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THE ROLE OF ARGENTINA IN THE HUMAN RIGHTS COUNCIL

Dottorando
Carlos Sebastian Rosales*

Tutor
Carmela Panella

* The views and opinions expressed in this work are those of the author and do not necessarily reflect the official policy or position of any agency of the Argentine government.

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ACRONYMS AND ABREVIATIONS.

Commission: United Nations Commission of Human Rights.

COE: Council of Europe.

Council/HRC: United Nations Human Rights Council.

DDPA: Durban Declaration and Program of Action on Racism, Racial Discrimination, Xenophobia and Related Intolerance

ECOSOC: United Nations Economic and Social Council.

European Convention: European Convention of human rights and fundamental freedoms

European Court: European Court of Human Rights.

EU: European Union.

GA: United Nations General Assembly.

GRULAC: Latin American and Caribbean States.

G-77: Group of 77 States.

IGWG: Intergovernmental Working Group.

Inter-American Commission: Inter-American Commission on Human Rights.

Inter-American Court: Inter-American Court of Human Rights.

OAS: Organization of American States.

OAS Charter: Charter of the Organization of American States.

OHCHR: Office of the High Commissioner for Human Rights.

OIC: Organization of Islamic Conference.

OSCE: Organization for Security and Cooperation in Europe.

Rome Statute: The Rome Statute of the International Criminal Court.

Set of Principles against Impunity: Set of Principles for the protection and promotion of human rights against impunity of gross human rights violations and serious violations of international humanitarian law.

Set of Principles on Reparations: United Nations Set of Principles and Guidelines on Remedies and Reparations for victims of gross human rights violations and serious violations of international humanitarian law.

SC: United Nations Security Council.

SP: Special Procedures.

Sub-commission: Sub-commission on the promotion and protection of human rights of the United Nations Commission on Human Rights.

Universal Declaration: Universal Declaration on Human Rights and Fundamental Freedoms of the United Nations.

UN: Organization of the United Nations.

UN Convention on enforced disappearances: International Convention for the Protection of All Persons from Enforced Disappearance.

UN convention against torture: International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

UPR: Universal Periodic Review.

WEOG: Western European and Others Group.

WG: Working Group.

1503 Resolution: ECOSOC Resolution 1503 establishing a communications procedure.

INTRODUCTION.

The genesis of the universal human rights system is closely linked to the creation of the Organization of the United Nations (UN). An institutional framework was developed under the umbrella of the UN Charter, which gave competences in the field of human rights to a series of inter-governmental bodies, including in particular the Commission on Human Rights.

The Commission was established in 1946 through a resolution adopted by the United Nations Economic and Social Council[1] and, gradually, it developed a vast and complex system for the promotion and protection of human rights, which included a Sub-commission of experts, a complaint mechanism and a system of special procedures.

For decades, one of the main contributions of the Commission was the development of international human rights law.[2] Indeed, many core UN human rights treaties were elaborated by the Commission. This inter-governmental body also had a remarkable role in the elaboration and development of international human rights standards through the adoption of several declarations, sets of principles or guidelines and resolutions. Its role in soft law contributed to the advancement in sensitive issues where there was no consensus to establish binding international instruments.

Furthermore, following the broadening of its mandate in the late 1960s, the Commission could start addressing specific human rights situations of grave concern when there was political consensus to do so. This important work was done through the establishment of specific mechanisms both of a public and confidential nature. The first public mechanism was designed to discuss human rights violations[3] and soon it was followed by a confidential procedure, widely known after the name of the resolution that created it: the 1503 procedure.[4] The process of decolonization helped to deal with specific issues of international

[1] United Nations Economic and Social Council Resolution 9 (II).
[2] Alston, Philip et al., "International Human Rights. The successor to International Human Rights in Context: Law, Politics and Morals", Oxford University Press, 2013, pages 701-702; Abraham, Meghna et. al. "A new chapter for human rights. A handbook on issues of transition from the Commission on Human Rights to the Human Rights Council", International Service for Human Rights and Friedrich Ebert Stiftung, June 2006, page 10, available at http://library.fes.de/pdf-files/bueros/genf/04375.pdf; Scannella, Patrizia and Splinter, Peter, "The United Nations Human Rights Council: A promise to be fulfilled", Human Rights Law Review, Volume 7, Issue 1, January 2007, page 41.
[3] United Nations Economic and Social Council Resolution 1235 (XLII).
[4] United Nations Economic and Social Council Resolution 1503 (XLVIII).

concern which were rejected by Great Powers such as the Apartheid and the territories occupied by Israel.[5]

Through their reports and oral presentations during the Commission's sessions, mandate-holders from the system of special procedures and other mechanisms gradually contributed to addressing the implementation of human rights norms and standards by UN Member States. In this regard, the Commission also provided capacity building and technical assistance to Governments.[6]

Despite its relevant heritage, in 2006, 60 years after its establishment, the Commission ended its work immerse in a context of discredit and extreme politicization and was replaced by the Human Rights Council. Key particular events were at the core of the international decision to extinguish this body. In its final years, the Commission's membership included States whose governments were accused of grave human rights violations. In 2003, Libya assumed the Presidency of this body, which was severely questioned by many stakeholders; and there were crossed accusations between States from the northern and southern hemisphere regarding selectiveness in dealing with human rights situations at a time where both groups had countries with negative records which were not considered at the Commission during the 2000s.[7]

The Human Rights Council was the result of a strategic proposal of the then UN Secretary-General, Kofi Annan, who reaffirmed the three main pillars of the Organization in line with the Charter: peace and security, development and human rights. In this context, he decided to push for the creation of a new body as the one that was finally created.[8]

Since its establishment by the General Assembly through resolution 60/251 of 2006, the Human Rights Council has been the main United Nations intergovernmental body tasked exclusively with the promotion and protection of the rights and freedoms of individuals.

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[5] Donnelly, Jack, "International human rights, Second Edition", Westview Press, 1998, page 9.
[6] Office of the United Nations High Commissioner for Human Rights, "Human rights Commission archives", "About the Commission", "Background Information", "Advisory services and technical cooperation", available at: https://www.ohchr.org/EN/HRBodies/CHR/Pages/Background.aspx
[7] Alston, Philip, "Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council", Melbourne Journal of International Law, 2006, pages 1-3, available at: http://www5.austlii.edu.au/au/journals/MelbJIL/2006/9.html
[8] Report of the United Nations Secretary-General, "In larger freedom: towards development, security and human rights for all", UN Document A/59/2005, 21 March 2005, page 67.

There were enormous expectations regarding this new body and its innovative characteristics, which included its standing nature, the procedure for the election of its members, and, in particular, the possibility to establish a mechanism to avoid selectiveness in dealing with country situations.[9] The main question at its review, in 2011,[10] and even now, almost a decade and a half after its creation, is whether or not the Council has lived up to the expectations.

There have been negative preliminary assessments about the initial work of the body by both States and civil society stakeholders, including scholars and representatives of non-governmental organizations, in part because it was not able to overcome the politicization and selectiveness of its predecessor.[11]

Even if there were relevant changes that improved significantly the system (i.e. the composition of the new body, the periodicity of its sessions, the possibility to hold special sessions and the establishment of the universal periodic review), the very nature of an intergovernmental body prevents it from moving away from politicization at least in a conclusive way.

Nevertheless, the Human Rights Council should not be underestimated. The political and legal relevance of an international body, composed of States with different legal backgrounds and cultures, should be highlighted as it has been able to successfully deal with country situations when there has been a right political constellation and also because it has contributed to the development of international norms and standards which have global recognition, legitimacy and the potential to be applied worldwide.

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[9] United Nations General Assembly Resolution A/RES/60/251, preambular paragraph 9 and operative paragraphs 1 and 5.e.

[10] United Nations General Assembly Resolution A/RES/65/281.

[11] Freedman, Rosa, "The United Nations Human Rights Council: A critique and early assessment", Rutheless Ed., 2013, pages 391 to 400; Amnesty International "Ten years of the United Nations Human Rights Council", Remarks by Salil Shetty, 2016, available at: https://www.amnesty.org/en/latest/news/2016/02/10-years-of-the-united-nations-human-rights-council/; Human Rights Watch, "Curing the selectivity syndrome. The 2011 Review of the Human Rights Council", 2011, available at: https://www.hrw.org/sites/default/files/reports/hrc0610webwcover.pdf; Baehr, Peter "The Human Rights Council: A Preliminary Evaluation", Netherlands Quarterly of Human Rights, Vol 28/3, Netherlands, 2010, pages 329-331; The Telegraph, "United States withdraws from the UN human rights council as criticism mounts over border policy", 20 June 2018, available at: https://www.telegraph.co.uk/news/2018/06/19/united-states-announce-withdrawal-un-human-rights-council; New York Times, "Trump Administration withdraws from the Human Rights Council", 19 June 2018, available at: https://www.nytimes.com/2018/06/19/us/politics/trump-israel-palestinians-human-rights.html

More than seventy years after the revolutionary irruption of international human rights law, which put into question or at least re-shaped many widely accepted and founding principles of international law (i.e. sovereignty, non- intervention in domestic affairs of other States and the exclusive centrality of States as subjects of international law), it is harder for any State today to invoke those principles in absolute terms when dealing with human rights issues. This is the reason why, irrespective of its agenda, every single State of the United Nations is encouraged to have a human rights policy at the national and international levels. It is in their interest to do so, as it is in their interest also to try to participate actively in the elaboration of international human rights norms and standards.

The Human Rights Council has successfully continued the role of the Commission as the principal legislative body at the international level in the field of human rights and it has become in practice the most important forum for single States, regional blocs and other groups to develop their priorities in terms of foreign policy in human rights. This could have been different if one considers that the United Nations composition is at present much more diverse and complex than the one existent in 1946. However, the vast majority of States from all over the world still consider it essential to have a say in the Council.

In this context, the Council has taken stock and reflected on some norms and standards which were developed first in regional systems (such as the Inter-American, European or African systems for the protection of human rights), in countries belonging to a regional group or to thematic blocs (like the Organization of the Islamic Conference) and even in some specific countries with strong national agendas and policies in human rights like Argentina. The creation of new human rights norms and standards is now much more complex than decades ago, when the process to elaborate and adopt such norms and standards was mainly dependent on a smaller and more compact group. In this context, it should be highlighted that this practice has a positive and continuous effect: the progressive development of international human rights law.

The present work aims at exploring how an individual State is able to contribute decisively to the work of the Council in one of the main successes of this still relatively new United Nations body: the elaboration of international human rights norms and standards. Argentina will be studied as a relevant example in this regard. During the last 40 years, it radically changed from defending itself from accusations of serious human rights violations to being

deeply committed to the promotion and protection of human rights at the national level. This was translated into a very active foreign policy in the field of human rights, which contributed to the development of international human rights norms and standards on issues such as the right to the truth, the fight against impunity for cases of gross human rights violations such as enforced disappearances, and the rights of LGBTI individuals.

As a starting point, Chapter I will provide a description of the main features of international law, including in particular international human rights law, as well as of the international framework to then analyze the universal human rights system for the protection of human rights. This will provide a clear picture of the importance of the Human Rights Council as the main universal body dealing with human rights issues, while at the same time will address some of its limitations, particularly considering the important progress made at the regional level.

Chapter II will explore in depth the transition that led to the creation of the Human Rights Council and its main changes vis-à-vis the former Commission on Human Rights. It will also describe the principal mechanisms of this body and, finally, it will make a preliminary balance of the work of the Human Rights Council 14 years after its creation.

Chapter III will provide the elements needed to explore the importance of the role of specific State actors in the outcome of this body: regional blocs, thematic blocs and individual States. It will focus in the role of the Republic of Argentina as a case study. In particular, the thesis will study Argentina's role in the Human Rights Council through the analysis of its position during the creation of the Council in 2006, its review in 2011, and its main initiatives in this body from its creation until present.

Chapter IV will describe relevant legislative and institutional measures taken in the last four decades by Argentina and will assess the country's role in the Human Rights Council considering civil, political, economic, social and cultural rights as well as the importance of its vibrant and solid civil society.

Finally, the last chapter will draw conclusions regarding the Human Rights Council, its functions, content and potential as well as the role of specific actors, such as Argentina,

which have had and could impact in the international human rights system, including in particular the development of international human rights law and standards.

PART I. INTERNATIONAL HUMAN RIGHTS LEGAL AND INSTITUTIONAL FRAMEWORK.

I.1 International legal framework.

I.1.1 Origin and fundamentals of international law.

As the main objective of the present work is to assess how the Human Rights Council has contributed to the development of international human rights law through the action of an individual State, it is worth describing relevant aspects of international law, which encompasses international human rights law.

Originally, international law was conceived to be restricted to relations among States and did not recognize any rights to individuals. Even if certain norms and rules were developed among ancient civilizations to regulate their common interaction, international law was recognized as a separate object of study since the latter part of the sixteenth century, in line with the development of the modern European State system after the Peace of Westphalia.[12]

In this context, different theories were elaborated regarding the foundations of international law, including in the fields of the philosophy of law and international relations.[13] From the perspective of the philosophy of law, the starting point is challenging: to define whether international law should be really considered law or a set of moral, political and social norms.[14]

One of the main criticisms made by skeptics about the issue is based on the lack of a hierarchical order at the international level; in other words, the absence of an authority that is superior to States. This situation is said to provide States with an enormous margin of discretion whether or not to respect those binding rules which they voluntary accept.[15]

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[12] Clapham, Andrew, "Brierly's law of nations. An introduction to the role of International law in International Relations", Oxford University Press, Seventh Edition, 2012, pages 23 to 44. See also Freeman, Mark et al., "Essentials of Canadian Law. International Human Rights Law", Irwin Law Inc, Canada, 2004, pages 3-5.

[13] Pinto, Mónica, "El derecho internacional. Vigencia y desafíos en un escenario globalizado", Fondo de Cultura Económica SA, 2004, pages 47-59.

[14] Besson, Samantha and Tassioulas, John, "Philosophy of International Law", Oxford University Press, 2010, pages 6-9, available at: https://iuristebi.files.wordpress.com/2011/07/the-philosophy-of-international-law.pdf.

[15] In this school of thought, we can mention John Austin (1790-1859), who considered international law in the nineteenth century as a system of commands and not of law. See in this regard Orakhelashvili, Alexander,

In response to skeptics, other scholars have emphasized that international law has a different nature because it is a law of coordination but not of subordination. This is based on the fact that States do not recognize an executive, legislative or judicial branch superior to them as it happens in domestic legal systems, where persons are subject to the jurisdiction of a particular State.[16] According to this view, known as a dualistic approach, it is necessary to adopt specific measures at the domestic level for any of these international norms to be considered enforceable.

In fact, the question of the legality of international law based on the lack of hierarchy among subjects of international law could have been argued in the past, when the only existent paradigm was that of the law applied at the national level. However, the current development of international law seems to no longer support this position.[17]

At present, the domestic law of any given State is not self-contained and it is difficult to understand it separately from international law. There is no choice but to interpret it in a holistic and complex way. The fact that States have no superior authority does not undermine their obligation to respect and comply with international norms as main subjects of international law.[18]

Even more, in an inter-related world, international norms -although not ratified and, as a consequence, not obligatory for a particular State-, could have consequences for this State and its nationals.[19]

"Akehurst's Modern Introduction to International Law", Eighth Edition, Routhledge, Taylor and Francis Group, 2019, pages 4-5.

[16] Sudre, Frédéric, "Droit européen et international des droits de l'homme", Presses Universitaires de France, 13rd Edition, 2016, page 23. See also, Weckel, Philippe, "Les droits fondamentaux et le droit international public", in Flauss J.F. et al. -Comp-, "Le droit des organisations internationales. Recueil d'Études à la mémoire de Jacques Schwob", Establissements Bruylant, 1997, pages 133-134.

[17] Besson, Samantha and Tassioulas, John, "Philosophy…", Ibid, pages 8-9.

[18] Clapham, Andrew, "Brierly's law of nations…", Ibid, pages 44 to 54.

[19] One example could be the case of the main power of the international community, the United States, which opposed to the establishment of the International Criminal Court and, for this reason, the respective treaty, which created the Tribunal and determined its competences, is not applicable to this country. Nevertheless, the United States have recognized the fact that the majority of States have ratified the Rome Statute, took note of its implications and, therefore, has tried to subscribe bilateral agreements to provide special protection to its soldiers when performing military activities abroad. See Pinto, Mónica, "El derecho internacional…", Ibid, page 59.

