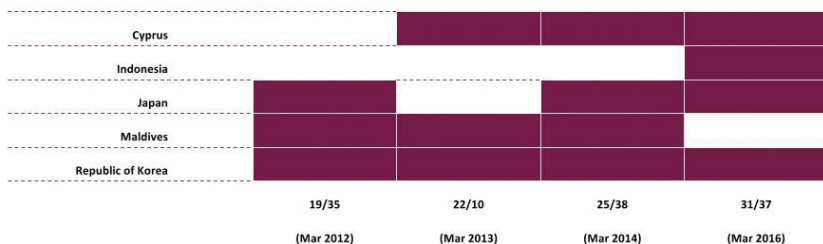


Figure 9: How Asian states sponsored the four resolutions of the Council on the promotion and protection of human rights in the context of peaceful protests

2.3 Civil Society Space

Normative gains by the Council with regards to the promotion and protection of the rights of the 'civil society' is another significant area of progress in expanding the understanding of the contents of the right to freedom of peaceful assembly and of association, and in particular the right to freedom of association, as enshrined in the UDHR and ICCPR.

CIVIL SOCIETY IN THE CONTEXT OF HUMAN RIGHTS

Civil society's relevance as a human rights concern and its link to UDHR and international Covenants on human rights might not be obvious immediately. One aspect of the connection between human rights, in particular the right to freedom of association, and civil society lies in the predominant understanding of civil society in contemporary human rights discourse. This understanding defines civil society as the 'third sector' which treads the space between the government and businesses, and consists of non-governmental organisations and civil society organisations. Non-governmental organisations are the most obvious manifestation of the right to freedom of association in global human rights discourse. This link legitimises the focus on civil society as promotion and protection, firstly, of the right to freedom of association as enshrined in the UDHR and ICCPR, which forms the basis of the Council's engagement on civil society space.

This link is taken further in the Vienna Declaration and Programme of Action (VDPA),¹⁰² the other key guiding document of the Council's engagement with civil society space, VDPA recognises pluralistic civil society – and essentially non-governmental organisations – as a vehicle for the promotion and protection of human rights.¹⁰³ VDPA emphasises the

¹⁰² The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna (25 June 1993), available online <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>

¹⁰³ VDPA, Section I, paragraph 34

need for governments and international organisations such as the UN, “in cooperation with non-governmental organisations, to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights.”¹⁰⁴ VDPA recognises pluralistic civil society a key outcome of promotion of democracy, development and human rights. VDPA “recommends that priority be given to national and international action to promote democracy, development and human rights”¹⁰⁵ with special emphasis on “measures to assist in the strengthening and building of institutions relating to human rights, strengthening of a pluralistic civil society and protection of groups which have been rendered vulnerable.”¹⁰⁶ Importantly, VDPA also recognises civil society or non-governmental organisations and individuals involved in such organisations as rights holders. It states that “[n]on-governmental organisations and their members genuinely involved in the field of human rights should enjoy the rights and freedoms recognised in the [UDHR], and the protection of national law. ... Non-governmental organisations should be free to carry out their human rights activities, without interference, within the framework of national law and the [UDHR].”¹⁰⁷

These three aspects related to civil society – civil society as a vehicle for human rights protection and promotion; pluralistic civil society as an indicator of human rights protection and democracy; and civil society as rights holders – are intrinsic to the Human Rights Council’s debate on civil society as a human rights concern. The Council’s resolutions on civil society focuses on the space or the “environment in which civil society operates” and as such are, “primarily, concerned with ensuring that existing rights are respected, as they relate to the work of civil society.”¹⁰⁸ It implies that a safe and enabling environment for civil society is a necessary condition for civil society to function as a vehicle for the promotion and protection of human rights. And that guaranteeing rights of all including those of civil society organisations and individuals working for civil society organisations is a precondition for democratic societies.

Based on these premises, three resolutions on civil society space led by Chile, Ireland, Japan, Sierra Leone and Tunisia and adopted by the Human Rights Council in September 2013,¹⁰⁹ September 2014¹¹⁰ and July 2016¹¹¹ lay out the fundamental principles necessary for the creation and maintenance of a safe and enabling environment for civil society.

104 VDPA, Section I, paragraph 13

105 VDPA, Section II, paragraph 66

106 VDPA, Section II, paragraph 67

107 VDPA, Section I, paragraph 38

108 Introductory statement by Ireland on draft resolution A/HRC/24/L.24 (23 September 2013)

109 UN Doc No A/HRC/RES/24/21 (adopted on 27 September 2013)

110 UN Doc No A/HRC/RES/27/31 (adopted on 26 September 2014)

111 UN Doc No A/HRC/RES/32/31 (adopted on 1 July 2016)

The first resolution on the topic, A/HRC/RES/24/21, titled 'Civil society space: creating and maintaining, in law and practice, a safe and enabling environment' explicates the fundamentals of civil society space, on which all successive resolutions build on. The resolution recognises the important role of civil society at all levels, and in facilitating the achievement of the purposes and principles of the UN; emphasise the need to prioritise measures to strengthening a pluralistic civil society; and highlight the importance of civil society participation in the process of governance and in promoting good governance. It underscores the need for domestic legal frameworks within which civil society operates to be consistent with international human rights law and the UN Charter, and these domestic frameworks in their application should "facilitate, protect and promote an independent, diverse and pluralistic civil society," and reject "any acts of intimidation or reprisals against civil society."¹¹² Importantly, the resolution expresses concern at the use and misuse of domestic legal and administrative provisions, such as national security and counter-terrorism legislation to hinder the work and endanger the safety of civil society in contradiction to international law.

The primary objective of the resolution is to urge States to "create and maintain, in law and in practice, a safe and enabling environment in which civil society can operate free from hindrance and insecurity."¹¹³ Although the resolution is not explicit in defining what this would entail, the preceding paragraph outlines a key determinant of a safe and enabling environment. It necessitates respect of all fundamental rights and freedoms of all in relation to civil society for it to be able to carry out its functions. The resolution states that respect for all human rights, in particular the rights to freedom of expression and opinion, assembly, and association, of all individuals including those espousing minority or dissenting views and beliefs, in relation to civil society contributes to addressing and resolving economic, social and political challenges and the realisation of all human rights.¹¹⁴ The resolution also asks States to acknowledge publicly that civil society has a legitimate role in the promotion of human rights, democracy and the rule of law, and to enable civil society to participate in debates on decisions that contribute to these goals.¹¹⁵ It further affirms the everyone, individually or in association with others, has a right to unhindered access to and communication with international bodies, in particular the UN and its mechanisms.¹¹⁶

This first resolution of the Council on civil society space was co-sponsored by 55 additional States. These included only three from Asia – Cyprus, Maldives and Republic of Korea. This is in addition to Japan, which was part of the core-group of States that initiated the resolution.

¹¹² UN Doc No A/HRC/RES/24/21, preambular paragraphs 7 and 8

¹¹³ UN Doc No A/HRC/RES/24/21, operative paragraph 2

¹¹⁴ UN Doc No A/HRC/RES/24/21, operative paragraph 1

¹¹⁵ UN Doc No A/HRC/RES/24/21, operative paragraph 3

¹¹⁶ UN Doc No A/HRC/RES/24/21, operative paragraph 5

Although the resolution was adopted by the consensus of the Council, the adoption was far from smooth. Before the adoption, the Council was confronted with a total of 5 restrictive amendments led by a group of States including several Asian States. India and Pakistan sponsored all five amendments while China and Saudi Arabia sponsored four each, United Arab Emirates sponsored two and Malaysia sponsored one. The sponsors withdrew two out of five amendments while three amendments were rejected by the Council after a vote.

These amendments were designed to undermine the resolution and justify restrictions on civil society. They sought to add references to unrelated past resolutions to obscure the scope of the resolution;¹¹⁷ delete references to the use or misuse of national legal and administrative provisions to hinder the work and endanger the safety of civil society;¹¹⁸ delete references to the recognition of the breadth and scope of civil society contribution to the society;¹¹⁹ add conditions such as the consent of the State concerned for civil society to undertake its functions;¹²⁰ and delete reference to the right of everyone, individually and in association with others, to access and communicate with regional, subregional, and international bodies including the UN.¹²¹

In all three votes on amendments, Asian States made up the majority of States that voted in favour of the amendments. India, Kuwait, Malaysia, Pakistan, Qatar and United Arab Emirates voted in favour of all three amendments. Indonesia voted in favour two amendments and abstained on one. Philippines abstained in two votes and voted in favour once and Thailand abstained on all three votes. Only Japan, Maldives and Republic of Korea voted against all three amendments. Following the rejection of all amendments, India, Pakistan and Qatar, that voted in favour all amendments, disassociated themselves from the consensus on the resolution.

The second resolution of the Council on civil society space¹²² was adopted in September 2014. Although the resolution was largely identical to the first resolution adopted by the Council in September 2013, it includes additional language that stresses the valuable contribution of civil society to the legislative processes, and the need for accountability and justice for human rights violations and abuses against civil society actors. However, the key and perhaps the most contentious element in this resolution is its emphasis on the importance of the ability of civil society to solicit, receive and use resources for their work. The resolution alludes to the increasing deployment of laws and regulations on financial practices to unduly restrict the work of civil society. The resolution calls on States to “ensure

117 UN Doc No A/HRC/24/L.50 (24 September 2013), this amendment was withdrawn

118 UN Doc No A/HRC/24/L.51 (24 September 2013), this amendment was rejected by 12 votes to 28, with 7 abstentions

119 UN Doc No A/HRC/24/L.52 (24 September 2013), this amendment was rejected by 11 votes to 28, with 7 abstentions

120 UN Doc No A/HRC/24/L.53 (24 September 2013), this amendment was withdrawn

121 UN Doc No A/HRC/24/L.53 (24 September 2013), this amendment was rejected by 14 votes to 27, with 6 abstentions

122 UN Doc No A/HRC/RES/27/31 (Adopted on 26 September 2014)

that domestic provisions on funding to civil society actors are in compliance with [States'] international human rights obligations and commitments and are not misused to hinder the work and endanger the safety of civil society actors."¹²³

This resolution was co-sponsored by 63 States in addition to the core-group. Asian support for the resolution remains low. Only Cyprus, Republic of Korea and Timor-Leste from Asian States co-sponsored the resolution. Japan remains part of the core-group. Maldives which co-sponsored the first resolution on civil society space did not join the co-sponsors for this second installment.

Despite the adoption of the resolution by consensus of the Council, this second resolution saw hostility against the Council's agenda on civil society space grow significantly compared to the first resolution on the topic. Those who opposed the resolution sought to subvert and weaken the resolution with a swathe of hostile amendments. Asian States were at the forefront of the attack against the resolution. Bahrain, China and United Arab Emirates from Asia joined Cuba, Egypt, Russian Federation, South Africa and Venezuela in leading the efforts against the resolution with ten negative amendments. India also co-sponsored three of the ten amendments. Nine out of the ten amendments were defeated by the Council's vote while one was withdrawn.

Several concerns were raised regarding the amendments to this particular resolution. Number of civil society organisations challenged the amendments arguing that "proposed amendments seek to undermine the spirit of the resolution and attempt to detract from States' obligations to protect and promote civil society space."¹²⁴ These amendments, if successful, would have removed reference to relevant Council resolutions that reinforce the rights of civil society.¹²⁵ Several of these amendments sought to undermine the binding nature of international law with repetitive attempts to affirm the supremacy of domestic law as they apply to civil society¹²⁶ and in particular to the right and ability of civil society to access and utilise resources.¹²⁷ These amendments would have undermined the work of civil society to empower persons belonging to all minorities and vulnerable groups with addition of an exclusive formulation of minorities and persons in vulnerable situations,¹²⁸ and remove references to the role of civil society in empowering dissenting voices.¹²⁹ Proposed amendments also sought to chip away at the rights of individuals and civil society to unhindered access to and communication with

123 UN Doc No A/HRC/RES/27/31, operative paragraph 10

124 Over 40 civil society organisations urge states to oppose proposed amendments that would weaken draft Human Rights Council resolution on civil society space (24 September 2014), open letter to permanent representatives of member and observer states of the United Nations Human Rights Council, available online https://www.ishr.ch/sites/default/files/article/files/revised_hrc27_letter_-_cs_space_resolution_v5_with_signatures.pdf

125 UN Doc No A/HRC/27/L.34 (23 September 2014)

126 UN Doc No A/HRC/27/L.36 (23 September 2014)

127 UN Doc No A/HRC/27/L.35 and L.40 (23 September 2014)

128 UN Doc No A/HRC/27/L.38 and L.39 (23 September 2014)

129 UN Doc No A/HRC/27/L.39 (23 September 2014)

subregional, regional and international bodies, in particular the UN mechanisms.¹³⁰ Further, two amendments were designed to undermine the role of the UN High Commissioner for Human Rights,¹³¹ and limit the scope of the compilation of good practices and practical recommendations for the creation and maintenance of a safe and enabling environment for civil society as well as the work of the High Commissioner in this regard.¹³²

Although all these amendments were defeated by the Council's vote, Asian States' strong support for all these amendments were significant. Asian States demonstrated their their vehement opposition to the Council's agenda on civil society space both through their role in tabling and voting in favour of amendments. Asian State made up a significant proportion of States that voted in favour of all the amendments whereas their opposition to the amendments were almost negligible in comparison to the total vote against each of the nine amendments. China, India, Kuwait, Pakistan, Saudi Arabia and United Arab Emirates voted in favour of all nine amendments, and Vietnam and Indonesia supported eight and five amendments respectively. Only Japan and Republic of Korea voted against all nine amendments, with Maldives voting against seven and supporting two amendments. Philippines proved to be reluctant to take a side on these amendments choosing instead to abstain on eight out of nine votes and voting against in one vote. Kazakhstan took a similar stand abstaining in all nine votes and Indonesia abstaining on four. By the third Human Rights Council resolution on civil society space (A/HRC/RES/32/31),¹³³ the resolution has become emblematic of the deep political divisions within the world's premier human rights body. Much like all previous resolutions on the topic, adoption of the resolution 32/31 on civil society space exposed the discord within the Council over the issue. Attempts to undermine the efforts to safeguard and promote civil society space worldwide reached unprecedented levels. Russian Federation and China that have been at the forefront of previous attempts to undermine past resolutions upped their ante with a total of 15 amendments that sought to effectively render the resolution worthless. Rejection of all these amendments, with no thanks to majority of Asian States, forced a vote on the resolution consequently eroding the fragile consensus on the resolution. Building on their previous initiatives, the same cross-regional core group of States consisting of Chile, Ireland, Japan, Sierra Leone, and Tunisia led the resolution. A total of 60 additional States co-sponsored the resolution. Support for the resolution among Asian States remained low – only two Asian States (Cyprus and Republic of Korea) co-sponsored the resolution. This is one less than the each of the two previous resolutions.

Fundamentals of the resolution remains the same as the two previous resolutions. Recognition of the escalation of attacks and reprisals against civil society

¹³⁰ UN Doc No A/HRC/27/L.41 (23 September 2014)

¹³¹ UN Doc No A/HRC/27/L.42 (23 September 2014)

¹³² UN Doc No A/HRC/27/L.43 (23 September 2014)

¹³³ UN Doc No A/HRC/RES/32/31 (Adopted on 1 July 2016)

organisations and human rights defenders, and the need for investigation, accountability and remedies for all such acts still remain the basic premise of the resolution. In addition to the usual condemnation of attacks against civil society, this resolution lamented in particular the increasing use of domestic legal and administrative provisions on national security and counter-terrorism legislation, as well as onerous registration, funding and reporting requirements to hinder the work and endanger the safety of civil society. This resolution, for the first time, includes the explicit assertion that restrictions on civil society organisations' access to funding could constitute a violation of the right to freedom of association. In response to the adoption of the Sustainable Development Goals, the resolution also attempted to foreground the importance of civil society in the realisation of these goals, in addition to all the areas of civil society contributions repeatedly iterated in previous resolutions.

In contrast to the two previous resolutions, this third installment however attempted to break away from the usual mold of Council resolutions which are often criticised for their lack of consideration for practical applicability or implementation. In a conscious effort to move away from this tendency, implementation of the High Commissioner's practical recommendations¹³⁴ for the creation and maintenance of a safe and enabling environment for civil society, compiled in accordance with the previous resolution (A/HRC/RES/27/31) on the topic, is placed at the center of this resolution.

Much of these, including the reaffirmation of fundamental principles as well as inclusion of new recommendations, seem perfectly valid and necessary in a document that professes to advance the right to freedom of association in an environment marred by routine crackdowns on civil society and human rights defenders. However, the amendments led by Russian Federation and China attacked this very essence of the resolution. They sought to reject the expert guidance and recommendations on civil society space, and remove substantive recommendations¹³⁵ to create and maintain a safe and enabling environment for civil society,¹³⁶ and attempts to follow up on the implementation of these recommendations.¹³⁷ These amendments alone would have fundamentally changed the focus of the resolution as it asks for the deletion of the centerpiece of the resolution.

Other proposed amendments sought to remove reference to 'human rights defenders' and previous work of the Council for their protection,¹³⁸ undermine the gravity of threats against civil society including illegitimate restrictions on their rights to freedom of expression, assembly and association, as well as reprisals

¹³⁴ UN Doc No A/HRC/32/20

¹³⁵ UN Doc No A/HRC/RES/32/31 (1 July 2016), operative paragraph 14

¹³⁶ UN Doc No A/HRC/32/L.63 (28 June 2016)

¹³⁷ UN Doc No A/HRC/L.64 (28 June 2016)

¹³⁸ UN Docs No A/HRC/32/L.53 and L.51 (28 June 2016)

against those seeking to cooperate with UN;¹³⁹ and remove reference to negative impact of restrictions on civil society space to the achievement of purposes and principles of UN.¹⁴⁰ Several amendments were designed to remove or distort references to State obligation to protect and promote the right to freedom of association, especially with regard to civil society's right to access resources for its work,¹⁴¹ and to be free of arbitrary and onerous registration and reporting requirements that hinder the work and safety of civil society.¹⁴²

Others sought to limit the scope of civil society participation in Universal Periodic Review process;¹⁴³ ignore the contributions of civil society to regional and international organisations in compiling procedures and practices in civil society engagement with these bodies;¹⁴⁴ and add unnecessary qualifiers that could open civil society for arbitrary restrictions.¹⁴⁵ Like in the case of previous resolution on the topic, proponents of the amendments also tried to narrow the understanding of minorities and vulnerable groups with a limited definition that excludes others recognised under international law.¹⁴⁶

Majority of Asian States were once again siding with attempts to weaken the resolution by voting in favour of amendments. Asian States made up the largest proportion of States that voted in favour of all 12 amendments that were voted on (the other three out of 15 amendments were withdrawn by main sponsors). China, which sponsored all 15 amendments with Russian Federation, and India voted in favour of all 12 amendments. Bangladesh voted for 11 and Vietnam for ten out of 12 amendments. Indonesia joined Saudi Arabia, Qatar, United Arab Emirates voting in favour of 8 amendments and abstaining on 4. Only Maldives and the Republic of Korea voted against all the amendments while Mongolia and Philippines voted against 8 and 7 amendments each respectively.

Despite the rejection of all the they supported majority of the Asian states voted in favour of the whole resolution. India, Bangladesh and Indonesia that voted in favour of all or the majority of the failed amendments, voted in favour of the resolution. Other Asian State that voted for the resolution adopted by 31 votes to 7, with 9 abstentions were Maldives, Mongolia, Philippines, and the Republic of Korea. China voted against the resolution, while Kyrgyzstan, Qatar, Saudi Arabia, United Arab Emirates and Vietnam abstained.

139 UN Doc No A/HRC/32/L.54 and L.60 (28 June 2016)

140 UN Doc No A/HRC/32/L.52 (28 June 2016)

141 UN Doc No A/HRC/32/L.57 and L.61 (28 June 2016)

142 UN Doc No A/HRC/32/L.56 (28 June 2016)

143 UN Doc No A/HRC/32/L.62 (28 June 2016)

144 UN Doc No A/HRC/32/L.65 (28 June 2016)

145 UN Doc No A/HRC/32/L.55 (28 June 2016)

146 UN Doc No A/HRC/32/L.59 (28 June 2016)

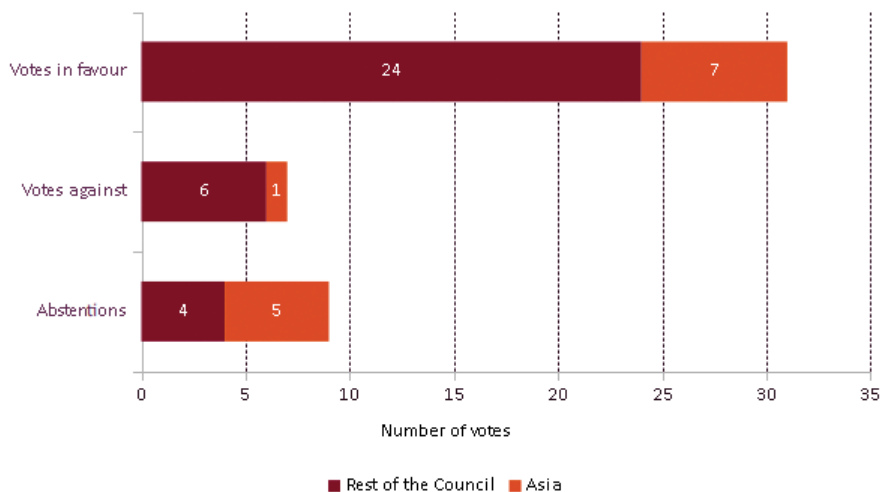
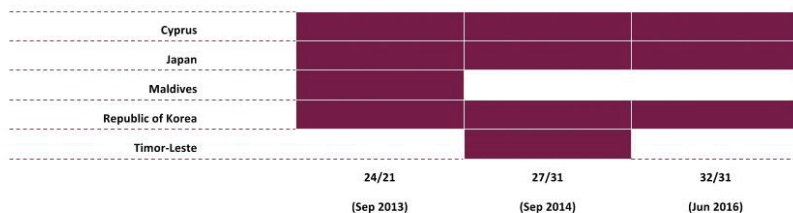


Figure 10: Voting on the resolution A/HRC/RES/32/31 (1 July 2016) on civil society space, adopted by 31 votes to 7, with 9 abstentions. Asian votes in favour: Bangladesh, India, Indonesia, Maldives, Mongolia, Philippines, and Republic of Korea; against: China; and abstentions: Kyrgyzstan, Qatar, Saudi Arabia, United Arab Emirates and Vietnam



Human Rights Council resolutions on civil society space remains one of the more divisive initiatives at the Council. Opposition to, and regressive attempts to undermine the Council’s work to promote a safe and enabling environment for civil society have been increasing year by year eventually eroding the Council’s consensus on these resolutions. Asian States, actively or by omission, played an instrumental role in these increasing attempts to subterfuge the Council’s work to promote civil society space as a human rights concern. Despite Japan’s role as member of the core-group of States that lead the resolutions, Asian support for the resolutions expressed in terms of co-sponsorship has been minimal. Contrastingly, Asian States have been more actively supportive of amendments through sponsorship and voting in favour of amendments.