Other major critiques include the lack of enforcement and the absence of effective compliance.[20] Regarding the alleged lack of enforcement, it should be said that breaches to international norms have concrete consequences in terms of international responsibility. Good examples are the existence of international tribunals with well-established jurisprudence such as the International Court of Justice, the International Criminal Court, the International Tribunal for the Law of Sea, and the Permanent Court of Arbitration.

Those tribunals are in a position to enforce international law and have contributed to the consolidation of international law. There are also ad hoc tribunals, which have contributed to address impunity for serious crimes committed in some States.[21] It is also worth mentioning that there is a growing tendency to solve disputes on trade and investments through arbitration according to international law within the framework of the World Trade Organization and the International Centre for the Settlement of Disputes.[22]

It could be argued, however, that this improvement has its limitations due to the fact that the competence of these tribunals or mechanisms has to be expressly recognized by States. It, therefore, remains fundamental that States incorporate international law in their domestic legal order or decide to apply it directly through their competent authorities, including national judicial systems.

Nevertheless, there are other enforcement mechanisms at the international level provided by international law, which can be applied even against the consent of a given State under specific circumstances. In this sense, the United Nations Security Council is able to take immediate and compulsory decisions under chapter VII of the Charter, which even allows the conduct of legitimate military operations in response to any situation that affects international peace and security.[23] Therefore, there are sufficient elements to affirm that international law has a series of enforcement mechanisms that, while disperse and not hierarchical, can be effectively applied to States under specific circumstances.

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[20] Besson, Samantha and Tassioulas, John, "Philosophy…", pages 11-12.
[21] United Nations, "Uphold International Law", "Courts and Tribunals", available at https://www.un.org/en/sections/what-we-do/uphold-international-law/.
[22] World Trade Organization, "Understanding on Rules and Procedures Governing the Settlement of Disputes", available at: https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm and Convention of the Settlement of Investments Disputes between States and nationals of other States, 1966, available at: https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx.
[23] Charter of the United Nations, articles 23-32.

Regarding critiques on the lack of compliance of international law, it is worth mentioning that even powerful States justify and defend their actions when there is an alleged breach of international law. In sum, today, no single State is able to dismiss international norms without legal, political and even economic consequences.[24]

International law has not only been considered just as a political, moral or social concept by skeptics. Since the XVII century, when the European State system was consolidated, and even before, several scholars gave grounds to this new emerging body of law on a more positive tone.

Since the Roman era, the term *ius gentium*, even if it was part of Roman internal law, was applied to relations among Roman and foreign citizens and relations among States. In the XVI century, Francisco de Vitoria (1483-1546) and Francisco Suarez (1548-1617) stated that the foundations of the *ius gentium* came from natural law. Its validity was understood under the premise of faith and an ideal of eternal and universal justice. De Vitoria used the term *ius gentium* from Roman jurisprudence and applied it to the relations among nations. Vitoria tried to find a law applicable to the expansion of the Spanish Empire in America. Suarez introduced the term *inter gentes* which is applied to emphasize the centrality of States in creating international law.[25]

Hugo Grotius (1583-1645) is often considered as the founder of international law. Whilst natural law was considered to have a divine basis, Grotius founded its existence in the need to have rules for the preservation of society and emphasized the importance of customary norms. As a consequence, he fostered its laicization. [26]

As from the XVII century, the emphasis was no longer placed on an abstract ideal of justice but rather on positive law, which varies in time and could be different in diverse places. Emerich von Vattel (1714-1767) made a key contribution when he based the validity of international law in State consent. The positivist approach influenced the majority of scholars

[24] Besson, Samantha and Tassioulas, John, "Philosophy…", Ibid, pages 13-15.
[25] Orakhelashvili, Alexander, "Akehurst's Modern Introduction…", Ibid, page 2.
[26] Gross, Leo, "The Peace of Westfalia", in Gross Leo (Ed) "International law in the twentieth century", Appleton Century Crofts, pages 31-46. See also Pinto, Mónica, "El derecho internacional…", Ibid, pages 47-50.

ever since and has prevailed for centuries. Even today it is the basis of mainstream thinking in modern international law.[27]

State consent is an essential condition to regulate relations among sovereign States. Sovereignty means that States are legally on an equal footing at the international level and not subject to a higher political authority. Legal scholars have paid particular attention to the issue of sovereignty which is essential for international law because many of its core principles rely heavily on this concept –i.e. non-intervention in domestic affairs, territorial integrity, sovereign immunity.[28] Notwithstanding its importance, it is also generally recognized that if it is applied in absolute terms it could be lethal for the compliance of international law because it would depend just on the State's will to do so.[29]

To sort out the margin of discretion of sovereign States, Dionizio Anzilotti (1867-1950) affirmed that fundamentals of international law reside in the principle that agreements must be complied with, known as *pacta sunt servanda.* A radical departure from the consensual approach –which placed the State consent at the center of international law- arrives with Hans Kelsen (1881-1973), who based international law on a norm of hypothetical nature at the top of a normative pyramid that admits no demonstration.[30] Sociologists such as Nicolas Politi (1872-1942) also defined international law as a social product and founded it in people's consciousness.[31]

A different approach on the fundamentals of international law stems from the perspective of political science and foreign policy scholars. Before World War II, political scientists adopted a formalist approach that focused on the content of international norms and judicial decisions (e.g. Gettel 1910; Wright 1922). Later, the realist theory prevailed and political scientists focused solely on State power and did not assign importance to international law, which was only considered as an instrument of power if needed (e.g. Morgenthau 1940-48). This approach, however, did not explain the fundamentals of international law and was

[27] Orakhelashvili, Alexander, "Akehurst's Modern Introduction…", Ibid, pages 2-15.
[28] Barreiros, Lucas, "El derecho internacional contemporáneo y el problema de la soberanía. Un intento de reconciliación", in Pinto, Mónica, "Las fuentes del derecho internacional en la era de la globalización", Editorial Eudeba, 2009, pages 80-89. See also Donnelly, Jack, "International human rights…", Ibid, pages 3-4.
[29] Diez de Velasco Vallejo, Manuel, "Instituciones de derecho internacional público", Tecnos, Sixteenth Edition, pages 276-278. See also Gross, Leo, "The Peace of Westfalia…", Ibid, page 44.
[30] Gross, Leo, "The Peace of Westfalia", Ibid, pages 44-45. See also Pinto, Mónica, "El derecho internacional…", Ibid, pages 50-51.
[31] Pinto, Mónica, "El derecho internacional…", Ibid, pages 52-53.

gradually replaced by other theories, including the decision-making theory and systems-theory (e.g. Falk 1970; Kaplan 1961).

Another perspective more related to legal scholars was the one that focused on case-study research relating to the role of international law in international conflicts (e.g. Henkin, 1979, Boyle 1985). A current interdisciplinary approach of international law and international relations is a joint work of legal scholars and political scientists and is based on three theories which tend to respond to skeptics related to realism: institutionalism (e.g. Keohane 1984-1997), constructivism (e.g. Onuf 1989) and liberalism (e.g. Moravcisk 1997). The content of these theories is vast but focuses mainly on three topics: the creation of international law (e.g. Finnemore and Sikkink 1998; Sandholtz 2007), State compliance with international law (e.g. Simmons 2000) and international courts (e.g. Alter 2014). These theories continue evolving.[32]

I.1.2 Notion, sources and subjects of international law.

At present, international law is the body of law which not only defines rights and obligations between States but also the rights of individuals subject to their jurisdiction. International law now encompasses a wide range of issues of international concern –e.g. the use of force, the treatment of prisoners, the conduct of war, disarmament, human rights, refugees- and global commons –including environment, outer space, trade and development.[33]

Article 38 of the Statute of the International Court of Justice recognizes three sources of this body of law: international conventions, international customary law and general principles of international law. This article further considers judicial decisions and the teachings of the most highly qualified publicists of different countries as subsidiary means for the determination of rules of law.[34]

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[32] See for example, Whytock, Christopher A., "From International Law and International Relations to Law and World Politics", University of California, Irvine School of Law and Department of Political Science [2/12/2016 Draft] Forthcoming in "Oxford Research Encyclopaedia of Politics: The politics of law and the judiciary", William Thompson & Keith E. Whittington eds, 2016, available at: https://www.law.uci.edu/faculty/full-time/whytock/whytock-il-021216b.pdf

[33] United Nations, "Uphold International Law", "What is International Law?", available at: https://www.un.org/en/sections/what-we-do/uphold-international-law/

[34] Kennedy, David, "The Sources of International Law", American University, International Law Review 2, no. 1, 1987, pages 1-96, available at: http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1632&context=auilr

As a general rule, a State is bound by the obligations that it voluntarily accepts vis-à-vis other States. This is why a relevant part of international law derives from international conventions or treaties, which States decide to become parties to. Treaties are written agreements concluded between two or more States -or between States and International Organizations or between International Organizations- whereby parties establish, or seek to establish, a relationship governed by international law between them.[35]

Nevertheless, there are some other cases where States could be bound even when they did not expressly accept those international norms. This could be the case of certain international customary norms or general principles of international law. International customary norms require two main elements: a generalized practice in this regard and also an *opinio iuris* –i.e. wide legal acceptance of this specific norm. These elements depend, to a great extent, on judicial interpretation.

The traditional approach of the International Court of Justice (ICJ) to identifying a rule of customary international law has been to rely on the *opinio iuris* (e.g. North Continental Shelf Cases, 1969).[36] This *opinio iuris* can be found, for instance, in principles, declarations and resolutions widely accepted by States. Lately, the International Court of Justice (ICJ) has required that the *opinio iuris* be confirmed by State practice. In other words, the tribunal emphasizes that it is important to focus on what States do more than what they say. However, the ICJ indicates that a contrary practice to this general tendency does not undermine the establishment of a rule except under certain conditions (Military and paramilitary activities in Nicaragua Case, 1986).[37] The approach is subject to debate and the ways to identify these norms will probably continue to evolve in time.[38]

There are two exceptions where there is no discussion about the obligatory nature of international customary norms. One of them are the obligations owed to the international community as a whole, known as *erga omnes*, because there is a universal interest in the protection of a specific right. The concept of obligations *erga omnes* has been expressly

[35] Vienna Convention on the Law of Treaties, 1969, article 2.
[36] North Sea Continental Shelf Cases, International Court of Justice, Judgement of 20 February 1969, paragraph 77.
[37] Case concerning military and paramilitary activities in Nicaragua, International Court of Justice, Judgment of 27 June 1986, paragraphs 184-186.
[38] Kamminga, Menno, "Humanisation of International Law" in "Changing Perceptions of Sovereignty and Human Rights, Essays in honour of Cees Flinterman", Intersentia, Antwerp-Oxford-Portland, 2008, pages 33-35.

recognized by the ICJ.[39] Indeed, this concept is one of the few human rights notions developed by this tribunal.[40] The other type of norms accepted and recognized by the international community of States from which no derogation is permitted are known as *ius cogens*.[41] These have been expressly consecrated in international law instruments.[42]

The existence of these norms is undeniable; its content, however, is still subject to interpretation.[43] This has not impeded international human rights courts,[44] and other international[45] and domestic courts[46], to apply them. The ICJ, however, has been more reluctant to refer to the notion in its judgments.[47]

Today, some scholars study the existence and scope of sources of international law beyond those formally included in article 38 of the ICJ Statute.[48] The issue is still under debate and there is no unanimous consensus on the recognition of emerging sources of international law beyond the ones briefly described above.

Regarding legal personality at the international level, States are undoubtedly the main subjects of international law. For a long period of time, they were considered the only ones. Gradually, with the establishment of the League of Nations, and later the Organization of the United Nations, this concept evolved.

In 1946, the Convention on the privileges and immunities of the United Nations awarded legal personality to this organization. In 1949, the ICJ considered that international organizations have capacity, privileges, immunities, and are able to conclude agreements with their Member States. In this context, this tribunal affirmed that this can only be explained on the basis of the possession of legal personality that differs from the one that is attributed

[39] Case concerning the Barcelona Traction, Light and Power Company Limited, International Court of Justice, Judgement of 5 February 1970, paragraph 33.
[40] Kamminga, Menno, "Humanisation of International Law…", Ibid, page 32.
[41] Clapham, Andrew, "Brierly's law of nations…", Ibid, page 502.
[42] Vienna Convention on the Law of Treaties, 1969, article 53; Vienna Convention on the Law between States and International Organizations and between International Organizations, 1986, article 64.
[43] Verdross, Alfred, "Ius Dispositivum and Ius Cogens in International Law", 60: 55-63 (1966), in Gross Leo (Ed), "International law in the twentieth century", Ibid, pages 217-225.
[44] See for instance Al Adsani v United Kingdom, European Court of Human Rights, Judgement of 21 November 2001, paragraph 61.
[45] See for instance, Kadi v. Council, Court of First Instance of the European Communities, Judgement of 21 September 2005, paragraph 226.
[46] See for instance, Ex parte Pinochet (N°3), House of Lords, Judgement of 24 March 1999.
[47] Kamminga, Menno, "Humanisation of International Law…," Ibid, pages 32-33.
[48] Cançado Trindade, Antonio Augusto, "International Law for Humankind", The Hague Academy of International Law. Martinus Nijhoff Publishers, 2010, pages 128-132.

to States.[49] This has been clearly supported and even further developed. In 1989, the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations was adopted and showed the importance of international institutions at the international level.

Nevertheless, some analysts, while recognizing the treaty-making capacity of international organizations, are still reluctant to consider their legal personality. They argue that there is no formal concept of international organization and that the work of these institutions depends largely on the will of the States that form part of them.[50]

There is also an open debate on the legal international personality of individuals.[51] On the one hand, individuals can submit claims before international human rights bodies or tribunals and at the same time they can have, under certain circumstances, international criminal responsibility. On the other hand, human rights are recognized by States at the domestic level and the international systems of protection only function in a subsidiary and exceptional fashion and with the consent of the State. Also, the individual criminal responsibility at the international level is generally attributed to a person with a specific institutional role in a certain State. In this context, even if it is clear that individuals and groups of individuals have at a certain extent rights to be exercised at the international level, the debate is still open regarding their international legal personality.

I.1.3 International human rights law.

The notion of individual rights had its origins in theories of scholars of ancient civilizations, notably from Greece and Rome, which in turn are based on those of Egypt and Sumeria. Nevertheless, it was in the XVII and XVIII centuries that this notion of rights had an early development, in particular through philosophers such as Locke, Montesquieu, Rousseau or Paine, who based this concept on theories of natural law.[52]

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[49] "Reparations for injuries in the Service of the United Nations", International Court of Justice, Advisory Opinion of 11 April 1949, page 174.
[50] Racic, Obrad, "The treaty making capacity of International Organizations: Practice vs Codification Efforts", in Wolfrum Rudiger et al, "Contemporary developments in International Law", Brill Nijhoff, Leiden Boston, 2015, pages 116-137.
[51] Janis, M. W. "Individuals as Subjects of International Law", Cornell International Law Journal: Vol. 17: Iss. 1, Article 2, 1984, available at: http://scholarship.law.cornell.edu/cilj/vol17/iss1/2. See also Pinto, Mónica, "El derecho internacional…", Ibid, pages 15-16.
[52] Freeman, Mark et al., "Essentials of Canadian Law. International Human Rights Law", Ibid, page 5.

Indeed, the notion of individual rights and freedoms was codified by some specific Western countries during the last part of the XVIII century in legal texts, notably, the American Declaration of Independence of the United States in 1776 and the Declaration of the rights of man and the citizen in France in 1789.[53]

For a long period, international law focused on inter-State matters such as territory, State immunity, armed conflicts and the use of force. The rights of inhabitants and citizens of a given State was considered an internal affair of such State and subject exclusively to its domestic law. This did not preclude the fact that, following the principle of reciprocity among States, there was a minimum standard of protection of foreign nationals.[54]

Gradually, the protection of the rights of individuals was considered at a certain extent in international law. In 1864, a group of European States adopted the Convention for the amelioration of the condition of the wounded in armies in the field. This was the founding instrument of international humanitarian law (IHL), which could be defined as a set of rules that seek to limit the effects of armed conflict. IHL protects persons who are not or are no longer participating in the hostilities – and it also restricts the means and methods of warfare.[55] In any case, in its origins, this body of law limited only what a State could do to foreign nationals, not its own nationals or people over whom it exercised colonial rule.[56]

The protection of minorities was also an issue early addressed by the international community. It can be found in the Treaty of Westphalia, in some treaties to protect Christian minorities during the Ottoman Empire, after the fall of some European Empires, and in the Treaty of Versailles and other treaties adopted after World War I. Other major milestones for the protection of all persons were the abolition of slavery in the late 19th century and the recognition of workers' rights in some specific areas.[57]

After World War I, the League of Nations was established. It was an international organization that existed between the two world wars. The League did not regulate specific

[53] Pinto, Mónica, "El derecho internacional…", Ibid, pages 91-92.
[54] Freeman, Mark et al., "Essentials of Canadian Law. International Human Rights Law", Ibid, pages 9-10.
[55] International Committee of the Red Cross, "Advisory Services on International Humanitarian Law", 2004, pages 1-2, available at: https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf.
[56] Donnelly, Jack, "International Human Rights…", Ibid, page 4.
[57] Freeman, Mark et al., "Essentials of Canadian Law. International Human Rights Law", Ibid, pages 10-15.

provisions on human rights, but it developed some specific norms relating to the abolition of slavery trade and freedom of religion, for instance, in colonies of countries that were defeated in World War I. It also established norms for the protection of minorities, in particular in Central and Eastern Europe after World War I. Finally, the League dealt with the protection of workers.[58] In this sense, a specific agency was established as soon as 1919: the International Labor Organization, which still exists today.[59]

Nevertheless, it was only after the horror of Nazism that the international community created the Organization of the United Nations (UN) and decided that there was a need to protect the rights of all individuals beyond the sphere of a given State as well as to develop provisions regarding human rights and freedoms in international law, starting with the United Nations Charter (UN Charter).

The term human rights can be defined as the rights inherent to all human beings, without discrimination, regardless of any status.[60] They have been classified at the international level in two main groups: civil and political rights and economic, social and cultural rights. It was the result of a long division at the international level between Western and Eastern countries during the Cold War era. Western countries pushed for the recognition of public freedoms while Eastern countries emphasized the need to provide social protection to individuals and groups.

In recent decades, there has been a tendency to emphasize their equal importance. The Proclamation of Teheran of 1968 and the Vienna Declaration of 1993 as well numerous United Nations declarations, resolutions and documents ever since have affirmed the universality, interdependence and inter-relatedness of all human rights.

Today, there is general agreement regarding the existence of a specific legal framework called international human rights law as a specific body of international law. International human rights law sets out a series of rights and freedoms for individuals and groups, which have to be fulfilled, respected and protected under the jurisdiction of each State. One of the

[58] Sudre, Frédéric, "Droit européen et international…", Ibid, pages 26 to 28; Pinto, Mónica, "Temas…" Ibid, pages 5 to 9; Pinto, Mónica, "El derecho internacional…", Ibid, pages 80-91; Diez de Velazco, M., "Instituciones de derecho internacional público", Ibid, page 649; Freeman, Mark et al. ,"Essentials of Canadian Law. International Human Rights Law", Ibid, pages 15-18.
[59] Information on the ILO is available at: https://www.ilo.org/global/about-the-ilo/lang--en/index.htm
[60] United Nations, "Shaping our future together", "Human Rights", "What are human rights?", available at: http://www.un.org/en/sections/issues-depth/human-rights.

distinctive characteristics of international human rights law vis-à-vis the rest of issues regulated by international law is that it provides rights to individuals, not to the States, but as part of the international obligations among States.

As a consequence, the State assumes the duty to respect human rights –meaning to abstain from adopting measures which affect the enjoyment of human rights; to protect persons and groups of persons against human rights abuses; and to fulfil human rights –through measures to guarantee its effective realization.

As any other body of international law, international human rights norms are binding when stemming from treaties, international customary norms or principles of law recognized by civilized nations. At the same time, there are international human rights standards in other instruments such as declarations, set of principles and guidelines that contribute to the progressive development of this body of law.

International human rights law was developed internationally and regionally since 1945, mainly through international conventions. From the beginning, it was closely linked to other bodies of international law, such as international humanitarian law or international criminal law. The former because it protects victims of armed conflicts and the latter due to the fact that it establishes individual responsibility to those who commit international crimes, including gross and massive human rights violations as defined by international law such as genocide or crimes against humanity.[61]

According to international human rights law, the State is primary responsible for the protection of human rights under its jurisdiction. In other words, the State has to take legislative and administrative measures to guarantee the full realization of all human rights in its jurisdiction. In fact, several States not only have ratified many international human rights treaties but have also incorporated human rights in their national constitutions or in specific laws.

In case of human rights violations, individuals have the right to an effective remedy and, therefore, should be able to submit claims before national authorities, in particular, domestic courts. In the light of the principle of State sovereignty, any international monitoring system

[61] Sudre, Frédéric, "Droit européen et international…", Ibid, pages 28-34.

of a judicial or quasi-judicial nature will only be in a position to deal with a case if its competence has been previously recognized by the State concerned and only if all available domestic remedies have been exhausted, the application of the remedies is unreasonably prolonged, or no legal remedies are available. The admissibility criteria for every international mechanism may vary, but these general characteristics are applied in the vast majority of cases.

Therefore, the international community only has a subsidiary role in terms of responsibility for the protection of human rights, in cases where the State is unable or unwilling to comply with this responsibility. Nevertheless, this role has been indeed very significant because it has allowed the gradual development of international systems for the protection of human rights through the establishment of an institutional framework at the universal and regional levels.[62]

I.2 International institutional framework.

To fulfill its subsidiary role in terms of human rights, since World War II, the international community, through the development of international human rights law, has gradually established international human rights systems of the protection which have been created within the framework of specific international and regional organizations.

The universal human rights system was developed within the UN system. Regional systems in Europe, America and Africa have also been established, considering their own specificities and cultural affinities. All these systems were created within the institutional framework of a regional organization: the Council of Europe (COE), the Organization of American States (OAS) and the African Union (AU), respectively.[63]

Although there were doubts about the convenience of developing regional systems of protection, especially from the UN perspective given its emphasis on universality, the benefits of having such systems are widely recognized today. Countries of the same region often share common cultural or religious values and tend to have similar legislation and

[62] Office of the United Nations High Commissioner for Human Rights, "International Human Rights Law", available at: www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx
[63] Information on the regional systems of protection is available at their respective websites: Council of Europe, European Court of Human Rights (https://www.coe.int/en/web/tirana/european-court-of-human-rights); Organization of American States (http://www.oas.org/en/iachr/mandate/basic_documents.asp); African Union (www.african-union.org). There is also information available at: https://ijrcenter.org/regional/african/.

policies. They have the advantage of proximity in terms of influencing each other's behavior and promote the implementation of common norms and standards. There is also a general agreement on the approach for enforcement mechanisms, which vary from region to region. In some cases, there is an emphasis on a judicial approach; in others non-judicial mechanisms, such as commissions, have a greater influence.[64]

There is a link of parentage among international or regional organizations and the institutions which form part of the universal and regional systems of protection of human rights. This is so because these institutions have been established by international instruments adopted by the UN (i.e. the Human Rights Council), the Council of Europe (i.e. the European Court of Human Rights), the Organization of American States (i.e. the Inter-American Commission and Court) and the African Union (i.e. the African Commission and Court). Moreover, these organizations elect the members of these institutions and supervise the implementation of their decisions. Nevertheless, as their parent bodies, international and regional human rights bodies have a life of their own and enjoy a great level of autonomy.

There are also some human rights mechanisms in other regions such as Asia (e.g. an intergovernmental commission of human rights of the Association of South East Asian countries)[65] or in a few sub-regions (i.e. the Meeting of High- Level Authorities in Human Rights and Foreign Ministries of Mercosur countries).[66] These mechanisms provide a space for dialogue, the promotion or exchange on human rights issues, the coordination of public policies, and for taking decisions of common interest. Nevertheless, they still do not fall under the category of international systems for the protection of human rights.

This is because international systems for the protection of human rights (both the universal and regionals systems) have some common features: a unified normative framework of a binding nature and control mechanisms composed of experts, rapporteurs, treaty bodies or tribunals. These mechanisms have competence to carry out visits to countries, establish preventive mechanisms, interrelate with civil society and national human rights institutions, make recommendations and/or investigate human rights violations. In some cases, they can

[64] Heyns, Christof et al, "A schematic comparison of regional human rights systems: an update", Sur, Revista internacional de direitos humanos, volume 3, number 4, São Paulo, June 2006, available at: https://dspace.library.uu.nl/handle/1874/309012

[65] Information available at: https://www.asiapacificforum.net/support/international-regional-advocacy/regional-mechanisms/.

[66] Information available at: http://www.raadh.mercosur.int.

even issue compulsory judicial decisions, which can include the obligation to provide reparation for the victims.[67]

Before the Human Rights Council was established at the turn of the new millennium, the universal human rights system had a remarkable normative and institutional development during around six decades.

I.2.1 The universal human rights system.

I.2.1.1 The evolution of the universal human rights system. A starting point: the Charter of the United Nations.

The very existence of the universal human rights system is linked to the establishment of the United Nations in 1945. This system was built on the basis of the UN Charter and soon it developed its own specific framework as a result of its increasing importance within the UN.

The UN Charter was adopted in San Francisco in 1945 and, in its first part, it sets out the objectives of the Organization. Among those, article 1(3) includes the promotion and encouragement of respect for human rights and for fundamental freedoms for all persons without distinction as to race, sex, language, or religion. Article 7 establishes the UN's main bodies: the General Assembly (GA), the Security Council (SC), the Economic and Social Council (ECOSOC), the Trusteeship Council –which in practice finished its work in 1995, the International Court of Justice (ICJ), and the Secretariat.

The competence of the GA regarding human rights stems from articles 10 and 13 of the Charter. In this sense, article 10 entitles the GA to discuss any questions or any matters within the scope of the instrument or relating to the powers and functions of any organs provided for in the Charter. Furthermore, except in cases under consideration by the SC that deal with the question of peace and security, the GA may make recommendations to the Members of the United Nations or to the SC or to both on any such questions or matters. Article 13 is even more specific as it calls for the GA to initiate studies and make

[67] Information in this regard is available at: http://bangkok.ohchr.org/programme/other-regional-systems.aspx

recommendations for assisting in the realization of human rights and fundamental freedoms for all.

The GA has 6 committees. The most important in terms of human rights is the Third Committee on social, humanitarian and cultural issues. Its main advantage is its legitimacy because it is represented by every Member State of the United Nations and every member has a vote.[68] Nevertheless, at the time the Charter was adopted, it was decided that the main body to deal with human rights issues would be the ECOSOC. In this sense, the Charter, under the "chapeau" of economic and social cooperation, provides in article 55(c) that the UN should promote "the universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

In the same direction, according to article 56, all members of the Organization pledge themselves to take joint or separate action to achieve this goal. ECOSOC composition and functions are regulated in Chapter X of the UN Charter (articles 61 to 72). At the procedural level, article 68 provides that it would "set up commissions in economic and social fields and for the promotion of human rights" as well as other commissions as needed.

There is also a reference to the respect of human rights without discrimination in article 76(c) relating to the competences of the extinct International Trusteeship system established at the time for territories under control of foreign powers. In some cases, the SC also has competence on human rights issues in situations where there is a threat to peace and security.

Even if some of these bodies have had, or still have, regular competences in the field, at the outset, article 68 of the Charter was the key provision that allowed ECOSOC to set up the Commission on Human Rights (the Commission) which was its subsidiary body and rapidly became the main body of the system dealing with the matter.

I.2.1.2 The Commission on Human Rights and its 60 years of work. Its role in international law making.

[68] Steiner, Henry and others, "International Human Rights In Context. Law, Politics, Morals", Oxford University Press, Third Edition, 2008, page 739.

The Commission was the most important body of the United Nations on human rights issues for six decades. Its main functions consisted of the promotion of the progressive development of international human rights law and the monitoring of human rights situations in every country of the United Nations. It was also an open space for dialogue and exchange in the field of human rights, including with other stakeholders such as non-governmental organizations (NGOs).

It was established by ECOSOC Resolution 5 (1) of 16 January 1946, and complemented by ECOSOC Resolution 9 (III) of 21 June 1946, with the mandate to elaborate an International Bill of Human Rights, elaborate declarations and conventions on issues related to rights and freedoms, including rights of women and prevention of discrimination, among other issues.[69]

In 1946, during its first session, the so called "nuclear" Commission for one single time was composed of relevant personalities from different countries, including Eleanor Roosevelt and Rene Cassin. The vast majority of these personalities recommended that the new body be composed of experts,[70] but this was not accepted by the ECOSOC, which decided that the composition would be at the level of State representatives. The ECOSOC also decided that the Commission would be a technical body.[71]

This decision was expected because it was difficult to concede control over sensitive issues such as human rights.[72] Eventually, it was also a positive decision because the participation of State representatives was needed to secure legitimacy in decisions taken by the Commission, in particular in the elaboration of international human rights norms and standards.[73]

The composition of the Commission progressively extended. From 18 members in 1962, 32 in 1967, and 43 in 1980, it reached 53 in 1992. This extension followed the process of

[69] Pinto, Mónica, "Temas…", Ibid, pages 155-156.
[70] United Nations Commission on Human Rights, First Session, Report to the Second Session of the Economic and Social Council, UNESCOR, UN Document E/RES/5(1) 1946.
[71] United Nations Economic and Social Council Resolution 9 (II), art. 2.
[72] Alston, Philip, "Reconceiving the UN Human Rights Regime: Challenges confronting the new UN Human Rights Council", 2006, MelbJIntLaw 9, 7 (1) Melbourne International Law 185, page 2, available at: http://www5.austlii.edu.au/au/journals/MelbJIL/2006/9.html.
[73] Boyle, Kevin, "The United Nations Human Rights Council: Origins, antecedents and prospects", in Boyle, Kevin, ed, "New Institutions for Human Rights Protection", Oxford University Press, 2009, in Mallory Conall, "Membership of the UN Human Rights Council", Canadian Journal of Human Rights, 2013, 2:1 Can J Hum Rts, page 5.

decolonization that made it necessary to have a more equitable geographic distribution in terms of representation.[74] The Commission had a six-week annual session, generally during the months of March and April at the United Nations Office in Geneva.

Its mandate changed over time. According to its founding ECOSOC Resolution 5/1, it was tasked to develop norms regarding human rights. This meant to include a declaration, a convention and implementation measures. At the beginning, the mandate did not allow the Commission to address specific human rights situations.

The role of the Commission in international law-making was a significant one within the UN. To put this into context, it should be considered that modern international law is elaborated mostly through diplomatic processes in international organizations, including the UN. International law is also developed through commissions, conferences or meetings of the State parties of multilateral treaties and international conferences (i.e. Rome Conference of 1998 that adopted the Rome Statute of the International Criminal Court).[75]

The GA can convene law making conferences –and later endorse its results, adopt treaties, and initiate codification processes. It has an expert body, the International Law Commission (ILC), which is in charge of the codification of international law. However, in practice, other UN bodies also do that. For instance, the ILC drafts are later negotiated by the GA's sixth committee, but this body does not address the codification of all international norms such as international human rights norms. Proposals for law-making generally originate in UN bodies -e.g. GA first and sixth committees- or subsidiary bodies –e.g. the former Commission on Human Rights- or in a specialized agency –e.g. the Food and Agriculture Organization.[76]

The law-making process involves the decision to promote a specific instrument, followed by deliberations on its convenience, the elaboration of a draft text, and the adoption of the text by States. States and intergovernmental organizations led by States have been the main actors in the international law-making processes. Some non-State actors, in particular NGOs,

[74] Schrijver, Nico. "The UN Human Rights Council: a new 'society of the committed' or just old wine in new bottles?", in: Skouteris, Thomas and Vermeer-Kunzli, Annemarieke (eds.), "The protection of the individual in international law: essays in honour of John Dugard", Cambridge, Cambridge University Press, 2007.
[75] Boyle, Alan et al., "The making of International Law", Oxford University Press, 2007, pages 98-162
[76] Boyle, Alan et al., "The making of …", Ibid, pages 116-117.

provide relevant inputs to many processes. In some cases, such as the ILO, there is a role for other actors, notably employers and trade unions.