3. HUMAN RIGHTS DEFENDERS

Debates on the protection of human rights defenders have become one of the most divisive at the Council. The UN Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms,¹⁴⁷ also known as the Declaration on human rights defenders, underpin the international debate on human rights defenders.

UN DECLARATION ON HUMAN RIGHTS DEFENDERS

Although the Declaration is not legally binding, its adoption by the consensus of the UN General Assembly represents a strong commitment by States to its implementation.¹⁴⁸ The Declaration also contains a number of principles and rights that are enshrined in legally binding international human rights instruments such as the ICCPR and ICESCR, and specifies how the rights and freedoms included in these instruments apply to human rights defenders and their work.¹⁴⁹

The Declaration on human rights defenders establishes the right of everyone, "individually and in association with others, to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels."¹⁵⁰ And while the Declaration does not contain an explicit definition of human rights defenders, by implication, "human rights defenders are those who individually or together with others, act to promote and protect human rights. It is their activities in defence of human rights that makes them human rights defenders."¹⁵¹ The Declaration alludes to the nature and scope of such activities human rights defenders undertake in defence of human rights:

"[...] the valuable work of individuals, groups and associations in contributing to, the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals, including in relation to mass, flagrant or systematic violations such as those resulting from apartheid, all forms of racial discrimination, colonialism, foreign domination or occupation, aggression or threats to national sovereignty, national

¹⁴⁷ UN Doc A/RES/53/144 (Adopted on 9 December 1998)

¹⁴⁸ OHCHR, Declaration on Human Rights Defenders, available online <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx> [cited on 3 July 2017]

¹⁴⁹ OHCHR, July 2011, Commentary to the Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, available online <http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf>

¹⁵⁰ UN Doc No A/RES/54/144, Annex, Article 1

¹⁵¹ UN Doc No A/63/288 (15 August 2008), Annex, Paragraph 1

unity or territorial integrity and from the refusal to recognize the right of peoples to self-determination and the right of every people to exercise full sovereignty over its wealth and natural resources[.]”¹⁵²

The Declaration provides for a number of fundamental rights to human rights defenders in undertaking these activities in defence of human rights. They include the rights to freedom of opinion and expression, of assembly, of association, right to protest, right to access funding, right to access and communicate with international bodies, right to be protected, right to an effective remedy, and right to develop and discuss new ideas in relation to human rights.¹⁵³ Similarly, the Declaration also sets corresponding responsibilities of the State to uphold these rights of human rights defenders. However, the Declaration does not create a specific categories of individuals or groups and a new set of rights for them. Instead, States are obligated to protect and promote the rights of human rights defenders as they ought to protect and promote human rights of all individuals within their respective jurisdictions.

The Human Rights Council, since its inception, has debated the protection of human rights defenders as well as creation of a safe and enabling environment for human rights defenders. These debates are underpinned by the need for the implementation of the Declaration for the creation of an enabling environment for human rights defenders. The Human Rights Council, between its creation in 2006 and 2016, has adopted six resolutions that are directly related to the protection of and creation of the enabling environment for human rights defenders. These include resolutions on the mandate of the Special Rapporteur on the situation of human rights defenders and on the protection of human rights defenders. To be sure, these are not the only resolutions that are pertinent to the creation and maintenance of a safe and enabling environment for human rights defenders. Protection of human rights defenders has been a cross-cutting issue that has been discussed in conjunction with several other thematic resolutions of the Council. However, all these discussions may not be within the scope of this paper. Protection of human rights defenders has also been discussed in detail in the context of several resolutions on freedom of opinion and expression, and freedom of assembly and association previously discussed in the paper.

¹⁵² UN Doc No A/RES.54/144, Annex, preambular paragraph 4

¹⁵³ Also see the Commentary to the Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, available online <http://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersJuly2011.pdf>

3.1 Mandate of the Special Rapporteur on the situation of human rights defenders

MANDATE OF THE SPECIAL RAPPOREUR ON THE SITUATION OF HUMAN RIGHTS DEFENDERS

A special procedure mandate on the situation of human rights defenders was first created as a Special Representative of the Secretary General of the UN on the request of the Commission on Human Rights in 2000. The Commission on Human Rights requested the Secretary-General to appoint a special representative whose primary responsibilities are twofold: reporting on the situation of human rights defenders in all parts of the world and on possible means to enhance the protection of human rights defenders in compliance with the Declaration on human rights defenders.¹⁵⁴ In undertaking these responsibilities, the Special Representative was empowered “to seek, receive, examine and respond to information on situation and rights of anyone...to promote and protect human rights and fundamental freedoms;” to cooperate and dialogue with governments and other stakeholders on the promotion and implementation of the Declaration; and to recommend strategies to better protect human rights defenders.¹⁵⁵

The special procedure remained a Special Representative of the Secretary-General until the Human Rights Council replaced the Special Representative with a Special Rapporteur with the adoption of the Council’s first resolution on the mandate of the Special Rapporteur on the situation of human rights defenders in March 2008.¹⁵⁶ The mandate of the Special Rapporteur outlined in the resolution, in essence, reflects the mandate of the Special Representative set by the Commission on Human Rights in 2000. Work of the Special Rapporteur, as outlined in the resolution, include promoting “effective and comprehensive implementation” of the Declaration on human rights defenders “through cooperation and constructive dialogue and engagement with Governments, relevant stakeholders and other interested actors”; to study “manner, trends, development and challenges in relation to the exercise of the right of anyone...to promote and protect human rights and fundamental freedoms”; to recommend strategies “to better protect human rights defenders through the adoption of a universal approach, and to follow up on these recommendations”; to “seek, receive, examine and respond to information on the situation and rights” of human rights defenders; to integrate gender perspectives throughout the work of the mandate with particular attention to the situation of women human

¹⁵⁴ UN Doc No E/CN.4/RES/2000/61 (adopted on 26 April 2000)

¹⁵⁵ UN Doc No E/CN.4/RES/2000/61 (26 April 2000), paragraph 3

¹⁵⁶ UN Doc No A/HRC/RES/7/8 (Adopted on 27 March 2008)

rights defenders; and to work in close coordination with UN bodies, in particular other special procedures of the Council.¹⁵⁷ The resolution also asked the States to cooperate with and assist the Special Rapporteur in the performance of the duties of the mandate.

This resolution as well as all succeeding resolution on the mandate of the Special Rapporteur on the situation of human rights defenders are led by Norway. 53 additional States co-sponsored the resolution. Support from Asian and African groups were significantly low for this first resolution of the Council on the mandate of the Special Rapporteur compared to the Western, Eastern European and Latin American States. Only Japan and the Republic of Korea from Asian group co-sponsored the resolution. Despite the fewer co-sponsors from two of the largest regional groups in the Council, the resolution was adopted by consensus.

The Council by consensus extended the mandate of the Special Rapporteur with another resolution¹⁵⁸ at the expiration the three-year period stipulated for the mandate in the first resolution. The mandate of the Special Rapporteur remained identical to that defined in the previous resolution of the Council and maintains the emphasis on the implementation of the Declaration on human rights defenders. This second resolution led by Norway, and adopted by consensus saw the number of States that co-sponsored the resolution increase to 65 along with number of Asian States that co-sponsored the resolution. Six Asian States, namely, Cyprus, Indonesia, Japan, the Republic of Korea, Thailand and Timor-Leste, co-sponsored the resolution.

The third resolution of the Council on the mandate of the Special Rapporteur on the situation of human rights defenders¹⁵⁹ extended the mandate of the Special Rapporteur for three additional years in the same terms provided for by the previous resolution, A/HRC/RES/16/5. However, unlike all previous resolutions on the mandate, this resolution, building on the two previous resolutions, set out a number of principles related to protection of human rights defenders as well as provisions reflective of the situations in which human rights defenders work. The resolution stresses the link between the respect and support for the work of human rights defenders and the overall enjoyment of human rights. While underscoring that the national legislation consistent with international human rights law is the legal framework within which human rights defenders work. But the resolution expresses concern that national legislation such as national security and counter-terrorism laws or laws that regulate civil society, are being increasingly used to target human rights defenders or to hinder their work and endanger their safety in a manner that contradicts international law.¹⁶⁰ The resolution emphasises the need

¹⁵⁷ UN Doc No A/HRC/RES/7/8 (27 March 2008), paragraph 2

¹⁵⁸ UN Doc No A/HRC/RES/16/5 (adopted on 24 March 2011)

¹⁵⁹ UN Doc No A/HRC/RES/25/18 (Adopted on 28 March 2014)

¹⁶⁰ UN Doc No A/HRC/RES/25/18 (28 March 2014), preambular paragraph 12

for domestic law and administrative provision and their application to facilitate the work of human rights defenders by “avoiding criminalisation, stigmatisation, impediments, obstructions or restrictions thereof contrary to international human rights law.”¹⁶¹ In this context, the resolution recognises the need to review or amend relevant legislation and their implementation in line with international human rights law in order to address or to stop the use of such legislation to hinder or unduly limit the ability of human rights defenders to exercise their work.¹⁶²

The resolution garnered greater support, in terms of co-sponsorships, in comparison to the two previous resolutions. A total of 80 States co-sponsored including seven from Asia – Cyprus, Indonesia, Japan, Maldives, the Republic of Korea, Thailand and Timor-Leste. However, despite growing support, the resolution also fell victim to the rising trend of attacks on the substance of key resolutions through subversive amendments. Prior to the adoption Russian Federation with the support of several States including Bahrain, China, India, Saudi Arabia, United Arab Emirates and Vietnam tabled four amendments to the resolution. Out of which two were withdrawn and two were rejected by the Council. Russian Federation also followed up these amendments with two oral amendments to the resolution during the adoption process.