For 60 years, several international human rights treaties were negotiated and adopted within the Commission and later endorsed by the ECOSOC and the GA. Its first major achievement came with the elaboration of the Universal Declaration of Human Rights, formally adopted by the GA on 10 December 1948. It was a landmark instrument at the international level because it provided a global catalogue of human rights.

After finalizing this task, the Commission was committed for two more decades in the elaboration of two treaties that ended up in the adoption of two instruments in 1966: the International Covenant on civil and political rights and the International Covenant on economic, social and cultural rights. It took a long time to adopt these Covenants because the exchanges and discussions were influenced by the Cold War. Indeed, Western countries promoted civil and political rights (i.e. the right to life, integrity, due process, freedom of expression) while Eastern countries pushed for the development of economic, social and cultural rights (i.e. the right to health, education, housing). These two instruments finally came into force over a decade later, in 1976. The Universal Declaration and the two Covenants are generally known as the "International Bill of Human Rights".[77]

Even if the Commission had a leading role in the progressive development of international human rights law, some other bodies worked on the elaboration of norms and standards relating to human rights issues such as the Commission on the condition of women or the GA. For instance, the GA was the main arena where the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families were negotiated and eventually adopted.[78]

Nevertheless, since the late 70s, many human rights conventions were elaborated and negotiated within the Commission. These conventions addressed several pressing human rights issues: the fight against racial discrimination, the rights of the child, and the fight

[77] Office of the United Nations High Commissioner for Human Rights, Factsheet No. 2 (Rev.1), "International Bill of Rights", United Nations Geneva, 1996, page 1, available at: https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf.
[78] Boyle, Alan et al., "The making of…", Ibid, page 121.

against torture, inhuman or cruel and degrading treatment, among others.[79] These new treaties gave added international prominence to the rights they address because they have greater range, precision and force than the Universal Declaration and the Covenants. [80] In general, these single-issue treaties and the committees they established coexist with non-conventional mechanisms dealing with the same issues –for example, special procedures of the Commission- or other related mechanisms –e.g. the UN fund for victims of torture.[81]

At the beginning and with the exception of the Universal Declaration of Human Rights, the normative work of the Commission mainly focused on "hard law", that is a normative framework of a binding nature, notably through international treaties. Gradually, the work also included a remarkable development of "soft law" composed of declarations, set of guidelines or principles, resolutions and other documents which have the nature of recommendations.[82]

Nearly all of these non-binding instruments have been carefully drafted and negotiated and States even make reservations to them. This is because they are expected to have normative significance. They can be useful to establish or interpret State practice or the *opinio iuris* in specific matters and they can contribute to the development of an international customary norm. Also, in other cases declarations are the first step towards regulating a specific issue in an international treaty. Finally, international courts can take them into consideration in their decisions, contributing to the enhancement and implementation of these instruments.[83]

I.2.1.3 The Sub-commission on the Promotion and Protection of Human Rights.

To do its valuable work in legislative terms, the Commission counted with the contribution of the Sub-commission on the promotion and protection of human rights. This body was created in 1947 and it was composed of 12 experts. At the end of its work in 2006, its membership had extended to 26 human rights specialists with equal geographical

[79] Information available on the website of the Office of the United Nations High Commissioner for Human Rights, "The Core International Human Rights Instruments and their monitoring bodies": https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx
[80] Donnelly, Jack "International human rights…", Ibid, page 59.
[81] Donnelly, Jack, "International human rights…", Ibid, pages 59-60
[82] A list of human rights instruments of binding and non-binding nature can be consulted from the website of the Office of the United Nations High Commissioner for Human Rights, "Universal human rights instruments", available at: https://www.ohchr.org/en/professionalinterest/pages/universalhumanrightsinstruments.aspx
[83] Boyle, Alan et al, "The making of…", Ibid, pages 212-311.

representation. This body was named Sub-Commission on Prevention of Discrimination and Protection of Minorities at the time of its establishment but, in 1999, its name was replaced by the one previously mentioned, which is clearly wider in scope.[84]

The Sub-commission used to prepare reports and studies on human rights issues and make recommendations, particularly on issues regarding the protection of vulnerable groups, including minorities and indigenous peoples. Gradually, the Sub-commission took a relevant degree of independence contributing to a series of declarations and guidelines on human rights issues, including important issues such as the fight against impunity, the rights of minorities and the right to reparation.

The Sub-commission also created a series of mechanisms which were under its leadership: the working group of indigenous peoples, the working group of minorities, the working group on business and human rights, the social forum and the working group on contemporary forms of slavery.[85]

What is more, the Sub-commission dealt with human rights situations within the framework of procedures established by the Commission and, eventually, this body of experts started to adopt resolutions on country situations. This competence was limited by the Commission at the beginning of the new millennium.

I.2.1.4 The development of conventional mechanisms: the treaty bodies system.

Several core UN international human rights treaties adopted by the Commission –and endorsed by ECOSOC and the GA- not only provided a catalogue of human rights, but also established a series of treaty bodies to monitor international obligations contained in those instruments. In this way, it can clearly be affirmed that the Commission contributed greatly to the establishment of a universal system of protection based on human treaties, which can be compared to the ones existing at the regional level.

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[84] Pinto, Mónica, "Temas…", Ibid, pages 156-157. Information also available at the website of the Human Rights Council, "Sub-Commission on the Promotion and Protection of Human Rights": https://www.ohchr.org/EN/HRBodies/SC/Pages/SubCommission.aspx

[85] Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 1, "The Human rights machinery", United Nations Geneva, 1987, pages 8-9, available at: https://www.ohchr.org/Documents/Publications/FactSheetNo.1-English.pdf

The international human rights treaty system comprises nine core treaties, supplemented in some cases by optional protocols, whose implementation is monitored by treaty bodies.[86] Gradually, as the core human rights treaties came into force, the treaty bodies set out in these instruments to monitor their implementation were established (also referred to as committees).[87] Each committee is composed of independent experts who supervise States' compliance with their conventional obligations through various procedures comprising: the reporting mechanism, the individual and inter-State complaint mechanisms, the enquiry procedure, urgent actions and visits.[88]

In relation to the reporting mechanism, every State party has to prepare a report on a periodic basis describing the measures taken to comply with the obligations contained in the specific treaty. The State report is then considered by the specific Committee, which following a constructive dialogue with the State Party, issues concluding observations. These observations contain observations and recommendations that by nature are not binding.

Probably, what is most valuable about the reporting mechanisms is its preventive potential. As there is a need to prepare a report involving many interstate agencies, some national concerns can be addressed and eventually solved in this context even before the presentation to the committee in question. Furthermore, reports can draw the attention to countries' human rights records and may occasionally cause embarrassment thus leading to the altering

[86] The UN core human rights treaties are: the International Convention on the elimination of all forms of racial discrimination (1965); the International Covenant on civil and political rights (1966); the International Covenant on economic, social and cultural rights (1966); the Convention on the elimination of all forms of discrimination against women (1979); the Convention against torture and other cruel, inhuman and degrading treatment (1984); the Convention on the rights of the child (1989); the International Convention for the protection of the rights of all migrant workers and members of their families (1990); the International Convention for the protection of all persons from enforced disappearances (2006); and the Convention on the rights of persons with disabilities (2006). See in this regard, Office of the United Nations High Commissioner for Human Rights, "Handbook for human rights treaty body members", HR/PUB/15/2, New York and Geneva, 2015, page 3.

[87] These treaty bodies are: the Human Rights Committee; the Committee against Torture; the Committee against Racial Discrimination; the Committee on the Elimination of all forms of Discrimination against Women; the Committee on the Rights of the Child; the Committee on the Rights of All Migrant Workers and Members of Their Families; the Committee on Enforced Disappearances; and the Committee on Persons with Disabilities. An exception was the Committee on Economic, Social and Cultural Rights, which was established by United Nations Economic and Social Council Resolution 1985/17. Information on the treaty bodies is available on the website of the Office of the United Nations High Commissioner for Human Rights, "Monitoring the core international human rights treaties": https://www.ohchr.org/EN/HRBodies/Pages/Overview.aspx

[88] Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 30, "The United Nations Human Rights Treaty Bodies System", New York and Geneva, 2015, pages 31-32, available at: https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf

of legislation and/or practices. It could also provide good practices and models for other States.[89]

The complaint mechanism has not been included in every human rights treaty and in some cases, it has been added in a protocol to the treaty.[90] As a general rule, the State Party has to expressly recognize the competence of the treaty body to deal with complaints.[91] These complaint mechanisms allow individuals who claim to be victims of a human rights violation to submit a communication before the relevant committee when all conditions of admissibility are met, including the exhaustion of domestic legal remedies. The victim or his or her representative is able to submit arguments and the State party has a space to respond. Afterwards, the committee will issue its findings and will make recommendations. The complaint mechanism can also be activated by a State party against another State party although it has rarely been used. In 2018, for the first time in history there were three complaints under the CERD convention.[92]

The decisions adopted under the complaint mechanism are not binding. As a way to enhance decisions, many treaty bodies have established follow up procedures and have appointed a special rapporteur to that end.[93] In all cases, there is a high political and moral cost for the State that decides not to comply with the committee's decision. Therefore, several States have changed their behavior or redress the victims. Examples from the Human Rights Committee are eloquent: Canada changed its legislation concerning the rights of indigenous peoples living off their tribal lands; Mauritius changed legislation on women's rights; and the Netherlands altered discriminatory social security legislation.[94]

Other procedures are more innovative and are included in more modern instruments. One of them is the inquiry procedure that allows the relevant Committee to initiate a confidential

[89] Donnelly, Jack, "Human rights mechanisms…", Ibid, pages 57-62.
[90] This is the case, for instance, of the First Optional Protocol to the International Covenant on Civil and Political Rights (1966) and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008)
[91] See for example, the Optional protocol to the Covenant on Civil and Political Rights of 1966 to establish a communications procedure, article 1. See also the Optional Protocol to the Covenant on Economic, Social and Cultural Rights of 2008 on a communications procedure, article 1.
[92] Office of the United Nations High Commissioner for Human Rights, "Human Rights Bodies", webpage of CERD, "Inter-State communications", available at: https://www.ohchr.org/EN/HRBodies/CERD/Pages/InterstateCommunications.aspx
[93] Office of the United Nations High Commissioner for Human Rights, "Follow-up to Concluding Observations", available at: https://www.ohchr.org/en/hrbodies/pages/followupprocedure.aspx
[94] Donnelly, Jack, "International Human rights law…", Ibid, pages 58-59.

investigation when there is reliable information of grave or systematic violations by a State party of the rights protected by the instrument. In this case, the committee may visit the State party concerned and make recommendations. Other examples of new procedures can be seen in most recent international human rights treaties, such as visits,[95] urgent actions[96] or the possibility to address the GA in cases where enforced disappearance is being practiced on a widespread or systematic basis.[97]

Except for the reporting mechanism, in the majority of the other procedures included in human rights treaties, the committee cannot take the case into consideration if its competence has not been expressly recognized by the State Party.

The development of international human rights law and the valuable work of treaty bodies have been generally recognized as part of the most positive legacies of the Commission and they both still have a significant relevance. In general terms, it could be said that these treaty bodies have a "quasi-judicial" nature: the committees that evaluate the States compliance are not composed of judges but they have specific mechanisms to assess States' performance and make recommendations. This is probably one of the main differences with the regional systems (European, Inter-American and African), which include tribunals that can adopt binding decisions. As a consequence, these international human rights treaties and their monitoring committees cannot force reluctant States to follow their recommendations.

In the last decades, even before the creation of the Human Rights Council, there has been a debate about the need to strengthen the system and to have coordinated and unified criteria to be used in all committees with equal mechanisms for coherence purposes and to ease the work of States in this regard.

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[95] See in this regard the Optional Protocol to the Convention against Torture, which empowers the Subcommittee on the Prevention of Torture to visit any place under the jurisdiction of the State party concerned where persons are deprived of their liberty. See also article 33 of the International Convention for the Protection of All Persons from Enforced Disappearance, which includes the possibility for the Committee on Enforced Disappearances to undertake visits when it receives reliable information indicating that a State party is seriously violating the provisions of the Convention.

[96] In this sense, the Committee on Enforced Disappearances is allowed to receive urgent actions, that is to say, urgent requests from relatives, their legal representatives or any other authorized person that a disappeared person should be sought and found. See International Convention for the Protection of All Persons from Enforced Disappearance, article 30.

[97] International Convention for the Protection of All Persons from Enforced Disappearance, article 34.

I.2.1.5 The development of non-conventional mechanisms: thematic and country mandates.

The possibility of dealing with complaints on human rights violations was not included among the functions of the Commission in its creation. As the UN started to receive communications on allegations of human rights violations at an early stage, the new UN body dealt with this issue in its very first session, held between 27 January and 10 February 1947. In that meeting, the Commission decided that it did not have competence to address communications regarding human rights violations.[98]

This decision was later confirmed by its superior body through ECOSOC Resolution 75 (V) of 5 August 1947. It was based on the principle of non-intervention on internal affairs of States, recognized in article 2.7 of the UN Charter. Nevertheless, ECOSOC Resolution 75 (V) instructed the Secretary-General to compile a confidential list of all communications on human rights violations received and to prepare a brief summary of its content to be distributed in a private meeting of the Commission without the identity of the authors of the claims.[99]

The no-power to address human rights complaints was challenged on a few occasions and it was necessary to consider the way to solve the problem of interpretation of Resolution 75 (V), which was later amended and complemented by other resolutions.[100] A committee was created by the Commission to discuss the issue and, as a result of this process, in 1959, the GA adopted Resolution E/728 F (XXVIII).

Resolution 728 confirmed that the Commission had no power to decide on communications on human rights violations. In this context, the practice of the Commission to take note of

[98] United Nations Commission on Human Rights, Report to the Economic and Social Council on the First Session of the Commission, held at Lake Success, New York, from 27 January to 10 February 1947, UN Document E/259, paragraph 22. See also Bartolomei, Maria Luisa, "Gross and Massive Violations of Human Rights in Argentina 1976-1983, An analysis of the procedure under ECOSOC Resolution 1503", Juristförlaget i Lund, Sweden, 1994, page 60. This decision was later confirmed by its superior body through United Nations Economic and Social Council Resolution 75 (V) of 5 August 1947. It was based on the principle of non-intervention on internal affairs of States, recognized in article 2(7) of the UN Charter. Nevertheless, United Nations Economic and Social Council Resolution 75 (V) instructed the Secretary-General to compile a confidential list of all communications on human rights violations received and to prepare a brief summary of its content to be distributed in a private meeting of the Commission without the identity of the authors of the claims.

[99] Bartolomei, Maria Luisa, "Gross and Massive Violations…", Ibid, pages 57-60.

[100] Bartolomei, Maria Luisa, "Gross and Massive Violations…", Ibid, pages 61-62.

the list of communications and replies from Governments consolidated by the Secretary-General was disregarded. In any case, it remained unclear what use the Commission could make with the list and replies, which continued to be distributed during the Commission's sessions.[101]

Ultimately, the terrible situation of the apartheid in South Africa pushed the GA to create a special committee to deal with individual claims of that regime and eventually that was a useful precedent that ended up with the adoption in 1967 of ECOSOC Resolution 1235, which finally allowed the Commission to examine relevant information regarding gross human rights violations and to make a thorough study of situations with consistent patterns of grave human rights violations such as racial discrimination and the apartheid regime.[102] This resolution allowed the Commission and its subsidiary body, the Sub-commission, to publicly examine information about the issue and gave the Commission the competence to prepare a study on the situation and submit it to the ECOSOC.[103]

In 1970, the ECOSOC adopted Resolution 1503, which established a confidential procedure with two working groups to study cases of gross and systematic human rights violations.[104] The first working group on communications was composed of five members of the Sub-commission for the promotion and protection of human rights. It analyzed the communications related to gross human rights violations in the first place.

Once considered, the Sub-commission could dismiss these communications or transmit them to a second working group on situations, which was composed of five members of the Commission acting on an individual capacity. The group of situations could decide to submit the case to the Commission for its consideration. At that point, after treatment of the case in a closed session, the Commission could bring the case into a public procedure like the one set out in Resolution 1235. The Commission could also transmit the issue to the ECOSOC and the GA for its public consideration.