These amendments sought to undermine the work of the Special Rapporteur and weaken the call on States to take concrete steps to create a safe and enabling environment for human rights defenders,¹⁶³ and limit the scope of the cooperation between the Special Rapporteur and UN agencies and organisations in ensuring the protection of human rights defenders.¹⁶⁴ The two oral amendments by Russian Federation proposed two additional paragraphs affirming the supremacy of the national law as the juridical framework within which human rights and fundamental freedoms as well as activities of human rights defenders should be conducted, and that the work of human rights defenders are subject to limitations determined to secure and respect of the rights of others and meet the requirements of morality, public order and the general welfare in a democratic society. These go counter to the spirit of a resolution and a mandate that aims to create a safe and enabling environment for human rights defenders to work freely without hindrance or insecurity.

Majority of Asian States supported all the amendments. Among all the regions, Asian States make up the single largest majority of States that voted in favour of all four amendments that were voted on (including the two oral amendments). China, India, Kuwait, Pakistan, Saudi Arabia, United Arab Emirates and Vietnam voted in favour of all four amendments, while Philippines voted in favour of three and against one. Japan, Maldives and the Republic of Korea voted against all four

¹⁶¹ UN Doc No A/HRC/RES/25/18 (28 March 2014), prepambular paragraphs 10

¹⁶² UN Doc No A/HRC/RES/25/18 (28 March 2014), prepambular paragraphs 13

¹⁶³ UN Doc No A/HRC/25/L.46 (25 March 2014)

¹⁶⁴ UN Doc No A/HRC/25/L.47 (25 March 2014)

amendments while Indonesia and Kazakhstan abstained in all votes. Despite the rejection of all the amendments, the Council managed to retain the consensus on the resolution on the mandate of the Special Rapporteur on the situation of human rights defenders.

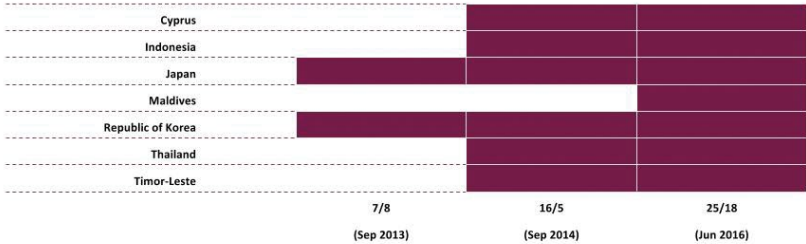


Figure 12: How Asian states sponsored the three resolutions of the Council on the mandate of the Special Rapporteur on the situation of human rights defenders

The mandate of the Special Rapporteur on the situation of human rights defenders remains one of the key special procedures mandates of the Human Rights Council, especially given the increasing, often fatal, attacks against human rights defenders. However, as one region that accounts for a large number of reports of attacks against human rights defenders, Asian States have been reluctant to support the resolutions on the mandate. Despite nominal increase in co-sponsorship of the resolutions on the mandate by each resolution, Asian support still remains significantly low. Only Japan and the Republic of Korea have co-sponsored all three resolutions while Cyprus, Indonesia, Thailand and Timor-Leste have supported the two latest installments of the resolution. This increase in support, however, pales in comparison to Asian States’ support for regressive amendments to the resolution each year. Asian States account for majority of votes in favour all the amendments voted on at the Council.

3.2 Protection of Human Rights Defenders

In addition to the resolutions on the mandate of the Special Rapporteur on the situation of human rights defenders, the Human Rights Council contributes to the development and implementation of the Declaration of human rights defenders through the resolutions on protection of human rights defenders. These resolutions led by Norway continue to incrementally elaborate and reaffirm fundamental normative and protective elements for the creation and maintenance of a safe and enabling environment for human rights defenders in accordance with international human rights law and through the implementation of the Declaration on human rights defenders. These resolutions are also closely connected to the work of the Special Rapporteur on the situation of human rights defenders. They highlight trends and recommendations identified by the Special Rapporteur through her or his work giving them moral and political authority through the broader support and recognition of States. The Council has adopted three resolutions on protection

of human rights defenders led by Norway over the first ten years of its existence.

The first resolution on the protection of human rights defenders was adopted by the Council in its 13th regular session in March 2010.¹⁶⁵ The resolution led by Norway reiterates minimum requirements and practical recommendations to promote a safe and enabling environment where human rights defenders can operate free from hindrance and insecurity. These include aligning domestic legislation such as national security or counter-terrorism laws that are being increasingly misused to target human rights, hinder their work or endanger their safety with international standards. The resolution recognises the public acknowledgement of the legitimacy and importance of the work of human rights defenders as an essential component of ensuring their protection, as well as the need for direct participation of human rights defenders through dialogue and mechanisms such as focal points within public administration in identifying specific protection needs, implementation of protection measures and ensuring their participation in development. The resolution calls on States to act to prevent and protect human rights defenders against attacks or threats, as well as discrimination, including through developing early warning systems to facilitate awareness of imminent risks and enable effective responses, allocation of resources for protective measures, and human rights education. Furthermore, it call for prompt, effective, independent and accountable investigations into complaints and allegations of threats or human rights violations against human rights defenders with a view to eliminate impunity for such acts. The resolution recognises the role of national human rights institutions as both human rights defenders and protectors, and calls for stronger mandate and capacity of national institutions to enable these roles in accordance with Paris Principles.

This resolution led by Norway was co-sponsored by 55 additional States. Lower Asian support for the resolution resembles the trend seen in their support for early resolutions on the mandate of the Special Rapporteur on the situation of human rights. Only four Asian States – Cyprus, Japan, Kyrgyzstan and Timor-Leste – co-sponsored the resolution. The resolution was adopted by the consensus of the Council without much opposition unlike the subsequent resolutions on the topic, whose adoptions were mired in divisive rhetoric and subversive attempts to undermine the work and protection of human rights.

The second resolution of the Council on the protection of human rights defenders¹⁶⁶ is perhaps the most comprehensive in its elaboration of the obligations of States to promote a safe and enabling environment for human rights defenders. The resolution in particular focuses on ensuring that domestic legislation are in line with international human rights law and are not misused to hinder the work or endanger the safety of human rights defenders. The resolution's emphasis on national legislation and its compliance with international law evinces the manifest reality of the situation of human rights defenders characterised by increasing use

¹⁶⁵ UN Doc No A/HRC/RES/13/13 (Adopted on 25 March 2010)

¹⁶⁶ UN Doc No A/HRC/RES/22/6 (Adopted on 21 March 2013)

or abuse of vague domestic legislation that contradict international laws to hinder the rights and criminalise the work of human rights defenders. The resolution especially focuses on hindrances or restrictions on and criminalisation of the work of human rights defenders invoking onerous reporting and funding requirements placed on human rights defenders and civil society actors, as well as, indeterminate and broad national security and counter-terrorism measures that are open for arbitrary application. In conjunction with these, the resolution enumerates the responsibilities of States to ensure that such legislation and their application are consistent with international human rights law to ensure that human rights defenders are able to undertake their work freely without hindrances and risks, and combat impunity for attacks against human rights defenders.

A total of 76 States co-sponsored the resolution led by Norway. Asian support once again remained relatively low with only five Asian States joining as co-sponsors. They are Cyprus, Indonesia, Japan, Maldives and Timor-Leste. Although the resolution was adopted by consensus, China, Cuba, Egypt and Russian Federation proposed several amendments that could weaken the resolution. However, following certain compromises by Norway to review the resolution to reflect some of the amendments, all the amendments were withdrawn by sponsors. Had they been successful in their bid to weaken the resolution, it would have, among others, confounded the State obligations to ensure national legislation are consistent with international law,¹⁶⁷ or weaken the call on States to ensure that domestic laws, in particular those relating to access to funding and resources, are not used to criminalise or delegitimise the work of human rights defenders.¹⁶⁸

While the second resolution on the protection of human rights defenders focused primarily on promoting and protecting civil and political rights including through legislation and practices consistent with international law, the third resolution on the topic focused specifically on the protection of human rights defenders addressing economic, social and cultural rights.¹⁶⁹ This stem from increasing reports, especially by the Special Rapporteur, of attacks and human rights violations targeted at human rights defenders working economic, social and cultural rights as related corporate accountability, natural resources, land, labour, corruption and transparency, and, in general, economic development. In this regard, the resolution recognises the legitimate and important role of human rights defenders in "identifying and raising awareness of human rights impacts, benefits and risks of development projects and business operations, including in relation to workplace health, safety and rights, and natural resource exploitation, environmental, land and development issues, by expressing their views, concerns, support, criticism or dissent regarding government policy or action or business activities."¹⁷⁰ Importantly, in addition to the primary responsibilities of governments to promote

167 UN Doc No A/HRC/22/L.48

168 UN Doc No A/HRC/22/L.49

169 UN Doc No A/HRC/RES/31/32 (adopted on 24 March 2016)

170 UN Doc No A/HRC/RES/31/32 (24 March 2016), operative paragraph 15

and protect human rights of all, the resolution underscores the responsibilities non-State actors and business enterprises, to respect human rights including the right to life, liberty and security of human rights defenders, and their exercise of rights to freedom of expression, assembly and association, and participation in public affairs.¹⁷¹ Additionally, it encourages business enterprises to avoid, identify, assess and address any adverse impacts of their activities on human rights through meaningful consultation with affected groups and relevant stakeholders in a way that is consistent with the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework,¹⁷² and underlies the necessity of accountability of all business enterprises in their remedial action.¹⁷³

The resolution saw the support, in terms of sponsorship or co-sponsorship, decrease compared to the previous resolution on the topic. 66 States co-sponsored the Norway led resolution, this is ten States less than the number of co-sponsors of the previous resolution. Already minimal Asian support for the resolution also shrunk with this resolution. Cyprus, Japan, the Republic of Korea and Sri Lanka are the only Asian States to co-sponsor the resolution. Timor-Leste that sponsored the two previous resolutions on the topic did not sponsor this resolution. Unlike the previous two resolutions, this resolution lost the Council’s consensus. The resolution was adopted by 33 votes in favour to 6 against, with 8 abstentions. Majority of the Asian States – Bangladesh, India, Indonesia, Kyrgyzstan, Maldives, Mongolia, Philippines, and the Republic of Korea – voted in favour of the resolution. China voted against the resolution while Qatar, Saudi Arabia, United Arab Emirates and Vietnam abstained.