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[101] Bartolomei, Maria Luisa, "Gross and Massive Violations…", Ibid, pages 61-62. See also, Donnelly, Jack, "International human rights…", Ibid, page 52.
[102] Sunga, Lyal S., "What effect if any will the UN Human Rights Council have on special procedures?", in: Alfredsson, Gudmundur y otros (eds.). "International human rights monitoring mechanisms: essays in honour of Jakob Th. Möller", Leiden, Martinus Nijhoff Publishers, 2009, pages 169-183.
[103] United Nations Economic and Social Council Resolution 1235 (XLII).
[104] United Nations Economic and Social Council Resolution 1503 (XLVIII).

At the same time, the Commission started to deal with specific human rights situations. In line with the public procedure established by Resolution 1235, the Commission progressively decided to establish country mandates to deal with specific situations of gross and systematic human rights violations. The first cases were the apartheid regime in South Africa (1967), the occupied territories by Israel (1967), the situation in Chile (1974) and then it was extended to many more cases during the decade of 1980.[105]

These decisions were made at a specific historic moment: the Commission experienced an enlargement of African, Asian and Caribbean members, which pushed for a change in a moment where Western Powers were not interested in dealing with country situations because of different reasons, including in particular, the decolonization process and a shameful institutional framework of racial discrimination in some countries.[106]

Eventually, country mandates were followed by thematic mandates. The first one was established in 1980 on the issue of enforced or involuntary disappearances to implicitly address the situation in Argentina during the military dictatorship that ruled the country between 1976 and 1983, as it will be analyzed in depth in Chapter 4. At the time, the dictatorship managed to avoid the creation of a country mandate with clear support from several countries.[107] In a few years, many other thematic procedures on different human rights issues were established.

The sum of country and thematic mandates eventually created a system that has been one of the main contributions of the Commission at the universal level. Since then, special procedures mandate holders have been visiting many different countries in the world; have been investigating and making public human rights violations in specific States through communications; have been sending urgent appeals in certain cases to prevent irreparable damage; and have been making reports and recommendations on a wide variety of human

[105] Chetail, Vincent, "Le Conseil des droits de l'homme des Nations Unies : réformer pour ne rien changer ?", in: Chetail, Vincent (ed.). "Conflits, sécurité et coopération: liber amicorum Victor-Yves Ghebali", Bruselas, Bruylant, 2007, pages 125-167.
[106] Limon, Marc and Power, Hillary, "History of the United Nations Special Procedures Mechanisms. Origins, evolution and reform", Universal Rights Group, 2014, pages 4-5, available at: https://www.universal-rights.org/wp-content/uploads/2015/02/URG_HUNSP_28.01.2015_spread.pdf.
[107] Kramer & Weissbrodt, "The UN Commission on Human Rights and the Disappeared", 1 Hum Rts. Q. 18, 1981, pages 18-19. See also Weissbrodt, David et al, "The effectiveness of international human rights pressures: the case of Argentina, 1976-1983", 75 Minn L Rev. 10009, 1991, pages 1029-1030, available at: https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1268&context=faculty_articles.

rights issues and country situations. At the same time, they have had a very close relationship with other stakeholders such as NGOs.[108]

Regarding country visits, until today, special procedures mandate holders make an average of 2 visits per year and some of them manage to do more. At present, international pressure is sufficiently strong for States to receive at least some mandate-holders. Nonetheless, there is always the possibility that they will pick and choose those mandates that are considered harmless at the internal level, leaving aside those which could be more thematic-sensitive in the country.

Regarding their function related to communications, mandate-holders are able to prepare allegation letters regarding human rights violations or urgent actions in cases of emergency. These measures give States the possibility to explain their policies or applicable law, allow them to have a record of abuses and to change specific measures.

Special procedures mandate-holders can help to introduce issues in the international agenda through thematic reports as it happened a few years ago with the report on secret detention;[109] can make recommendations including on ways to interpret existent provisions; or develop new norms and standards as it happened with the Principles of internal displaced persons a few decades ago.[110]

These mandates took different formats including special rapporteurs, Secretary-General representatives or special representatives, independent experts and working groups, and they all contributed to shed light on specific grave human rights situations all over the world. The experts receive no remuneration for their work but their expenses are paid through the OHCHR.

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[108] Information in this regard is available on the website of the Office of the United Nations High Commissioner for Human Rights, "Special procedures of the Human Rights Council": https://www.ohchr.org/en/hrbodies/sp/pages/welcomepage.aspx.

[109] Alston, Philip, "Hobbling the monitors. Should UN human rights monitors be accountable?", Volume 52, N° 2, Harvard University, Summer 2018, page 573, available at: http://www.harvardilj.org/wp-content/uploads/2011/07/HILJ_52-2_pages 576-578.

[110] Guiding Principles on Internal Displacement, UN Document E/CN.4/1998/53/Add.2, 11 February 1998.

By the last years of the Commission, more than thirty mandates were functioning and many of them were inherited by the Human Rights Council when it replaced the Commission.[111] As of July 2019, there are 44 thematic mandates and 12 country mandates depending of the new Human Rights Council.[112] In the last few decades, the number of thematic mandates grew on a constant basis, pushed by States according with their national human rights priorities.

These mechanisms can only make non-binding recommendations mainly through specific reports. Nevertheless, in general, States do not want to be included in public reports as part of the group that does not comply with the universal system of human rights. National and international human rights NGOs also play a role in terms of pressure for States to comply with recommendations.

Moreover, recommendations are often seriously considered by States because they can demonstrate commitments at the international level. At the same time, mandate-holders are able to criticize national human rights situations in a more independent way, which is always more difficult to do for States when it comes to evaluate the situation of their peers. It also may help to facilitate information on specific issues and consider the possibility for States to develop standard-setting.[113]

Special procedures reports were considered at the plenary of the Commission –today at the plenary of its successor body- and, on occasions, at formal sessions of the GA. This, in the end, influence States to seriously consider the convenience to follow the recommendations made by these mechanisms. There are a few exceptions where States pay little or no attention to the system of special procedures but, in general, it is the case of recalcitrant States which are isolated at the international arena and usually pay a high political cost because of that situation.

A major positive aspect of this system, at present known as the "system of special procedures", was the fact that it consolidated a solid and diverse group of experts in different

[111] Human Rights Council Resolution A/HRC/RES/5/1, Appendix 1.
[112] Information available on the website of the Office of the United Nations High Commissioner for Human Rights', "Human Rights Mandates, Thematic and Country mandates": https://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM.
[113] Alston, Philip, "Hobbling the monitors…", Ibid, pages 579-580.

formats that eventually had competence over all UN States, irrespective of their international legal obligations under human rights treaties. This is why they are known as non-conventional mechanisms. Their mandate and work did not depend on an international human rights treaty, but on a decision by the Commission under the umbrella of the UN Charter. This permitted that the competence of non-conventional mechanisms extended to all States of the international community that were represented at the UN, including States with very poor human rights records.

The role of this system has been positively recognized by high level officers –former Secretary-General Annan and former High Commissioner for Human Rights Arbour, the extinct Commission, NGOs and relevant scholars.[114] At the same time, a number of States considered that, while performing their activities, mandate-holders somewhat undermined State sovereignty through techniques considered overly intrusive or biased against particular governments, and therefore they expressed their dissatisfaction with the interpretations, working methods, or other activities of mandate-holders. This is the reason why there were many proposals to monitor their work since the mid-1990s until the establishment of the Human Rights Council.[115]

I.2.1.6 The United Nations High Commissioner for Human Rights.

A new milestone in the human rights system came with the creation of the United Nations High Commissioner for Human Rights (High Commissioner). Following a recommendation contained in paragraph 18 of section II of the Vienna Declaration and Program of Action of 1993, the GA decided that same year to create this position.[116] The UN High Commissioner was thought to reinforce the work of the existing Center for Human Rights of the Secretariat. According to the resolution which created this new position (GA Resolution 48/141) the candidate for the post is appointed by the Secretary-General, approved by the GA, and has a 4 year- mandate, which can be renewed only once for the same period.

The work of the High Commissioner is performed within the framework of the Charter, the Universal Declaration of Human Rights, other international instruments on human rights

[114] Piccone, Ted, "Catalysts for Rights: The Unique Contribution of the U.N.'s Independent Experts on Human Rights", Final Report of the Brookings Research Project on Strengthening U.N. Special Procedures 9 (2010), in Alston, Philip, "Hobbling the monitors…", Ibid, page 565.
[115] Alston, Philip, "Hobbling the monitors…", Ibid, pages 571-572.
[116] United Nations General Assembly Resolution A/RES/48/141.

and international law; he or she shall promote and protect the full enjoyment of all human rights; perform his or her activities under the direction of the Secretary-General and within the framework and overall competence of the GA. Formally, her or his Office is part of the Secretariat and the rank is Under-Secretary-General.

The High Commissioner can make recommendations and provide advisory services and technical assistance; provide cooperation; engage in dialogue and exchanges with States and other stakeholders; and promote mainstreaming in the human rights machinery and in general within the whole UN. The High Commissioner is also tasked with an express mandate to submit annual reports to the Commission (today the Council) and to the GA (before, through the ECOSOC, today directly to the GA). Her or his reports have an important impact during sessions because they contain a description of the annual priorities and the current situation in terms of implementation of the Office's strategic management plan, periodically designed to comply with the High Commissioner's functions. During those occasions, the High Commissioner also often uses this relevant political space before the main UN intergovernmental bodies to express concerns about one or more specific situations of human rights violations in different countries of the world.

The work of the High Commissioner has taken a significant relevance in the whole universal human rights system. His or her Office provides secretariat support to main human rights mechanisms and it has a key role in the work that the UN performs in different countries. Taking into consideration the vast and complex UN structure, it is not surprising that, over time, some reforms have been made.

In this sense, following efforts of improvements made by his predecessor, Boutros Boutros Galli, on 14 July 1997, then Secretary-General, Kofi Annan, submitted a report where he informed the GA his decision to merge the Centre for Human Rights and the High Commissioner into the Office of the High Commissioner for Human Rights (OHCHR). This new office was thought to increase efficiency and coordination on human rights throughout the whole organization.[117]

[117] United Nations Report "Renewing the United Nations. A Programme for reform", UN Document A/51/950, 14 July 1997, pages 63-64.

This decision consolidated the status of the High Commissioner as the main United Nations human rights officer of the universal system. At the same time, it was decided that a Deputy High Commissioner would be responsible for all administrative issues and would replace the High Commissioner when needed.

Later, in 2005, after the 2005 World Summit, the budget of the Office of the UN High Commissioner was doubled. This contributed to strengthen all the work of the Office both at the administrative –support of UN bodies and to the special procedures and treaty body systems- and operational levels –work on the ground in specific missions or national offices. Unfortunately, lately, the budget has suffered a reduction.[118]

Since its creation, this high-level position has been performed by prominent figures, including the former President of Ireland, Mary Robinson, and the former Judge of the International Criminal Court, Navy Pillay. At present, the High Commissioner is former President of Chile, Michelle Bachelet. Today, the High Commissioner continues to perform a central role in the system, including through the assistance to UN intergovernmental bodies dealing with human rights as well as to the system of treaty bodies and special procedures and other non-conventional human rights mechanisms. OHCHR also contributes to the development of international human rights law through reports and special inputs prepared upon request. Moreover, it assists commissions of inquiry- and it has a leading role in the promotion of human rights education.

At present, OHCHR also has policy priorities which include issues such as: enhancing equality and non-discrimination, combating impunity and promoting the rule of law, integrating human rights in development and cooperation, widening the democratic space, strengthening international human rights mechanisms and providing early warning in situations of violence or insecurity.[119]

I.2.1.7 The decline of the Commission.

[118] Office of the United Nations High Commissioner for Human Rights, News and Events, "UN Budget shortfalls seriously undermines the work of human rights treaty bodies", 17 May 2019, available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24621&LangID=E

[119] Information available on the website of the Office of the United Nations High Commissioner for Human Rights, "Our priorities": https://www.ohchr.org/SP/Pages/Home.aspx.

In its final years, the Commission received criticisms of politicization, selectivity and double standards. These were the main reasons of its discredit and decline as well as its final replacement by the Council.[120] The politicization of the Commission has been a main weakness which was linked to the very nature of its intergovernmental composition but it became a major problem during its final years.

Indeed, the last sessions of the Commission witnessed several cases of Member States that promoted a selective treatment of country situations mostly linked with geostrategic goals and political alliances. As a consequence, there were clear cases of double standards when dealing with human rights situations. Many Member and Observer States of the Commission were inclined to support initiatives when aimed at denouncing human rights violations committed by political enemies but those same States were against addressing human rights situations in like-minded countries.

The politicization was worsened by the appreciation that the independent universal human rights mechanisms were not widely known and there was a problem of lack of coordination and duplication in existing mandates. In 1999, the President of the Commission at the time decided to push for the establishment of a working group to improve existing mechanisms.[121] This working group prepared a report on the issue and made recommendations in this regard.[122] However, these efforts were not enough neither to improve the mechanisms nor to stop the growing negative image of the system. These difficulties were deepened in 2000 when some of the Commission's subsidiary bodies, notably the Sub-commission, faced limitations in their competences. Indeed, the Sub-commission lost its mandate to adopt resolutions on country situations.[123]

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[120] Schrijver, Nico, "The UN Human Rights Council…", Ibid, page 809. See also, Mallory, Conall, "Membership and the UN Human Rights Council", 2:1 Can J Hum Rts 1, 2013, page 6. See also Ghanea, Nazila, "From UN Commission on Human Rights to UN Human Rights Council: One Step Forwards or Two Steps Sideways?", In: Warbrick, Colin (ed.). Current developments: public international law. International and comparative law quarterly, Vol. 56(1), 2007.

[121] This decision can be consulted from UN Document E/CN4/1999/WG.15/Inf.1.

[122] This decision can be consulted from UN Document E/CN4/dec/2000/109.

[123] Weissbrodt, David et al, "A Review of the Fifty-third Session of the Sub- Commission on the Promotion and Protection of Human Rights", 20 Neth. Q. Hum. Rts. 231 (2002), pages 236-242, available at: http://scholarship.law.umn.edu/faculty_articles/261. See also United Nations Commission on Human Rights, "Rationalization of the work of the Commission", "Report of the inter-sessional open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights", UN Document E/CN.4/2000/112, 16 February 2000.

At the same time, even if the question of membership of the Commission was not a new issue of concern, a particular focus on the composition began when the United States failed to secure re-election for the first time in history in 2001 during the Bush Administration. This attracted particular international attention to the members elected that same year. Among them, the Commission included two countries with controversial human rights records at the time: the Libyan Arab Jamahiriya (Libya) and Syria.[124]

Criticisms deepened in 2003 when Libya was appointed as Chair of the Commission.[125] Libya's chairmanship came at a time when the composition of the Commission included an increasing number of countries with questionable commitment to human rights.[126] In this sense, the election of Sudan in 2004 was severely criticized by many actors, including the United States.[127] The main powers of the system –in particular, some permanent members of the SC from different regions of the world- did not help to provide an appropriate setting either. Indeed, a number of them started to seriously act to prevent the Commission from addressing situations of national concern.

There were also criticisms related to the work and functioning of the Commission, exemplified by the lack of regular meetings throughout the year and its inability to call emergency sessions.[128]

Growing and fierce criticism from some countries and NGOs about the Commission eroded the body's credibility at the international level. There were some initiatives to promote a change, but it was only when then Secretary-General, Kofi Annan, decided to intervene that a major reform was finally considered and implemented.

[124] Mallory, Conall, "Membership of the UN Human Rights Council…", Ibid, page 7.
[125] Alston, Philip, "Reconceiving the Human Rights Regime…", Ibid, page 2.
[126] Mallory, Conall, "Membership of the UN Human Rights Council…", Ibid, page 7.
[127] Economic and Social Council, Press Release ECOSOC/6110, 4 May 2004, "United States objections as African Group proposes Sudan for election to the Commission on Human Rights". See also, Mallory, Conall, "Membership of the UN Human Rights Council…", page 7.
[128] Cox, Eric, "State interests and the creation and functioning of the United Nations Human Rights Council", Journal of International Law and International Relations, Vol. 6, N°1, page 88.

II. THE HUMAN RIGHTS COUNCIL.

II.1 The 2005 UN reform initiative and its impact on the universal human rights system.