Notwithstanding its adoption by a significant margin, this resolution marks a nadir in attacks against key Council resolutions and attempts to derail the Council’s ongoing and past work for the protection of not only human rights defenders, but human rights, in general. Prior to the adoption of the resolution, the Council was forced to reject an unprecedented number of amendments – a total of 31 amendments – led by China, Cuba, Egypt, Pakistan and the Russian Federation in a bid to subvert the resolution. Several other Asian States, namely, Bahrain, Bangladesh, Iran, Saudi Arabia, and United Arab Emirate, joined these States in their attempted subterfuge of the resolution. Perhaps the most absurd goal of the majority of their amendments was the deletion of all references to ‘human rights defenders’ or ‘women human rights defenders’ from a resolution, including from the title of the resolution, that ironically seeks to protect human rights defenders.¹⁷⁴ The term ‘human rights defenders’ have been repeatedly used in Human Rights Council as well as in General Assembly resolutions adopted by consensus of both these bodies. Demands to retract this term from the resolution is ominous of

171 UN Doc No A/HRC/RES/31/32 (24 March 2016), operative paragraph 17

172 UN Doc No A/HRC/17/31 (21 March 2011)

173 UN Doc No A/HRC/RES/31/32 (24 March 2016), operative paragraph 18

174 UN Docs No A/HRC/31/L.41, L.43, L.45, L.46, L.47, L.50, L.51, L.53, L.56, L.57, L.58, L.59, L.61, L.62, L.66, and L.69 (21 March 2016)

possible future attempts to walk back on internationally agreed human rights standards.

Other amendments include removing language that reflects prevailing concerning situations and challenges faced by human rights defenders,¹⁷⁵ undermine the legitimacy of their work,¹⁷⁶ and downplay the gravity of the threats, risks and reprisals they are exposed to as a result of their work.¹⁷⁷ In keeping with similar attempts by these same group of States in relation to other resolutions, several of their proposals attempted to confuse the obligation on States to align their national legislation with international law,¹⁷⁸ and enact legislation to protect protect human rights defenders,¹⁷⁹ instead attempting to justify restrictions and limitations of the work of human rights defenders based on domestic legislation in a manner that is inconsistent with international human rights law.¹⁸⁰

All 30 out of 31 amendments were rejected by the Council's majority vote (one amendment was withdrawn). Support of majority of Asian States for these amendments stand in stark contrast to the general opposition of the majority of the Council to these amendments. Asian States make up for nearly half of the total vote in favour of all the amendments. China, Saudi Arabia, United Arab Emirates and Vietnam voted in favour of all 30 amendments; India voted for 29 and abstained in 1 vote, while Bangladesh voted for 28 amendments and abstained on 2. Only the Republic of Korea voted against all the amendments, with Maldives and Philippines voting against 22 and 20 amendments respectively. Indonesia voted for 19 amendments, against 1 and abstained on the remaining 10 amendments. Mongolia was recorded absent for votes on all 30 amendments.

Asian support for these resolutions on the protection of human rights resembles their minimal support for the resolutions on the mandate of the Special Rapporteur on the situation of human rights defenders. Asian States make up for a negligible share of States that co-sponsored each of the three resolutions. To be sure, Asian States are not alone in their reluctance to support these resolutions. African support for these three resolutions are comparable to that of Asian group. Resolutions on the protection of human rights defenders also remain highly contentious with repeated, and unprecedented, attempts to subvert these resolutions. Asian States, once again, showed their consistency in their support for such attempts with sponsorship and votes.

175 UN Doc No A/HRC/31/L.44 (21 March 2016)

176 UN Docs No A/HRC/31/L.47, L.61, L.65, L.66 (21 March 2016)

177 UN Docs No A/HRC/31/L.51 and L.57 (21 March 2016)

178 UN Doc No A/HRC/31/L.48 (21 March 2016)

179 UN Doc No A/HRC/31/L.59, L.62 (21 March 2016)

180 UN Doc No A/HRC/31/L.47, L.54, L.62, (21 March 2016)

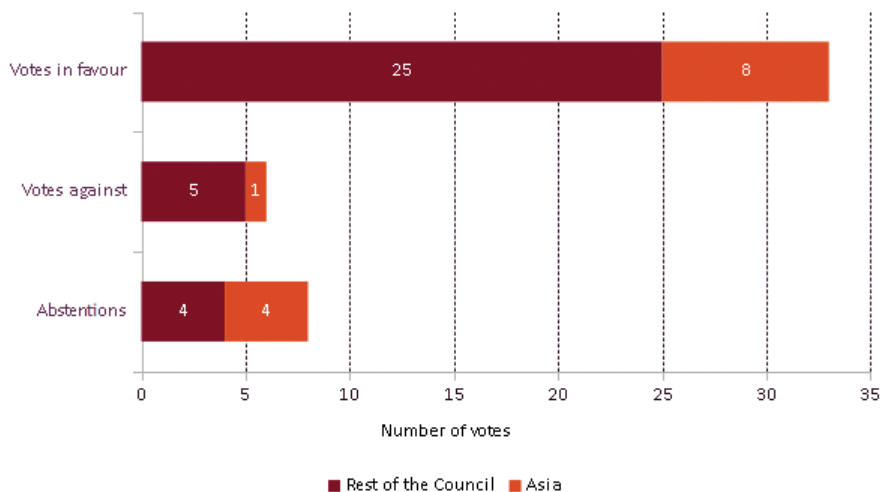


Figure 13: Voting on the resolution A/HRC/RES/31/32 (24 March 2016) on protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights, adopted by 33 votes to 6, with 8 abstentions. Asian votes in favour: Bangladesh, India, Indonesia, Kyrgyzstan, Maldives, Mongolia, Philippines, and Republic of Korea; against: China; and abstentions: Qatar, Saudi Arabia, and United Arab Emirates.

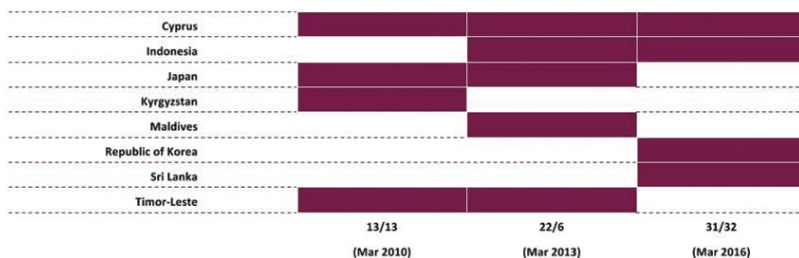


Figure 14: How Asian states sponsored the each of the three resolutions of the Council on the protection of human rights defenders

PART II

COUNTRY-SPECIFIC RESOLUTIONS

Country-specific engagement is conceivably one of the most controversial aspects of the work of the Human Rights Council. International debates on human rights situations in particular countries have inevitably been subject to controversy and international dispute. Discussions at intergovernmental platforms regarding country-specific human rights situations are frequently mired in accusations of selectivity and politicisation. The UN Commission on Human Rights was paralysed by such allegations of selectivity and politicisation for a long period, before its eventual demise largely due to its approach to debates on country situations. States were accused of seeking the membership of the Commission to shield themselves from international criticism and scrutiny or to criticise others.¹⁸¹

Similar pitfalls threaten the Human Rights Council. However, ability to take country-specific action remains one of the most important tools in the Council's arsenal in particular to carry out its function to "contribute...towards the prevention of human rights violations and respond promptly to human rights emergencies," and promote human rights through "advisory services, technical assistance and capacity-building."¹⁸² Over the first ten years, the Council has been able to use this tool to address several country-specific human rights situations with some success. In Asia, these include Sri Lanka, Burma/Myanmar, Cambodia and the Democratic People's Republic of Korea (DPRK). The Council played a key role in opposing a repressive regime and exposing wartime atrocities after the Civil War in Sri Lanka; it has sustained international pressure in the context of democratic changes in Burma/Myanmar; and the Council mandated investigation exposed the gravity of the human rights catastrophe in Democratic People's Republic of Korea.¹⁸³

The Council acts on country-specific human rights situations primarily under two separate items on its standing agenda: agenda items 4 (human rights situations that require the Council's attention), and 10 (technical assistance and capacity building). These agenda items are often seen as two diametrically opposite approaches to addressing human rights violations specific to particular countries. Agenda item 4 relies on tougher scrutiny and formal condemnation while agenda item 10 focuses on providing technical assistance and capacity-building with the consent of the State concerned which implies acknowledgement human rights challenges by the State concerned.

¹⁸¹ UN Doc No A/59/565 (2 December 2004), paragraph 283; also see the report of The High-Level Panel on Threats, Challenges and Changes contained in the UN Doc No A/59/565 (2 December 2004)

¹⁸² UN Doc No A/RES/60/251 (15 March 2006), paragraph 5 (a) and (f)

¹⁸³ R. Iniyana Ilango (2016), 'Human Rights Council in 2013: Relevant or moribund?', in International Service for Human Rights (ed.), *The Human Rights Council @ 10, the Human Rights Monitor*, Special Edition, page 62, available online https://www.ishr.ch/sites/default/files/article/files/ishr_hr_monitor_eng_web2.pdf

Many States continue to reject scrutiny of country situations under agenda item 4 in favour of softer approaches such as capacity building and technical assistance with the consent of concerned State. Increasing number of States are also completely opposed to the Council scrutinising country specific situations at all except through the Universal Periodic Review mechanism. The Council has progressively attempted to avoid getting drawn into item 4 versus item 10 dichotomy by adopting an increasing number of country-specific resolutions under item 2 (Annual report of the UN High Commissioner for Human Rights and reports of the OHCHR and UN Secretary-General) often mandating the High Commissioner to scrutinise country-specific situations.¹⁸⁴

With such varying degrees of support – or opposition – to these different strategies at the Council's disposal, its decisions on country-specific situations are anything but consistent. Inconsistency at all levels, in particular the inconsistent application of country-specific scrutiny in similar situations and inconsistencies in voting behaviour of States define the Council's approach to country-specific situations. No decision by the Council hits home the reality that it is a political body susceptible to the vagaries of international politics more than its resolutions on human rights situations in specific countries. They foreground the power of national self-interest and political alliances between States. General positions of States on country-specific scrutiny, whether they are in favour of one agenda item over other or are totally opposed to such scrutiny, often become irrelevant when confronted with capricious reality of international politics. States, constrained by their own political interests and influence of their political alliances, frequently contradict their positions – official or unofficial – in their voting behaviour in the Council.

These inconsistencies and idiosyncrasies in State behaviour on country-specific decisions of the Council is further accentuated by the existence of agenda item 7 (human rights situations in Palestine and other occupied Arab territories) of the Council, which is essentially an agenda item dedicated solely for country-specific scrutiny. Resolutions adopted under this agenda item, which generally follow the condemnatory mould of item 4 resolutions, enjoy the support even of States that are most vehemently opposed to item 4 debates as well as country-specific scrutiny in general.

Despite these peculiar dynamics, limited success and disputable effectiveness, country-specific scrutiny continues to be one of the primary tools of the Council to address systematic and widespread or emergency human rights situations. During its first ten years, the Council has adopted 206¹⁸⁵ resolutions under agenda items

¹⁸⁴ John Fisher (2016), 'Human Rights Council in 2013: Relevant or moribund?', in International Service for Human Rights (ed.), *The Human Rights Council @ 10*, the Human Rights Monitor, Special Edition, page 35, available online https://www.ishr.ch/sites/default/files/article/files/ishr_hr_monitor_eng_web2.pdf

¹⁸⁵ This number represents the number of resolutions adopted by the Human Rights Council under its agenda items 2, 4, 7 and 10 after the current standing agenda was adopted following the approval of the institutional building package with the adoption of the resolution A/HRC/RES/5/1 by the 5th regular session of the Council on 18 June 2007.