During his 8-year mandate, former Secretary-General, Kofi Annan, pushed for innovative changes to the UN on a few occasions. Indeed, he made proposals to reform the organization in a specific report only six months after he took office.[129] In this report, he focused on 5 substantive issues: peace, security and disarmament; economic and social affairs; development cooperation, environment, habitat and sustainable development; humanitarian affairs; civil society and human rights.[130] Regarding human rights, Annan informed that he decided to merge the High Commissioner for Human Rights with the Center of Human Rights for efficiency purposes and to streamline and rationalize the work of the human rights machinery.[131]

After the 2000 World Millennium Summit, Annan referred again to the need for changes in the universal human rights system in his 2002 report "Strengthening of the United Nations: an agenda for further change".[132] In this report, he specifically referred to the situation of the Commission on Human Rights. He recognized the positive role of this body in the elaboration of international norms and standards –in particular the adoption of the Universal Declaration- but alerted about the credibility challenges that this body faced at the time due to its politicization and the risks that this situation entailed for the system.[133]

Beyond the importance of all these efforts as well as the administrative and institutional changes in the human rights machinery that the Secretary-General made within his powers, it was only in 2005 that there was momentum to finally push for a structural change in the universal human rights system.

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[129] United Nations General Assembly, report of the Secretary-General "Renewing the United Nations. A Programme for reform", UN Document A/51/950, 14 July 1997, pages 32-91.
[130] Ibid, pages 36-69.
[131] Ibid, page 26, paras. 78-79; page 64, paras. 97-206 and action 14.
[132] United Nations General Assembly, report of the Secretary-General "Strengthening of the United Nations: an agenda for further change", UN Document A/57/387, 9 September 2002.
[133] United Nations General Assembly, report of the Secretary-General "Strengthening of the United Nations…", Ibid, page 11, paragraph 46.

In the two previous years, Annan had contributed in a significant way to generate conscience of the existence of a new historic and political context at the international level that called for a United Nations reform. In a speech to the GA, in September 2003, Kofi Annan stated that the UN faced a decisive moment to guarantee collective security for all. In this context, he appointed an international high-level panel of eminent experts to assess the existing threats to peace and security, evaluate strategies and make recommendations.

It is clear that then Secretary-General suggested a profound and general reform, mainly focused on the new challenges in the field of peace and security. However, the analysis and proposals of the panel went beyond the threats to peace and security –which included the creation of a Peacebuilding Commission- and referred to the way to enhance effectiveness of the work of the United Nations, including many of its main bodies: the GA, the SC, the ECOSOC, the Commission on Human Rights and the Secretariat.[134]

Regarding the Commission on Human Rights, while the panel of experts appreciated the efforts of the High Commissioner and the Secretary-General to integrate human rights in the whole work of the UN, they affirmed that the credibility and professionalism of the Commission was severely undermined.[135] Indeed, according to the panel of experts, States had sought membership of the Commission to avoid being criticized or to criticize others.

In this context, the panel affirmed that law-making and standard-setting could not be performed by States which demonstrated lack of commitment to the promotion and protection of human rights. Moreover, the experts indicated that the Commission could not have double standards to deal with human rights situations and indicated that the most difficult problem for this body to overcome was the question of its membership. As a possible solution, the panel suggested that the Commission be composed of all UN Member States and that State delegations should be led by prominent experts in the human rights field. Another suggestion to reinforce the work of the Commission was to establish an advisory group of experts in order to provide assistance, when needed. Finally, the panel of experts suggested Member States of the UN to consider to upgrade the Commission to a

[134] United Nations General Assembly, report of the High-Level Panel on Threats, Challenges and Change "A more secured world: our shared responsibility", UN Document A/59/565, 2004, pages 19-239.
[135] United Nations General Assembly, report of the Secretary-General "A more secured world…", Ibid, page 74.

Council, in line with the importance of the issue as a main pillar of the Organization, together with the ECOSOC and the SC.[136]

The report of the panel of eminent experts helped to make the lack of credibility and efficiency of the Commission more visible at the international level, an issue already raised by Annan in his 2002 report but in a rather subtle manner. The reaction of the then Secretary-General to these observations and proposals was fast and robust. Only a year later, in 2005, he delivered his now famous report "In larger freedom: towards development, security and human rights for all", where he suggested important changes for the organization, including in relation to human rights issues.[137]

This report was presented to the GA within the framework of the five-year progress report on the implementation of the 2000 Millennium Declaration. It was not the first attempt to make changes to the organization in institutional terms, but it was the right time. In his report, Annan set out the three pillars for the UN in the 21th century: peace and security, development, and human rights. He affirmed that they are not only imperative but that they also reinforce each other.[138]

The changes proposed by Annan have to be understood in the historic context. As the former Secretary-General himself recognized in his report, some events led to the decline of public confidence in the UN even if for opposite reasons. He cited as an example that both opposite sides of the war on Iraq felt disappointed in the UN: one group because it could not prevent it and the other group because UN resolutions were not complied with.[139] Nevertheless, Annan was convinced about the relevance of multilateralism. He took stock of his 8 years of mandate as Secretary-General as well as proposals from the high-level panel to push for essential reforms in the context of the implementation of the Millennium Development Goals adopted at the turn of the century.[140]

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[136] United Nations General Assembly, report of the Secretary-General "A more secure world…", Ibid, page 74.
[137] United Nations General Assembly, report of the Secretary-General "In larger freedom: towards development, security and human rights for all", UN Document A/59/2005, 21 March 2005.
[138] Ibid, paragraphs 14, 16 and 17.
[139] Ibid, paragraph 10.
[140] Ibid, paragraph 4.

The first part of the 2005 report, entitled "Freedom from want", focused on international strategies to promote development and achieve the proposed goals.[141] The second part of the report, on "Freedom from fear", echoed the proposal of the panel of eminent experts to create a Peacebuilding Commission.[142]

The third part of the part of the report entitled "Freedom to live in dignity" referred to the importance of strengthening human rights, democracy and the rule of law. In this context, the Secretary-General requested that the budget of OHCHR be reinforced in order to strengthen the capacity of country teams that are key in terms of prevention. These teams are able to bring timely information and draw urgent situations that require the intervention of the UN. The report also indicated that the High Commissioner should have exchanges with the SC and the new Peacebuilding Commission. Moreover, the report referred to the need to mainstream the work of OHCHR in the activities of the whole organization.[143]

The fourth and last part of the report entitled "Strengthening the United Nations" contains proposals for various bodies of the GA, the SC, the ECOSOC, the Commission and the Secretariat. Regarding human rights, the Secretary-General recognized the contribution of the Commission in terms of development of international human rights law and valued its system of special procedures. He also recognized the importance of the Commission's annual session to draw the attention of human rights issues and the contribution of NGOs. Nevertheless, he emphasized that the current credibility problems of the body transformed it in a forum where Member States took part to avoid criticisms or criticize others. In this context, he suggested to create a Human Rights Council.[144]

He framed this initiative in a major change, which came after 60 years of life of the UN. Indeed, he recalled that the UN had a system of three Councils for six decades: the SC, the ECOSOC and the Trusteeship Council –that finished its work and only had a formal existence. These councils were key for three main purposes: peace and security, development, and decolonization. In this context, he believed that if the UN was going to take human rights issues as seriously as peace and development, States should agree to establish a new Human Rights Council, as a subsidiary body of the GA, with a smaller size, elected by two-

[141] Ibid, paragraphs 25-73.
[142] Ibid, paragraphs 74-126.
[143] Ibid, paragraphs 127-152, in particular paras 140-147.
[144] Ibid, paragraphs 181-183.

thirds majority present and voting, and whose members should abide by the highest human rights standards.[145]

In addition, the Secretary-General produced an explanatory note to his report where he only focused on the future Human Rights Council and provided more inputs on the need of reform and the way to do that. Indeed, Annan indicated that a standing body would permit dealing with emergency situations. He also emphasized that being elected by the GA would make members more accountable and the body more representative.[146]

Annan also argued for the convenience for the Council to be based where the Commission was: Geneva. OHCHR was also based in Geneva and could assist the work of the new body. The then Secretary-General affirmed that there were precedents of main bodies outside New York, such as the ICJ –based in the Netherlands.[147]

Moreover, Annan called for the establishment of a new peer review. He indicated that this mechanism should focus on an exam on all human rights –civil, political, economic, social and cultural- and include all UN Member States without exception. The peer mechanism should also be equipped with technical assistance when needed and it should not prevent the Council from dealing with emergency situations on a separate basis.

Annan considered that the new mechanism did not replace treaty bodies –based on conventional obligations taken by States on human rights- but it would represent a peer scrutiny on the basis of the Universal Declaration. He also thought that OHCHR could help in the process by providing information available in this regard. According to his opinion, OHCHR could also have competences to contribute in cases of urgent situations.[148]

The then Secretary-General also recommended that the creation of the Council should take a complementary vision with the rest of the universal human rights system –comprising OHCHR and the treaty bodies. He also considered that the body should be small, elected by a two-thirds majority and should lead to a rationalization of the work of the Third Committee

[145] Ibid, paragraph 183.
[146] United Nations General Assembly, report of the Secretary-General "In larger freedom: towards development, security and human rights for all", "The Human Rights Council. Explanatory note from the Secretary-General", UN Document A/59/2005/Add.1, 23 May 2005, paragraph 4.
[147] Ibid, paragraph 5.
[148] Ibid, paragraphs 6-11.

of the GA. In addition to the new peer mechanism, Annan emphasized the importance that the Council should also focus on the interpretation and development of international human rights law.[149]

The final decision about the reform of the human rights system arrived only a few months after the report of the Secretary-General, during the 2005 World Summit led by Heads of State and Government. States participating in the Summit at the maximum political level agreed in paragraphs 121 to 133 of Resolution 60/1 to strengthen the human rights machinery and to reinforce the High Commissioner, doubling the budget of the Office in the following 5 years, to improve the human rights treaty bodies and to mainstream human rights throughout the work of the whole Organization. They also agreed on the importance to continue the States commitment regarding some specific group of persons, such as indigenous peoples, persons with disabilities, and minorities.[150]

The major change was included in Chapter V of Resolution 60/1 called "Strengthening the United Nations". In this chapter, Heads of States and of Governments participating in the Summit decided to create the Human Rights Council (Council).[151] It was decided that the Council would be responsible for promoting the universal respect for the protection of all human rights and freedoms without distinction of any kind. The leaders also decided that the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations in this regard. There was also consensus in the sense that the Council would promote mainstreaming within the whole UN system.

The 2005 World Summit requested the President of the GA to conduct negotiations to be completed during the sixtieth session of the Assembly on the mandate, modalities, functions, membership and other procedural issues regarding the new UN body.

Overall, the World Summit did not bring major institutional changes as proposed by the Secretary-General. Even if the original proposal was very ambitious and some of the most important proposals were not incorporated –mainly, an effective change of the composition

[149] Ibid, paragraphs 11-17.
[150] United Nations General Assembly Resolution A/RES/60/1, paragraphs 121-131.
[151] United Nations General Assembly Resolution A/RES/60/1, paragraphs 157-160.

of the SC- the major consequence in this resolution came with the decision taken regarding the universal human rights system.

The US Government made several proposals during the summit and firmly rejected changes in the SC. Nevertheless, the US did not reject at this stage the creation of the Human Rights Council or the establishment of the Peacebuilding Commission. Therefore, even if not all suggestions of structural changes could be performed, Annan's proposal to upgrade human rights in the United Nations turned into reality. The decision to create the Human Rights Council was undoubtedly one the most important legacies of his 8 year-mandate that concluded after this process.

II.2 Mandate and composition of the Human Rights Council: General Assembly Resolution 60/251.

II.2.1 Elements of continuity.

Following the 2005 World Summit, and after only a few months of intense negotiations, in March 2006, the GA adopted Resolution 60/251 whereby it created the Human Rights Council. The resolution was adopted by a vast majority of 170 votes in favor. The countries that voted against were only four: the United States, Marshall Islands, Palau and Israel. Three countries abstained: Iran, Venezuela and Belarus. Fourteen countries did not vote: Central African Republic, Chad, Cote d'Ivoire, Democratic People's Republic of Korea, Dominica, Dominican Republic, Equatorial Guinea, Eritrea, Georgia, Kiribati, Liberia, Nauru, Papua New Guinea and Seychelles.[152]

It was decided that the Council would be based in Geneva, following the place where sessions of the former Commission took place for 60 years. The principles agreed to guide the work of the Council were: universality, impartiality, objectivity, non-selectivity, international constructive dialogue and the promotion of cooperation in the promotion and protection of all human rights.[153]

[152] United Nations General Assembly Resolution A/RES/60/251.
[153] United Nations General Assembly Resolution A/RES/60/251, operative paragraph 4.

The competence to deal with human rights situations was preserved. In line with the 2005 World Summit decision, the Council was not only tasked to promote universal respect for the protection of all human rights and fundamental freedoms without discrimination of any kind, but it was also mandated to address and prevent human rights violations, including gross human rights violations, as well as to promote the effective coordination and the mainstreaming of human rights within the United Nations system.

The decision to specifically include the possibility to address and prevent human rights violations in specific countries was particularly positive.[154] Even if the competence to do so started in the decade of 1970 with ECOSOC Resolutions 1235 and 1503, it remained a highly contentious issue during negotiations on the establishment of the Council at the GA level in 2005 and, at later stage, in the institution-building process of the new body in 2006. Indeed, the decision was taken against the will of some States, such as China, which would have preferred to have an intergovernmental body with a limited mandate regarding country situations.[155]

Furthermore, the mandate of the Council also managed to preserve a relevant and positive continuity of several functions performed by the extinct Commission such as: to make recommendations to further develop international human rights law; to serve as a forum for dialogue, to promote human rights education, to provide advisory services and technical assistance and capacity building with the consent of the State concerned; and to follow up to world conferences and summits. There was also a positive continuity in the sense of allowing observers, including NGOs, to actively participate in the new Council, in line with the practice of the Commission.[156]

II.2.2 Main changes of the Council: hierarchy, composition, periodicity, terms and conditions of membership, voluntary commitments and the universal periodic review.

In Resolution 60/251, the GA not only took stock of many competences of the former Commission but also decided to provide clear and specific changes to the new Council. To

[154] United Nations General Assembly Resolution A/RES/60/251, operative paragraphs 2-5.
[155] Foot, Rosemary et al, "China's influence on Asian States during the creation of the Human Rights Council: 2005-2007", Asian Survey, Vol. 54, N° 5 (September/October 2014), page 857.
[156] United Nations General Assembly Resolution A/RES/60/251, operative paragraphs 5 and 11.

address the main criticisms of the Commission and its role, in particular in its final years, the Council had innovations in terms of its status in the UN; its composition; the periodicity of its sessions; the conditions of membership and the possibility to make voluntary commitments. In addition, the GA decided to establish a new mechanism to assess human rights situations in an equal manner: the universal periodic review.[157]

Regarding its status, it was decided that the Human Rights Council would be a subsidiary inter-governmental body of the GA.[158] As a consequence, the Council directly reports to the GA, the most democratic UN body composed of all States of the Organization.[159] The decision to officially upgrade the Council had a significant political importance because it formally recognized human rights as one of the three pillars of the organization, together with peace and security and development, which already counted with two separate Councils (SC and ECOSOC). [160]

From a legal perspective, the ideal change for the Council would have been a recognition of its existence in the UN Charter. Nevertheless, this was not possible because that option would have opened other important negotiations on the content of the Charter. Soon after discussions on the establishment of the Council began, main negotiators at the GA level decided to push for a practical proposal: to establish the Council through a GA Resolution.

Nevertheless, the discussion remained opened because operative paragraph 16 of Resolution 60/251 provided for a review of the work and functioning of the Council 5 years after its creation. However, in 2011, during the review, nothing was changed in this regard.[161] Consequently, the Council has a consolidated higher status than its predecessor.

A second relevant change was the HRC's composition, which became a major problem for the extinct Commission at the beginning of the new millennium. The election of some States with questionable human rights records as members of the Commission was challenged by many stakeholders, including in particular NGOs. In this context, some NGOs suggested

[157] United Nations General Assembly Resolution A/RES/60/251, operative paragraphs 5 and 7-10.
[158] United Nations General Assembly Resolution A/RES/60/251, operative paragraph 1.
[159] United Nations General Assembly Resolution A/RES/60/251, operative paragraph 5(j).
[160] Office of the United Nations High Commissioner for Human Rights, "Trabajando con el Programa de las Naciones Unidas en el ámbito de los Derechos Humanos: Un manual para la sociedad civil", Chapter V "El Consejo de Derechos Humanos", page 78, available at: https://www.ohchr.org/Documents/AboutUs/CivilSociety/Chapter_5_sp.pdf
[161] United Nations General Assembly Resolution A/RES/65/281, operative paragraphs 1-3.

criteria to be applied in the election of Member States. These criteria included the ratification of core human rights treaties, compliance with treaty obligations and the issuance of standing invitations to special procedures.[162] The United States also included a proposal as a condition to be a Member State of the future body: that the State should not have sanctions of the Security Council.[163]

During negotiations, the 2004 proposal of the panel of eminent experts –consistent of universal membership- enjoyed the support of countries such as Canada. Annan's own proposal in its 2005 report –i.e. a reduced membership of 15 states- was strongly supported by the United States. Nevertheless, the majority of members of the GA decided otherwise.

This was because several States considered that there were many problems with both extreme options: on the one hand, the universal membership would not have solved the problem of politicization and it would have been very difficult for this body to take timely decisions, particularly in cases of emergency situations. Moreover, there would have been challenges of participation of developing countries, as at least 30 UN Member States do not have representation in Geneva, where the Council would be based. On the other hand, the proposal of a reduced membership did not enjoy much support, in particular as it would have implied a lack of legitimacy in terms of representation and could have given a special preponderance to some powerful States.[164]

Consequently, GA Resolution 60/251 decided that the Council shall consist of 47 Member States. The membership shall be based on equitable geographical distribution and, thus, African States would have 13 seats; Asian States 13; Latin American and Caribbean States 8; Eastern Europe 6; and Western countries and Others 7.[165]

Even if the number of Members was quite similar to the number of Members of the Commission in its final years of existence, the new geographical distribution allowed States from Africa, Asia and Eastern Europe to gain more seats in the Council. The change was so important that at present any initiative submitted by Latin American, Western or Eastern

[162] Human Rights Watch, "Reform of the U.N.'s Human Right's System. An Open Letter to Member Governments of the U.N. Democracy Caucus", 29 March 2005, available at: https://www.hrw.org/news/2005/03/29/reform-uns-human-rights-system.
[163] Alston, Philip, "Reconceiving the Human Rights Regime…", Ibid, page 3.
[164] Mallory, Conall, "Membership of the UN Human Rights Council…", Ibid, page 12.
[165] United Nations General Assembly Resolution A/RES/60/251, operative paragraph 7.

European countries at the Council for adoption now needs the support of at least a few countries from Africa or Asia if the initiative is to be successful.

The new distribution represented a significant power shift as in the extinct Commission Western countries used to have a certain degree of influence with the support of Latin American States. Conversely, particularly at the beginning, the Council's work has been more influenced by the African Group and the Organization of Islamic States (OIC) in several although not all initiatives.[166]

Even if with the current geographical distribution decisions have not been always positive in terms of promotion and protection of human rights, the decision was a reasonable and fair compromise because it took into consideration a more democratic geographical representation at the international level.

The level of support needed to be a member of the Council was also modified. Indeed, to be part of the Council a State must have at least the majority of votes of the GA. The United States unsuccessfully tried to impose a two-thirds majority to elect Member States of the new Human Rights Council, in line with the proposal of then Secretary-General. This was one of the main reasons that led this country to vote against the resolution to establish the new UN body.[167]

Nevertheless, overall, there was a slight improvement in terms of election, even if insufficient, because, until that moment, members of the Commission were elected by the ECOSOC –composed only of 54 Members States- with no limit in re-election and on many occasions without competition because each regional group submitted the quantity of candidates to fill in the available vacancies.

A third change focused on the periodicity of sessions. The Commission had one annual single session and only convened special sittings to discuss emergency situations on an exceptional basis. Firstly, because ECOSOC only authorized the extinct Commission to have special sessions as late as 1990 by Resolution 1990/48. In the following years until 2005, it

[166] Mallory, Conall, "Membership of the UN Human Rights Council…", Ibid, pages 13-14.
[167] In this regard, see Alston, Philip, "Reconceiving the Human Rights Regime…", Ibid, Chapter III.B and C.

held 5 special sessions.[168] In part, this could be explained because it required a high number of States to hold these sessions: 25 out of 53 Member States.

In sum, the GA decided that the Council would have no fewer than 3 sessions per year for a duration of no less than 10 weeks and that it would be able to hold special sessions if one third of the members so requested.[169] This was a response to the need to have a standing body able to react to emergencies during the whole calendar year. The results have proved to be positive: as of March 2019, the Human Rights Council had 40 regular sessions and 28 special sessions. The latter were held to deal mainly on specific country situations with two exceptions, where the special sessions were convened to deal with urgent themes. That was the case of the 7th special session (2008) on the world food crisis and the 10th special session (2009) on the financial crisis.[170]

A fourth change was related to the terms and conditions of membership. Regarding the terms of membership, Members of the Council are elected by simple majority of the GA in a secret ballot for a three-year term, renewable once. However, it is no longer possible for States to run for immediate re-elections after two consecutive terms.[171] The election of the members of the Council by the General Assembly –and not the ECOSOC like in the case of the predecessor body- is more democratic and in principle requires more support to be elected. The limit to re-election was conceived to allow small States to be members of the Council and, at the same time and probably more important, to limit the influence of powerful countries in the result of the work of the Council.

Regarding the conditions for membership, many proposals were discussed during negotiations as parameters of commitment to human rights: the level or ratification of human rights treaties, the cooperation with non-conventional mechanisms such as special procedures –including standing invitations to visit the country at any given moment- and the information given by NGOs. None of these proposals were included in the final result of negotiations.

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[168] Human Rights Council, "About HRC", "HRC Archives", "Sessions", "Previous sessions", available at: https://www.ohchr.org/EN/HRBodies/CHR/Pages/PreviousSessions.aspx

[169] United Nations General Assembly Resolution A/RES/60/251, operative paragraph 10.

[170] Human Rights Council, "HRC Sessions", "Regular Sessions", available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Pages/RegularSessions.aspx. See also Human Rights Council, "HRC Sessions", "Special Sessions", available at: https://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Pages/SpecialSessions.aspx

[171] United Nations General Assembly Resolution A/RES/60/251, operative paragraph 7.

The United States suggested that membership would not to be granted to a State under sanctions of Chapter VII by the Security Council in relation to human rights abuses or acts of terrorism. Arab States opposed to this suggestion and, finally, it was not accepted. This was another major reason for this country to vote against the establishment of the Human Rights Council and not joining the body at the beginning.[172]

In the end, it was agreed that the election of Council members should consider the contribution of candidates to the promotion and protection of human rights and their voluntary commitments.[173] This decision was criticized by its vagueness and limited scope.[174] The majority of States have made voluntary commitments, but it is up to the States to decide whether or not to honor them as well as to define the terms and contents of those commitments.

Finally, it was also expressly decided that Member States of the HRC should take steps to uphold highest standards in the field of human rights and fully cooperate with the Council and that they will be reviewed by the universal periodic review mechanism (UPR) during their membership.[175] What is more, in case of grave and systematic violations, the GA could suspend membership of States by a two-thirds majority.[176]

Some analysts consider the possibility of suspension as an important deterrent, while others consider that the prospects of suspension are low because they have to be originated in the Council by a qualified majority –a two thirds majority- and the decision has to be confirmed by the GA.[177] In practice, there has only been a case of suspension so far. Libya was suspended in 2011 following allegations of gross human rights violations committed by the Gaddafi regime, which was then in power.[178]

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[172] Mallory, Conall, "Membership of the UN Human Rights Council…", Ibid, page 22.
[173] United Nations General Assembly Resolution A/RES/60/251, operative paragraph 8.
[174] Steiner, Henry et al, "Human rights in context…", Ibid, page 793. See also Mallory, Conall, "Membership of the UN Human Rights Council…", Ibid, page 24.
[175] United Nations General Assembly Resolution A/RES/60/251, operative paragraph 9.
[176] United Nations General Assembly Resolution A/RES/60/251, operative paragraph 8.
[177] Duxbury, Alison, "The participation of States in International Organizations: The role of human rights and democracy", Cambridge University Press, 2011, page 22, in Mallory, Conall, "Membership of the UN Human Rights Council…", pages 20-21.
[178] Human Rights Council Resolution on the "Situation of Human Rights in Libyan Arab Jamahiriya", A/HRC/RES/S-15/1, operative paragraph 14.

To assess the membership provisions set out in Resolution 60/251, we agree with Mallory in the sense that it would be futile to use the approach that a State with an imperfect human rights record would discredit the body. This approach would end up in the existence of an unrepresentative institution, both geographically and in terms of religious, political and cultural backgrounds. At the same time, it would be wrong not to consider some sensitivity towards the human rights records of the Members of the Council. Indeed, Mallory used two interesting elements to evaluate the provisions: the first one is if those provisions allow the inclusion of "pariah States" as Members of the Council and the second is if there is a high number of States with questionable human rights records as HRC members.[179]

A preliminary assessment taking into consideration those two criteria seemed to show a positive balance. Indeed, there have been cases of States with very negative human rights records which have not taken part of the Council because they were deterred by the Council's membership requirements or due to the fact that other States considered this situation at the election process.[180]

Nevertheless, as the requirements set out in Resolution 60/251 are not strong as they should be, it could well happen that States with very negative human rights records could get elected in the Council. The secret nature of the election, the growing practice of clean slates –that is to say, putting forward a number of candidates from a regional group as seats available in the body- and the lack of rigorous requirements in terms of admission could clearly permit so.[181]

A fifth and most powerful change was the decision to design a new and democratic peer control mechanism called the universal periodic review. Resolution 60/251 requested UN Member States to submit information about the fulfillment of their obligations in the framework of a cooperative mechanism on an equal foot. This mechanism had to be based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs. The General Assembly requested the Council to define its modalities within its first year of functioning. The possibility to deal with human rights situations all around the globe without selectivity and double standards was at the core of the establishment of this new mechanism. It is therefore not surprising

[179] Mallory Conall, "Membership of the UN Human Rights Council…", Ibid, pages 10-11.
[180] Mallory Conall, "Membership of the UN Human Rights Council…", Ibid, pages 25-26.
[181] Mallory, Conall, "Membership of the UN Human Rights Council…", Ibid, pages 32-33.

that the creation of the UPR has been considered one of the most important innovations of the HRC.[182]

II.3 Main mechanisms of the Human Rights Council.

II.3.1 Negotiations of the institutional building package: Human Rights Council resolutions 5/1 and 5/2.

Even if the GA outlined many of the new and key elements of this new intergovernmental body in Resolution 60/251, it decided that the Council itself should be in charge of defining its own structural elements during its first year of existence. The Council began its work on 19 June 2006 with the specific goal to conclude negotiations on its institutional building process within the deadline of 365 days.[183]As a consequence, the new Council had one year after holding its first session to review and where necessary rationalize the vast and complex array of mandates, mechanisms and functions of the Commission. The Council was also instructed to keep the system of special procedures, the advisory role of experts and the complaint procedure.[184]

The President of the HRC decided to create three working groups to deal with this process: one for the establishment of the universal periodic review; a second for the review and rationalization of all mandates, functions and responsibilities of the Commission –including the 1503 procedure, the future of the former Sub-Commission and the special procedures; and a third one on the agenda and methods of work of the Council. Eventually, it was necessary to appoint facilitators for what would constitute the 6 pillars of the so-called institution-building process of the Council.[185]

These facilitators were Ambassadors of Member States of the Human Rights Council and focused on the following issues: the universal periodic review; the review and rationalization of special procedures mandates; the decision on the need to have an advisory body; the future

[182] Theyskens, Ester, "8 years of the UN Human Rights Council, a success or failure?", Faculteit Rechstegeleerdheid Universiteit Gent, 2013-2014, pages 90-91, available at: https://lib.ugent.be/fulltxt/RUG01/002/163/306/RUG01-002163306_2014_0001_AC.pdf
[183] United Nations General Assembly Resolution A/RES/60/251, operative paragraph 6.
[184] United Nations General Assembly Resolution A/RES/60/251, operative paragraph 6.
[185] Megna, Abraham, "Building the New Human Rights Council. Outcome and analysis of the institution-building year", Friedrich Ebert Stiftung, Dialogue on Globalization, Occasional Papers, 33, August 2007, page 9.

of the procedure established by Resolution 1503; the agenda and program of work of the Council; and the methods of work. By April 2007, there were many unresolved issues and negotiations which were personally taken by the President of the Human Rights Council who, in the very last available day, presented a compromise proposal which was accepted minutes before midnight.

In light of the dynamics of negotiations and the strength in numbers of both African and Asian members, the results were positive in the sense that many valuable aspects of the Commission were preserved.[186] To do so, the President had to concede to abolish two country mandates of the system of special procedures on the human rights situations in Cuba and in Belarus. This concession consolidated a trend of decrease of country mandates –from 26 in 1998 to 13 in 2006.[187] This tendency was later reverted, as we will see below.

The whole intense year of negotiations ended up with the adoption of Council Resolutions 5/1 and 5/2 on 17 June 2007. That same day, the first President of the Human Rights Council, Ambassador de Alba from Mexico, finished his term as President.

Nevertheless, the following day, Canada highlighted to the newly elected President of the Council that the previous night there was no consensus on the adoption of the so-called institutional building package. Canada's main problem was the inclusion of the situation of the Occupied Palestinian Territories as a separate item in the agenda of the Council. The new President, Ambassador Costea, from Rumania, put the interpretation of Canada to a vote in the understanding that the package was indeed approved the night before. By 46 votes in favor and 1 against –Canada- the President's interpretation prevailed.[188]

Resolution 5/1 was framed taking into consideration the pillars defined by the then President of the Human Rights Council and negotiated under the following titles: universal periodic review; the system of special procedures; the advisory committee; the complaint procedure; the agenda and program of work; and the methods of work. To complete the institutional building package, Resolution 5/2 imposed some specific rules to special procedures

[186] Megna, Abraham, "Building the New Human Rights Council, Ibid, page 5.
[187] Spohr, Maximilian, "United Nations Human Rights Council. Between Institution-Building Phase and Review of Status", Max Planck Yearbook of United Nations Law, Volume 14, 2010, page 186.
[188] Megna, Abraham, "Building the New Human Rights Council", Ibid, page 11.

mandate-holders in the way they have to conduct when performing their activities. Resolutions 5/1 and 5/2 were endorsed by its superior body, the General Assembly.[189]

II.3.2 The Universal Periodic Review.

II.3.2.1 Towards the establishment of a new mechanism. Raison d'être and precedents.

Selectivity and double standards in dealing with human rights situations within countries were undoubtedly the main criticisms of the Commission. It could be added that there was also a general position among several countries from the South –in particular Asian and African States- regarding the need to have a more cooperative approach when reviewing a country situation.

In this sense, a few decades ago, a group of countries, known as the like-minded group, questioned the Commission for its tendency to "name and shame" individual States for their human rights records. In the late 90's, this group of States made proposals to guarantee that the Commission could deal with all human rights situations without double standards and to adopt a more cooperative approach.[190]

Eventually, it became a proposal of the then Secretary-General Annan that could be acceptable for all States: a universal human rights review mechanism managed by peers. This initiative had a relevant precedent at the beginnings of the Commission on Human Rights. In 1950, France proposed a reporting system linked to the Universal Declaration. This was not an isolated initiative at the time because there were already in place other similar mechanisms, such as the one which existed within the framework of the ILO. The French proposal was not accepted that year by the United States and Latin American countries.

Nevertheless, in 1953, the United States changed its position. The Eisenhower Administration was against the development of human rights covenants and saw the establishment of a reporting system as a positive chance to focus on the implementation of

[189] United Nations General Assembly Resolution A/RES/62/219.
[190] Alston, P., "Reconceiving the human rights regime…", Ibid, page 6.

existing treaties and, at the same time, to share its human rights policy with Member States of the Commission.[191]

Finally, a report mechanism was adopted in 1956. According to this mechanism, a special committee on periodic reports reviewed the information provided by States and later submitted a report to the Commission. According to the opinion of experts, this procedure had some of the problems that many intergovernmental UN mechanisms still face: it focused on achievements –and not on challenges in human rights policies- as well as on summaries –instead of analysis. Gradually, the mechanism lost general interest and support and its work finished in 1981, after 25 years of existence.[192]

During negotiations at the GA level, the proposal by Annan of a "universal peer review" was replaced by a "universal periodic review" in Resolution 60/251. Some States and NGOs considered that this could be a change that would allow a significant participation from stakeholders different from States, but in the end that did not happen.[193]

During negotiations relating to the UPR, some mechanisms were studied as possible models, including the WTO peer review mechanism and the ILO monitoring procedures. The ILO, for example, has a committee of experts which meets on an annual basis to review reports made by States on their implementation of ratified treaties. The committee is entitled to make direct requests and, if necessary, observations related to violations to the ILO treaties. The Conference Committee composed of State representatives selects each year some cases for further review providing the mechanism political support and also a higher level of scrutiny. There are also specific mechanisms to deal with violations to the right to freedom of association and for discrimination in employment. The ILO also has a procedure of direct contacts which provides advice to improve one or more aspects related to the States obligation in ILO conventions, which helps States to solve problems before the issue is raised in monitoring bodies.[194]

II.3.2.2 Negotiations and agreement on the new mechanism.