2, 4, 7 and 10 focusing on country-specific situations. These include 6 resolutions under item 2, 66 resolutions under item 4, 49 resolutions under item 7, and 85 resolutions under item 10 of the Council's agenda. Of these 206 resolutions, 88 resolutions (43 per cent) are adopted by vote while 118 resolutions (57 per cent) are adopted by consensus. Majority of the resolutions that required a vote were those adopted under agenda items 7 and 4. 45 out of 49 resolutions under item 7, and 36 out of 66 resolutions under item 4 were adopted by vote. In contrast, only 4 out of 85 resolutions adopted under item 10 required a vote. These numbers are indicative of the deep political divisions between States over the Council's approaches to address country-specific human rights situations.

Asian States have not publicly declared an official collective position on country-specific resolutions at the Council, voting records as well as sponsorship data projects a complicated picture, one that is primarily characterised by inconsistency. Asian States' voting records on the three resolutions adopted by vote under item 2 of the Council's agenda might suggest Asian States are more likely to oppose scrutiny of other Asian States without the consent of the state concerned. All three resolutions relate to reconciliation and accountability in post-Civil War Sri Lanka, a key Asian State. Voting records on these three resolutions show that, on average, 59 per cent of Asian States in the Council have consistently voted against these resolutions, while nearly 31 per cent abstained on all three votes with only 10 per cent of Asian States voting in favour of these resolutions. This rejection to scrutiny of Sri Lanka by majority of Asian States could be construed as a defense of a key regional ally from what is seen, primarily by Sri Lanka, as a politically motivated attack on its sovereignty by the West.

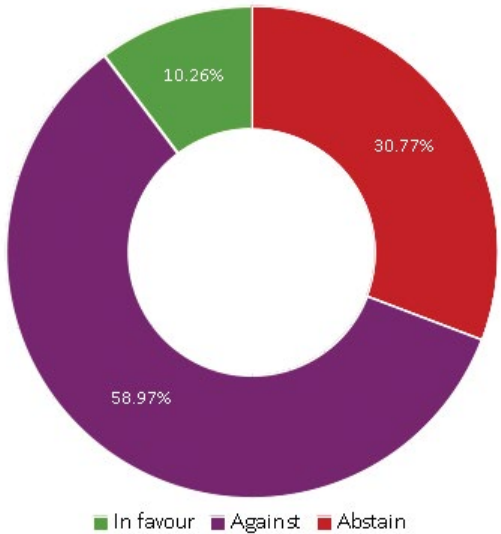


Figure 15: Aggregate average of Asian votes on the item 2 resolutions of the Council on Sri Lanka

Asian States were comparatively more vocal than other regions in their defence of Sri Lanka at the Council as demonstrated by the large proportion of Asian States among those that voted against resolutions on Sri Lanka. On average, Asian States accounted for over half of all votes against each of the three resolutions, while they accounted for only 5 per cent of the States that voted in favour. India and the Republic of Korea were the only Asian States to ever vote in favour of any of the three resolutions, with each voting in favour two resolutions. Asian States joined the consensus on the fourth resolution¹⁸⁶ on Sri Lanka in 2015 following Sri Lanka's co-sponsorship of the resolution. India's largely positive position on Sri Lanka, especially during early years of the Council's engagement with Sri Lanka, when the schism between those who supported international scrutiny and the rest ran deep, is contrary to India's routine objections country-specific scrutiny.

Asian States' voting on resolutions adopted under item 4 of the Council's agenda is perhaps the best illustration of this inconsistency. The Council has adopted 66 resolutions under item 4 of its agenda on 13 separate country situations, including four Asian States: Iran, Burma/Myanmar, Democratic People's Republic of Korea and Syria. 30 out of these 66 resolutions were adopted by consensus of the Council. This exposes the fallibility of the argument against item 4 resolutions that they are primarily politically motivated attempts to undermine the sovereignty of States from the global South. It is true that almost all of the item 4 resolutions relate to countries in the global South, majority of them are led by Western States, and none of these resolutions enjoys the support of the States concerned. However, the fact that nearly half of the item 4 resolutions are adopted by consensus suggest that even the most ardent critics of country-specific scrutiny, in particular through item 4 resolutions, such as China, India and Pakistan from Asia, are malleable and open to compromise. Joining consensus does not necessarily connote support. States often grudgingly acquiesce to resolutions just to maintain the longstanding consensus even if they do not agree with the contents or nature of the resolution. And on several occasions, States have disassociated themselves from the consensus. For instance, India advocated strongly against the March 2016 resolutions on the human rights situations in Burma/Myanmar, yet decided not to break the consensus.

Over half of the all item 4 resolutions – 36 out of 66 – adopted by the Council required a vote. Resolutions that did not enjoy the consensus of the Council relate to six specific-country situations out of the 13 separate country situations discussed by the Council under the agenda item 4 during its first ten years. These include the Council's resolutions on the human rights situations in Syria. Like all other UN organs and bodies, the Council continues to fail to reach a political consensus on how to address the grave and deteriorating humanitarian and human rights calamity in Syria. All 15 resolutions the Council on Syria adopted under item 4 since the disastrous civil war began have failed to reach a consensus. Similarly, the Council's resolutions on Belarus and Iran have been marred by political discord. On

¹⁸⁶ UN Doc No A/HRC/RES/30/1 (adopted on 1 October 2015)

Democratic People’s Republic of Korea, even after a Council mandated Commission on Inquiry exposed the gravity of the human rights catastrophe, the Council has dithered back and forth on consensus. Only three out of the nine resolutions on the Democratic People’s Republic of Korea were adopted by consensus.

Voting records on the 36 resolutions adopted by vote show that majority of Asian States are invariably resistant to country-specific scrutiny. The only exception to this appears to be the Asian votes on the resolutions on the human rights situation in Syria. 15 out of the 36 resolutions adopted by vote under item 4 were on the situation of human rights in Syria. Majority of Asian States have been uncharacteristically supportive of the Council’s resolutions on Syria. 61 per cent of Asian States have consistently supported the resolutions on Syria, while only 6 per cent voted against and 33 per cent abstained. Although no Asian State except China has ever voted against any of the resolutions on Syria, support among Asian States for the these resolutions has declined over time. China has consistently voted against all resolutions on Syria adopted by Council whenever it has been a member of the Council. Japan, Kuwait, Maldives, Mongolia, Qatar, the Republic of Korea, Saudi Arabia, and United Arab Emirates have been among the most ardent Asian supporters of the Council’s scrutiny of Syria. Bangladesh, India, Indonesia, Pakistan and Philippines have abstained on most resolutions.

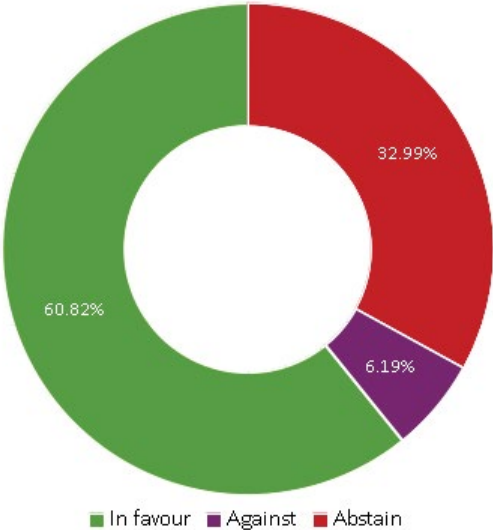


Figure 16: Aggregate average votes by Asian states on the item 4 resolutions of the Council on the human rights situations in Syria

It is no surprise that Japan and the Republic of Korea, and to some extent Maldives have voted in favour of resolutions on Syria. These countries have been comparatively more supportive of country-specific scrutiny by the Council. However, greater support for Syria resolutions in particular among Arab States, that have ordinarily opposed country-specific scrutiny, arguably have more to do

with their political interests, regional alliances as well as ideological differences, than the urgency and gravity of the situation in Syria. Many of the Arab States that favour the resolutions on Syria are politically and ideologically aligned with Saudi Arabia. These States appear to have come together against Iran, which is seen as the diametric opposite, politically and ideologically, of Saudi Arabia, and has been accused of supporting the repressive Syrian regime. Bangladesh, India, Indonesia, Pakistan and Philippines have been persistent in their general resistance to country-specific scrutiny, including in the case of Syria.

In contrast, Asian voting patterns on other individual country situations on the Council's agenda item 4 differ substantially from that of Syria. For instance, the resolutions on the human rights situation in Iran have been one of the least popular among Asian States. On average, only 20 per cent of Asian States have voted in favour of the resolutions on Iran, while 36 per cent and 44 per cent have consistently voted against and abstained, respectively. Similarly, majority of Asian States are loath to back the Council's resolutions on the human rights situation in Belarus. 58 per cent of Asian States have repeatedly abstained, refusing to take a clear stand, while only 21 per cent of Asian States have chosen to either support or reject the resolutions on Belarus. The only resolution on Burundi, adopted in September 2016 in response to the recent dramatic decline in the situation, largely reflects this trend of majority of Asian States choosing to abstain rather than taking a clear position (15 per cent of Asian States voted in favour, 8 per cent voted against and 77 per cent abstained). Asian reaction to resolutions on the situation in the Democratic People's Republic of Korea have been mixed. Out of the nine resolutions on the Democratic People's Republic of Korea three, including the most recent resolution in March 2016, have been adopted by consensus. Voting on the six remaining resolutions show that there is comparatively greater support for these resolutions, albeit not to the same extent as the resolutions on Syria. Only 17 per cent of Asian States have consistently voted against the resolutions on the Democratic People's Republic of Korea, whereas 40 per cent of Asian States have either voted in favour or abstained.

Taken together, overall Asian voting on the 36 item 4 resolutions adopted by vote shows that the majority of Asian States are less inclined to vote in favour of country-specific scrutiny. On average, only 41 per cent of Asian States have voted in favour of item 4 resolutions with 19 per cent voting against and 40 per cent abstaining (Figure 21). Largely positive Asian votes on resolutions on Syria, which go against the general pattern of Asian positions, appear to have had a moderating cumulative impact on this overall vote. Excluding the Asian vote on Syria, the average proportion of Asian States that regularly vote in favour of item 4 resolutions decrease to 27 per cent while the proportion of those that vote against and abstain increase to 28 per cent and 45 per cent respectively (Figure 22). In comparison with other regions, Asian States are also less likely to vote in favour of item 4 resolutions. While Asian States account for nearly one-third – or more precisely 27.6 per cent – of the Council's membership, Asian votes have

accounted for only 19 per cent of average votes in favour of all item 4 resolutions adopted by vote, while they have accounted for 38 per cent and 41 per cent of average votes against and abstentions respectively. These proportions become more significant without the effects of voting on Syria, which seems to be an exception to the general pattern of Asian voting on item 4 resolutions. Without

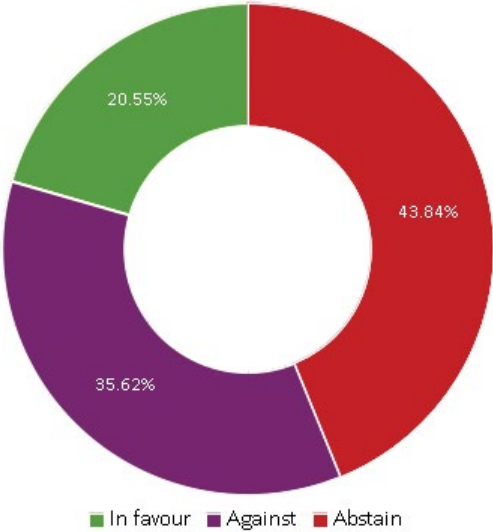


Figure 17: Average votes by Asian states on the item 4 resolutions of the Council on the human rights situations in Iran

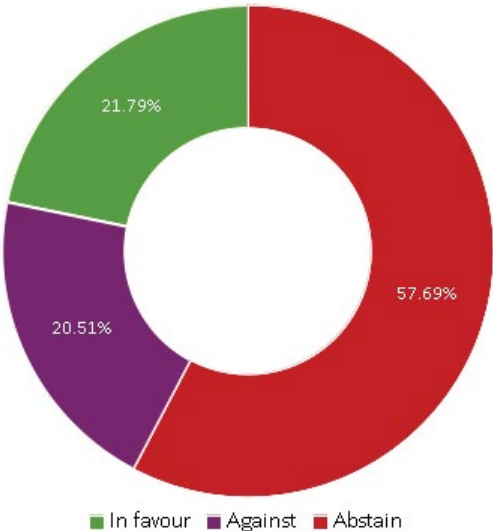


Figure 18: Average votes by Asian states on the item 4 resolutions of the Council on the human rights situations in Belarus

Syria vote, Asian votes account for only 15 per cent of average votes cast in favour of item 4 resolutions, while the share of Asian votes cast against these resolutions increase to 46 per cent. This means, on average, nearly half of the all States that voted against each of the item 4 resolutions adopted by vote were Asian States.

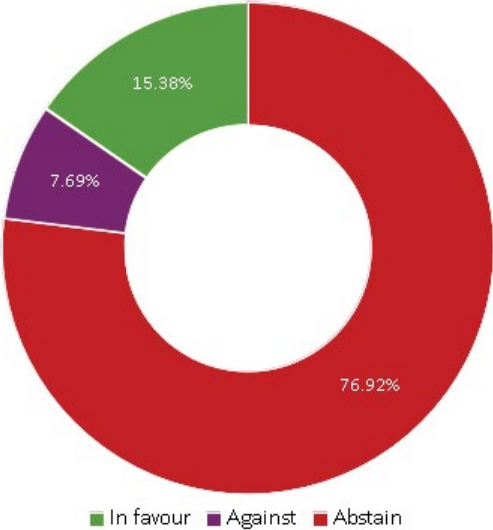


Figure 19: Average votes by Asian states on the item 4 resolution of the Council on the human rights situations in Burundi

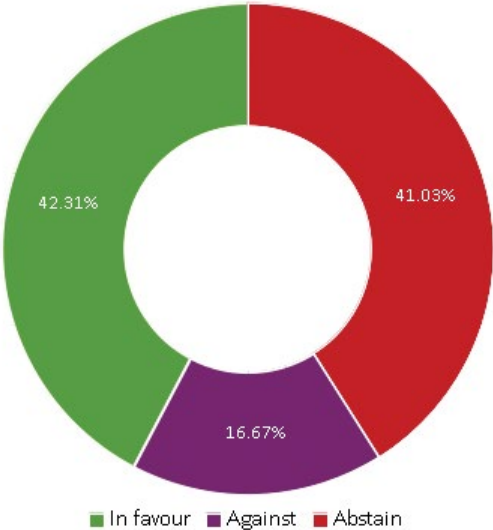


Figure 20: Average votes by Asian states on the item 4 resolutions of the Council on the human rights situations in the Democratic People's Republic of Korea

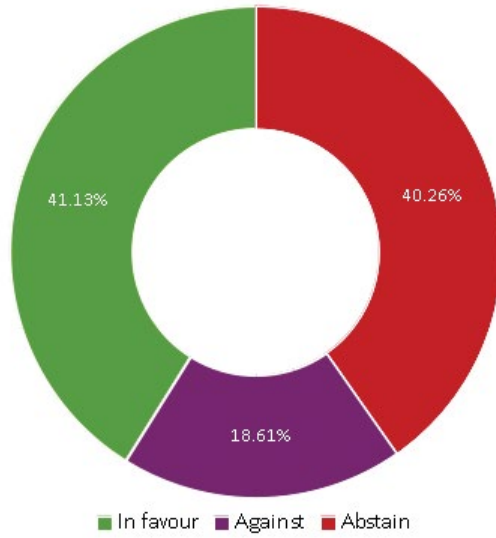


Figure 21: Aggregate average votes by Asian states on all item 4 resolutions of the Council adopted by vote

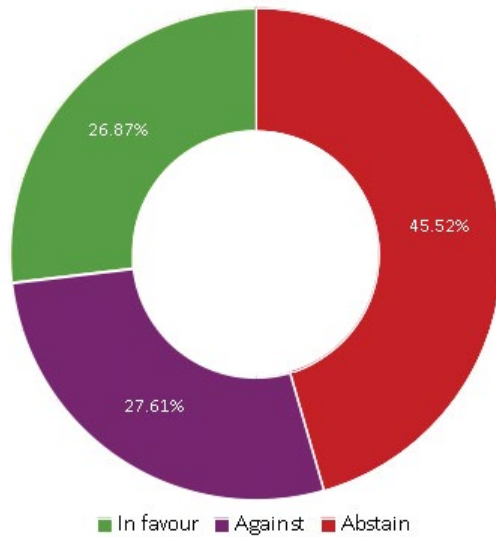


Figure 22: Average votes by Asian states on all item 4 resolutions without taking into account votes on the human rights situation in Syria

While voting records seem to suggest that Asian States are generally opposed to country-specific scrutiny under item 4 of the Council's agenda, nearly half of the item 4 resolutions during the first ten years of the Council (30 out of 66) were adopted by consensus. And this inevitably requires the consent of all Council members, including all Asian States in the Council. Nearly half of all item 4 resolutions adopted by consensus are resolutions on the situation of human rights in Burma/Myanmar. No Asian State or any other State has objected to any of the 13 European Union-led resolutions of the Council on Burma/Myanmar, despite growing backlash against these resolutions led by Burma/Myanmar itself with the support of others including several Asian States. Significantly, Burma/Myanmar's fellow Association of Southeast Asian Nations, whose regional politics is defined by commitment to national sovereignty, non-intervention and consensus decision making, have continued to stand by the Council's consensus on scrutiny of Burma/Myanmar. Similarly, Asian States joined the consensus on the resolution on the human rights situation in Eritrea in June 2014, which established a commission of inquiry on Eritrea¹⁸⁷ despite Eritrea's outright rejection of the resolution as a violation of its sovereignty and basic principles of the Council.

In addition to these, Asian States have consistently joined the consensus on several other item 4 resolutions on Eritrea, South Sudan, Mali, and on occasion on the Democratic People's Republic of Korea and the Sudan, among others. This pattern further confounds Asian States' positions on country-specific resolutions. Many of these resolutions contradict the arguments made by Asian States, and others that oppose item 4 scrutiny of country-specific situations. Many of these resolutions are opposed by the States concerned. A large majority of them are led by Western States. And many of these resolutions have created independent investigative or monitoring mechanisms which are seen by States concerned as infringements on their sovereignty and internal affairs. Yet, Asian States have been willing to join consensus on these resolutions betraying their own positions on the consent of the States concerned, politicisation of human rights by Western States, or violations of sovereignty of States under scrutiny of the Council.

Unlike the item 4 resolutions, 81 out of 85 resolutions under item 10 of the Council's were adopted by consensus. These 81 resolutions relate to providing technical assistance and capacity building support for 16 different country situations. Only four resolutions required a vote. Three of which are on human rights cooperation with and assistance to Ukraine. Consensus on nearly all country situations on the item 10 of the Council's agenda illustrates the broader political support for conciliatory approaches to country-specific situations. Many States, including many Asian States, have consistently advocated for such softer approaches of providing technical assistance and capacity-building. Many insist on securing the consent of and acknowledgement by the State concerned of the need for such assistance as necessary prerequisites for the Council's intervention. For them, the item 10 of

¹⁸⁷ UN Doc No A/HRC/RES/26/24 (adopted on 27 June 2014)

the Council's agenda is the only appropriate method of Council's engagement in specific country situations even in cases of widespread human rights catastrophes.

Engagement under item 10 have sometimes led to Council interventions that are not commensurate to – or are out of touch with – the gravity of the situation on the ground. For instance, a September 2015 proposal for an item 2 resolution requesting the Office of the High Commissioner for Human Rights to independently monitor the human rights situation in Yemen “to establish the facts and circumstances of the serious violations and abuses committed by all parties in Yemen since September 2014”¹⁸⁸ was withdrawn in favour of an item 10 resolution after several key States failed to support the proposal.¹⁸⁹ At the same time, the Council has continued longstanding item 10 resolutions without proportionate scrutiny on country situations even as the situations under consideration descend in to chaos with systematic human rights violations. For example, Cambodia, a country with one of the longest-standing UN mandates on human rights established in 1993, has seen a sharp deterioration of the human rights situation in the recent years. Although the government of Cambodia has backtracked on almost all commitments related to democracy, human rights and the rule of law included in the 1991 Paris Peace Accords, which also led to the creation of the UN mandate on Cambodia, the Council has continued business as usual without commensurate increase in scrutiny or attention. Similarly, the Council has continued to the item 10 mandate to provide assistance to Somalia since 1993 despite severe escalations of violence and abuses. In this sense, item 10 resolutions can essentially be used as an excuse to let human rights abusing States easily off the hook for political expediency, and to undermine scrutiny under item 4 of the Council.

While 95 per cent of all item 10 resolutions were adopted by consensus, the three item 10 resolutions on Ukraine that were adopted by vote exposes the un-tenability of some of the arguments in favour of item 10 resolutions. Votes at the Council on the three resolutions on cooperation and assistance to Ukraine in the field of human rights saw many Asian, and other States, abandon their positions favouring item 10 resolutions: that item 10 with the consent of and acknowledgment of the need for technical assistance by the State concerned is the only appropriate mode of country-specific discussions at the Council. However, many States including Asian States that insist on such conditions for the Council's engagement on country situations, ostensibly, did not consider the fact that Ukraine led these resolutions as their consent and acknowledgement of the need for assistance. Instead, majority – 66 per cent – of Asian States consistently abstained on the three resolutions on Ukraine, with only 23 per cent voting in favour, and 10 per cent voting against.

188 UN Doc No A/HRC/30/L.4/Rev.1 (30 September 2015), this proposal was withdrawn by the main sponsor before voting

189 Also see, John Fisher (2016), 'Human Rights Council in 2013: Relevant or moribund?', in International Service for Human Rights (ed.), *The Human Rights Council @ 10, the Human Rights Monitor, Special Edition*, page 35, available online https://www.ishr.ch/sites/default/files/article/files/ishr_hr_monitor_eng_web2.pdf

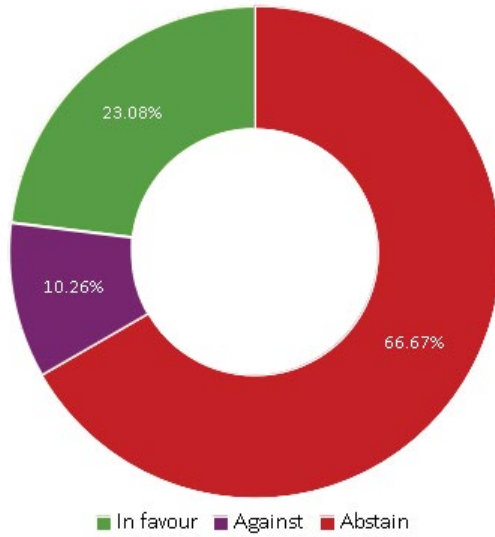


Figure 23: Average Asian vote on item 10 resolutions of the Council on cooperation with and assistance to Ukraine in the field of human rights

Similarly, the existence of item 7 and the large number of resolutions adopted regularly with over 80 per cent of the Council’s support seem to belie the persistent criticisms of country-specific scrutiny by even the harshest detractors. The Council has adopted a total of 49 resolutions under item 7 on the human rights situation in Palestine and occupied Arab territories, out of which four were adopted by consensus. Item 7 of the Council’s agenda is essentially an entire agenda item dedicated to country-specific discussions and scrutiny congruent with item 4 of the Council’s agenda. While, on average, 80 per cent of the Council has regularly voted in favour of these resolutions only three per cent of the Council has voted against these resolutions. Asian votes on these resolutions diverge remarkably from their votes on resolutions on other agenda items. On average, over 93 per cent of Asian States have regularly voted in favour item 7 resolutions adopted by the Council by vote. With only about 6 per cent abstaining, Asian States’ vote against these resolutions are negligible with only one Asian State voting against one resolution out of the 45 item 7 resolutions adopted by vote. Even States that have been constantly opposed to country-specific resolutions, especially under item 4, also continue to vote in favour of item 7 resolutions (Figure 24).

Notwithstanding the resolutions adopted by consensus, item 7 resolutions have seen several Asian States completely reversing their usual positions on country-specific resolutions. China, the only Asian State to have voted against all item 4 resolutions adopted during its membership of the Council, have voted in favour all item 7 resolutions adopted while it had been a member of the Council. Similarly, India had voted in favour of all except two – on which India abstained – resolutions under item 7 adopted during its membership of the Council. India had never voted

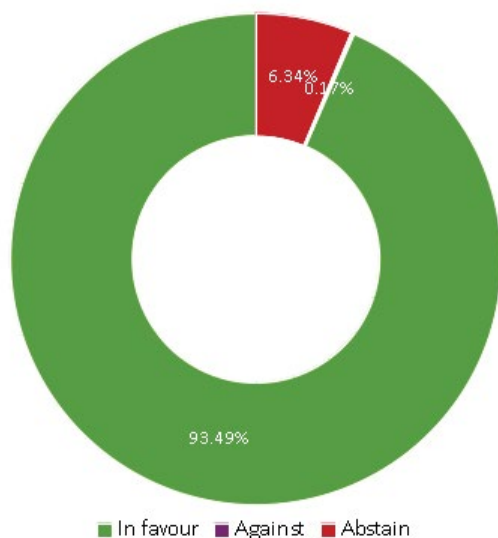


Figure 24: Average Asian vote on all item 7 resolutions adopted by the Council by vote

in favour of an item 4 resolution except the first resolution of the Council on Syria in March 2012. But on the other hand, Japan and the Republic of Korea, the two Asian States to have voted in favour all item 4 resolutions adopted by vote during their membership of the Council, have abstained on more item 7 resolutions than any other Asian State. Japan had abstained on 16 occasions and voted against in one, while the Republic of Korea has abstained on 20 occasions.

Sponsorship data gives further credence to the claim that majority of Asian States are opposed to country-specific scrutiny, especially under item 4. Although, unlike voting at the Council, non-member States of the Council can sponsor or co-sponsor resolutions, only a few Asian States have ever sponsored or co-sponsored country-specific resolutions, in particular item 4 resolutions. Resolutions on Syria, as well as the June 2011 resolution on the situation of human rights in Libya,¹⁹⁰ are however, exceptions to this pattern. Over the course of 15 resolutions on Syria, over 13 Asian States, majority of which are Arab States, have joined as sponsors. These include Jordan, Kuwait, Qatar, Saudi Arabia, Japan, and the Republic of Korea that have sponsored all 15 resolutions; Cyprus, Maldives and the United Arab Emirates that have sponsored 14 resolutions; and Bahrain that sponsored 13 resolutions. In addition, Yemen, Oman and Iraq have joined sponsors on occasion. Similarly on the resolution on Libya was sponsored by Jordan, Maldives, Qatar, Cyprus, Japan, Kuwait, and the Republic of Korea.

However, no other Asian State besides Cyprus, Japan, Maldives, Republic of Korea and Thailand have sponsored or co-sponsored an item 4 resolution other than the resolutions on Syria and Libya. Cyprus, which sponsored 29 resolutions, have aligned with the European Union despite belonging to Asia group by the UN definition. The Republic of Korea and Japan, the two Asian States that have also voted in favour of the most item 4 resolutions, have sponsored 24 and 22 resolutions each respectively. The Republic of Korea is the only Asian State besides Cyprus to sponsor all the resolutions on the human rights situation in Burma/Myanmar. Japan had played a leading role in propelling the resolutions on the Democratic People's Republic of Korea. Maldives, which had sponsored 8 resolutions, had been a regular supporter of the early resolutions on Iran. It appears to have recently reversed its position on Iran and other country-specific resolutions. Thailand have co-sponsored only two resolutions – both of which were on the situation in Mali.

Compared to the number of Asian States that backed item 4 resolutions, noticeably more Asian States have been willing to sponsor or co-sponsor item 10 resolutions. However, the same Asian States that have sponsored item 4 resolutions, in particular, Cyprus, Japan, Maldives, Republic of Korea and Thailand, are more likely to sponsor item 10 resolutions, too. These States have sponsored more item 10 resolutions than other Asian States such as Indonesia which have been more selective in its sponsorship. At the same time, Asian States, especially China and India, which have been opposed country-specific scrutiny have never sponsored an item 10 resolution further reinforcing their opposition. Item 10 resolutions have also seen more States acting collectively as regional groups and groups based on membership in intergovernmental organisations. Asian States that belong to the Arab group or the Organisation of Islamic Cooperation have acted jointly with others to sponsor several item 10 resolutions. However, unlike other regional groups such as the African or the Latin American groups that have led several resolutions on States in their respective regions, Asian States have not been able to work collectively, with a common position.

CONCLUSION

Creation of the Council 10 years ago was seen as necessary to overcome the challenges of the Commission on Human Rights and meet the expectations of those suffering from human rights violations all over the world. Despite some success, the Council appears to be far from being safe from the pitfalls that eroded the credibility and legitimacy of the Commission on Human Rights. The Council continues to be beset by accusations of politicisation and selectivity in its work. The promise of meeting the expectations of victims remains a distant dream, as the gap between the debates and decision at the Council and realities on the ground grows wider. An examination of important decisions at the Council during its first decade on the rights to freedom of opinion and expression, freedom of assembly and association, and protection of human rights defenders shows that more needs to be done to achieve real impact on the ground. In reality, these fundamental rights as well as those who work to defend these rights are increasingly under attack in a world reeling under a rising tide of populism and authoritarian tendencies.

Rights to freedom of opinion and expression, and freedom of assembly and association, and human rights defenders are usually the first casualties of such tendencies. Laws and policies are being enacted in several Asian countries to restrict these basic rights and work of human rights defenders in contradiction to international human rights obligations as well as decisions of the Council. Over the past two years alone, Asia has seen an increasing proliferation of laws and policies that significantly restrict these basic rights, both online and offline. Civil society and human rights defenders have faced increased threats on the pretext of protecting sensitivities of majority populations or national security from both State and non-State actors.

In the meanwhile the Council has seen increasing attempts to rollback existing international human rights standards and infrastructure, with considerable support from Asian States. There has been an unprecedented increase in attempts to subterfuge key resolutions, especially those related to freedom of opinion and expression, freedom of assembly and association and human rights defenders. An increasing tendency to propose negative amendments to resolutions has focused on contradicting and subverting international human rights standards and affirming the supremacy of domestic laws that are inconsistent with international standards – with the ultimate aim of justifying and legitimising increasingly repressive domestic measures. Most of these attempts have so far failed on the floor of the Council. But the fact that many of the established human rights principles are increasingly being questioned or challenged at the world's principal human rights body is alarming and indicative of bleak prospects for global human rights discourse. This trend reflects the proliferation of repressive legislation and policies against freedoms of expression, assembly and association, and human rights defenders. Majority of Asian States have consistently supported most of these attempts through their vote and sponsorship.

Pervasive secrecy around foreign policy in most Asian States have ensured that States are rarely held accountable for their decisions at international platforms, allowing them to act in accordance with narrow political exigencies rather than the broader interests of their peoples. For decisions of the Council to have any meaningful positive impact on the ground member and observer States should take positions that genuinely advance human rights and reflect realities on the ground. It is essential that governments are held accountable for these decisions by the people who elect them – civil society and democratic bodies such as Parliaments have an important role to play in this. Often in regions such as Asia, due to lack of information and awareness, international positions taken by States escape domestic scrutiny – even when they contradict domestic laws and Constitutions. At the same time in an increasingly interconnected world, dominated by competing geopolitical interests, international positions and decisions on issues such as human rights can have significant consequences at the domestic level.

Therefore it is essential that civil society and the public scrutinise foreign policy positions of States on human rights and demand greater transparency and accountability. Foreign policy is public policy and it is critical in a democratic society that it remains transparent and accountable to the public – especially on issues such as human rights. This paper shows that key issues such as freedoms of association, assembly and expression as well as human rights defenders are topics that see poor foreign policy performance in Asia. A similar weakness exists in Asian States' foreign policy approach to grave and serious human rights situations. These are areas that need greater scrutiny by Asian civil society, the public and Parliaments.

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