[191] Alston, P., "Reconceiving the human rights regime…", Ibid, page 7.
[192] Alston, P., "Reconceiving the human rights regime…", Ibid, page 7.
[193] Megna, Abraham, "Building the New Human Rights Council, Ibid, page 34.
[194] Donnelly, Jack, "International human rights norms…", Ibid, pages 63-64.

The President of the Human Rights Council requested Morocco to facilitate negotiations of this relevant pillar of the so-called institutional building package, who successfully achieved a general agreement before the deadline. Negotiations included the legal basis of the mechanism, principles and objectives, cycles and period of review, participants, modalities, outcome and follow-up of the review.

The result of the negotiations was delivered by the facilitator to the then President of the HRC and finally included in the annex to Resolution 5/1. It was agreed that the legal basis for the review would include the UN Charter, the Universal Declaration, the human rights treaties to which the State is a party to, the voluntary commitments of the State concerned – including those presented as candidates of the HRC- and applicable international humanitarian law. During negotiations, the United States opposed to the inclusion of international humanitarian law indicating that this body of law was not part of the mandate of the HRC. In the end, it was included with the safeguard that it could only consider "applicable" IHL norms.

Bearing in mind the issues that contributed to the end of the former Commission, States adopted a number of principles that should guide the universal period review. In this respect, Member States of the Council decided that the review should be conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner.[195] The Council also decided that the review should take into consideration the universality, interdependence and interrelatedness of human rights, have universal coverage and equal treatment of States, and be a State-oriented mechanism with a cooperative approach and with the full involvement of the State under review. The review would also complement other mechanisms, consider the level of development and specificities of the country under review, and not be overlong or burdensome for the State concerned.[196]

The principles also expressly included a reference to the fact that the mechanism would not diminish the possibility to deal with emergency situations of the Council. This is important because, at the time of negotiations, there was no clarity regarding the future role of the Council in dealing with specific human rights crises.

[195] Human Rights Council Resolution A/HRC/RES/5/1, "Institution-building of the United Nations Human Rights Council", Annex, paragraph I.3(g.)
[196] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 3 (a)-(l).

Finally, the principles included a general reference to the participation of other stakeholders, as set out in ECOSOC Resolution 1996/31 and other decisions that the Council may take in this regard.[197] Indeed, this was one of the most divisive issues during negotiations. Several Asian and African States as well as members of the OIC emphasized the importance to ensure the intergovernmental nature of a peer mechanism and, as consequence, discouraged the participation of NGOs and other stakeholders during the review.

On the opposite side, the EU and some Latin American countries –including Argentina and Chile- favored the participation of civil society during the exam and its outcome. The compromise solution was to allow other stakeholders to make comments in the adoption of the report, but not during the review of the State concerned.[198]

Thus, the solution was more inclined to a lesser participation of other stakeholders than in the rest of the existing mechanisms, where there is a chance for other stakeholders to make comments and even, in some cases, recommendations. However, the distinctive intergovernmental nature of the review was at the same time its major innovative characteristic, which made it different from the special procedures mechanisms or the treaty bodies system.

The objectives agreed for the UPR were general: improvement of the situation on the ground, assessment of human rights obligations, exchange of best practices, cooperation, and technical assistance with the consent of the State concerned.[199]

At the time, it was decided that the periodicity of the mechanism would be 4 years and, during that period, all UN Member States would be under exam, mixing Member and Observer States of the Council, taking into consideration a geographical distribution but guaranteeing that all Member States would be under review during their membership.[200] These decisions tried to emphasize that the Council would take seriously the commitment to human rights of its members.

[197] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 3(m).
[198] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 32.
[199] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 4.
[200] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 5-14.

In negotiations, there were opposite positions regarding information to be considered during each review. Several African and Asian States emphasized the need to consider exclusively information provided by the State. On the contrary, the EU and some Latin American countries –e.g. Argentina, Chile- suggested different proposals to include information, recommendations and analysis emanating from other stakeholders –e.g. OHCHR, treaty bodies, special procedures, NGOs.[201]

In the end, it was agreed there will be a report from the State and two summaries of the High Commissioner: one taking stock of information contained in reports of special procedures, treaty bodies and in other UN documents; and a second one systematizing information received from other stakeholders.[202]

During negotiations, there were exchanges on the role of OHCHR during the review. Some States wanted to give the High Commissioner the capacity to analyze the information. Nonetheless, the position that prevailed was the opposite: OHCHR would make a summary of credible and reliable information from available UN sources and other stakeholders.[203]

Regarding the modalities of the UPR, the Council decided that a working group chaired by the President of the Council would consider 48 countries in three sessions per year. It also decided that Observer States may participate in the review and other stakeholders may be present. The majority of States rejected the possibility that NGOs or national institutions could participate in the dialogue.[204]

The Council further agreed that the review would be facilitated by a troika composed of Member States elected by drawing of lots. The State under review may ask that one member of the troika be from its regional group and can ask for the substitution of one member of the troika only once. At the same time, a member of the troika elected by lot could be excused from participating if requested. The review would take place in three hours where there would be a presentation by the State concerned followed by an interactive dialogue. An

[201] It has been argued that the UPR should focus on the follow up of recommendations made by treaty bodies. See in this regard, De Frouville, Olivier, "The missing link: What kind of relationship should there be between the treaty bodies and the Human Rights Council?", International Service for Human Rights, Human Rights Monitor, Special edition, 2016, paragraph 9.
[202] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 15-17.
[203] Megna, Abraham, "Building the New Human Rights Council", Ibid, page 38.
[204] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 18.

additional half hour is devoted for the adoption of the outcome in the plenary of the Council.[205]

Resolution 5/1 also referred to the format of the outcome, which in practice ended up being a report: it would be a summary of the presentation of the State concerned, followed by a summary of the interactive dialogue and of conclusions and recommendations.

Accepted recommendations would be included and other recommendations and comments would be noted. This was a relevant achievement because there was a proposal to include only recommendations accepted by the State.[206]

Resolution 5/1 decided that the reviews in subsequent cycles would focus on implementation, called the international community to provide technical assistance for the implementation of recommendations with the concerned State´s consent and decided to include the issue as a permanent item of the HRC's agenda. The Council further agreed that it could deal with persistent cases of non-cooperation.[207]

In 2007, the HRC adopted a resolution requesting the Secretary-General to create two voluntary funds: one to help the participation of least developed countries in the UPR and a second fund to provide financial and technical assistance to States for the implementation of the recommendations.[208] To date, many States have benefited from the fund to participate in UPR sessions, particularly least developed countries that have no representation in Geneva.

During negotiations of the institution-building of the Council, there was so much emphasis put on this new mechanism to solve the main failures of the Commission that its work is often considered a significant marker for the failure or success of the new body.[209]

II.3.2.3 Balance of the agreement on the UPR and its first years of work.

[205] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 19-25.
[206] Megna, Abraham, "Building the New Human Rights Council", Ibid, page 37.
[207] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 27-36.
[208] Human Rights Council Resolution A/HRC/RES/6/17.
[209] Megna, Abraham, "Building the New Human Rights Council", Ibid, page 35.

An initial assessment of the creation of the UPR is positive and admits a certain degree of optimism. Even for scholars who from the beginning had a very negative opinion about the Council's performance, this new mechanism was seen as an improvement. The major achievement is that the human rights record of every UN Member State is subject to international scrutiny. [210]

Indeed, there are significant grounds to welcome the new mechanism and its impact. During six decades, albeit in a selective manner, the Commission considered the situation of several developing countries facing dictatorships, armed conflicts or even cruel regimes grounded on institutionalized discrimination based on race. However, the Commission was not used to dealing with the human rights situation of powerful Western countries. The fact that those States now have to be under public examination in an intergovernmental forum represents a relevant change for the universal system. During the first cycle of reviews, when scrutinized under the UPR, some of these developed countries had to explain relevant human rights policies relating to sensitive and controversial issues such as the exceptional conditions of pre-trial detention of suspected terrorists or serious problems of violence against women.[211]

In any case, during the first cycle, which reviewed all Member States of the UN, there was also a serious procedural problem: the list of speakers. It became usual practice for some States to arrive to the Council the day when the list was opened as early as possible –even before 5 am- in order to guarantee that only allies and friendly States could take the floor during the review. This practice had very negative consequences. Many –if not almost all- the interventions by States in the interactive dialogue of the review praised the situation of human rights of the State concerned instead of making recommendations to improve the situation at the national level. The results of the dialogue impacted the outcome report of the State under review. Fortunately, this situation was resolved during the 2011 HRC review, as it will be described later.

Two full cycles –the first between 2008 and 2011 and the second between 2012 and 2016- consolidated, to a certain extent, the original format of this still new mechanism. Currently,

[210] Baehr, Peter, "The Human Rights Council: A preliminary evaluation", Column, Netherlands Quarterly of Human Rights, Vol 28/3, 2010, pages 329-331.
[211] Human Rights Council, report of the Working Group on the Universal Periodic Review, UN Document A/HRC/8/25, 23 May 2008, paragraphs 8 and 9. See also Human Rights Council, report of the Working Group on the Universal Periodic Review, UN Document A/HRC/8/24, 23 May 2008, paragraph 17.

the UPR is at its third cycle (2017-2021) and is trying to focus more on implementation of the recommendations made by the mechanism in the previous cycles.

The level of cooperation of UN Member States with the UPR has been very high. Almost all Member States have submitted their reports in a timely manner and have participated with high-level Delegations in their respective examinations. One notable exception during the second cycle was Israel, which decided to suspend its relations with the Council in May 2012 and did not present its report to the UPR later that year. At the beginning of 2013, the HRC took the exceptional measure to adopt a resolution requesting the country to resume cooperation with the system, asking the President of the HRC to take appropriate measures in this regard and rescheduling the exam during that same year.[212] The review finally took place in October 2013 and Israel participated again in the third cycle in January 2018.[213]

Since the creation of the UPR, a number of States submitted, on a voluntary basis, midterm implementation reports (approximately two years after the recommendations were made). Those reports give an account of the level of implementation of the recommendations by the time the midterm report is presented. By February 2019, some States had submitted voluntary UPR midterm reports on the implementation of the recommendations they received during the first and/or second cycle and one State submitted a report regarding the implementation of selected recommendations concerning the third cycle.[214] These reports constitute a relevant indicator of the interest of States in the UPR and the recommendations received in that context. Nevertheless, less than a hundred States have submitted those voluntary reports and the number is decreasing. It remains to be seen if it would be possible to measure the success of the mechanism in terms of implementation of the recommendations stemming thereof.

In sum, the balance is overall positive. Even if the nature of this intergovernmental body makes it almost impossible to escape from politicization, this democratic and equalitarian mechanism has represented significant progress for the universal system of protection of human rights.

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[212] UPR Info, "Israel absent from its own UPR", 30 January 2013, available at: https://www.upr-info.org/en/news/israel-absent-its-own-upr

[213] Office of the United Nations High Commissioner for Human Rights, "Universal Periodic Review-Israel", available at: https://www.ohchr.org/EN/HRBodies/UPR/Pages/ILindex.aspx

[214] Human Rights Council, "Universal Periodic Review", "UPR Mid-term information", "UPR Mid-Term reports", available at: https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx

II.3.3 Special Procedures.

II.3.3.1 Resolution 5/1. Selection and appointment of mandate-holders and review, rationalization and improvement of procedures.

The GA let the Council decide how to move forward with the valuable system of special procedures. After polarized negotiations, the agreement on special procedures as set out in Resolution 5/1 focused on two main themes: the selection and appointment of mandate-holders and the review, rationalization and improvement of mandates.

Regarding the first theme, the Council decided to establish clear and defined criteria for the nomination, selection and appointment of mandate-holders (special rapporteurs, independent experts and working groups). At present, Governments; regional groups of the UN; international organizations including OHCHR; NGOs; other human rights bodies and individuals can submit nominations. OHCHR is now mandated to prepare an updated list of all nominated candidates and publicize the vacancies.[215]

A new consultative group –composed of five representatives of Member States of the Council, one per regional group- consider the candidacies and propose a list to the President of the Council according to the established criteria. During negotiations, delegations considered the possibility of counting with a panel of experts to do this work, but this option was finally disregarded.[216]

The Consultative Group considers candidates from the public list prepared by OHCHR, but in exceptional cases it may consider candidates outside the list. In all cases, decisions are public and substantiated. On the basis of these proposals, the President conducts consultations and makes proposals which are finally presented to and adopted by the plenary.[217]

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[215] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 42-43.

[216] Human Rights Council, report of the Intersessional open-ended intergovernmental working group on the implementation of operative paragraph 6 of General Assembly resolution 60/251 established pursuant to Human Rights Council decision 1/104 on the "Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council"", UN Document A/HRC/3/4, 30 November 2006, page 3.

[217] It should be noted that the criteria established in Resolution 5/1 to select candidates for mandate holders include: high standards of preparation; expertise; experience in human rights, in particular in the field of the mandate; independence, impartiality, integrity and objectivity. Candidates will also be selected taking into

Moreover, the Council decided that technical and objective requirements for eligible candidates should be adopted by a resolution at a later stage.[218] Thus, the HRC, in Decision HRC 6/102, mandated OHCHR to prepare a questionnaire for candidates, update the list of nominees, and provide for assistance to the Consultative Group which should be formed in advance to the Council sessions where appointment of mandate-holders should take place. The Council's decision also includes specific requirements for candidates (e.g. qualifications, established competence, and availability).

Mandate-holders now have a limit in their re-election –only two consecutive terms of three years each, they cannot accumulate functions and they are expected not to have any conflict of interest with any other professional activity, in particular a position in his or her Government.[219]

This new procedure to select mandate-holders established in Resolution 5/1 represents a significant and positive improvement in relation to the procedure of the former Commission. Indeed, it clearly limited the power that Presidents of the former Commission used to have to decide on nominations of mandate-holders and also enhanced transparency.

The most positive change is that the current system allows any competent expert to submit his or her own nomination, without having to count with the support of any State, international organization or NGO. Moreover, the selection procedure has now more filters –e.g. the consultative group and OHCHR- and there are objective requirements to select experts –a series of technical requirements. Finally, mandate-holders can be reelected only once.

Regarding the second theme agreed in Resolution 5/1, there was only a broad decision on the renewal, rationalization and improvement of mandates. In this regard, it was agreed that the decision on the future of each mandate would be taken on a case-by-case basis, within the context of negotiations of specific Council resolutions.[220]

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consideration the need to ensure gender balance and equitable geographical distribution, according to paragraphs 39 and 40 of Resolution 5/1.

[218] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 41.

[219] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 44-46.

[220] Human Rights Council, report of the Intersessional open-ended intergovernmental working group on the implementation of operative paragraph 6 of General Assembly Resolution 60/251 established pursuant to

Resolution 5/1 only specifies that the discontinuation of mandates should be based on the premises of a better promotion and protection of human rights. Also, as general rules for improvement, the resolution indicates that mandates should be coherent with the universal human rights system, should pay equal attention to all human rights, avoid duplication and cover areas where there is a gap through a new procedure or expanding an existing one, or requesting joint action to various mandate-holders.[221]

Negotiations on the future of the mandates were very difficult and divisive. There was a general disagreement on the criteria to establish these mandates; the way to make mandate-holders accountable for their actions; the cooperation by and with States; the working methods; the relationship with the Council and other human rights mechanisms and stakeholders; the funding; and the support from OHCHR. It was not possible to arrive to a consensus decision on any of these topics.

There were also exhausting negotiations about whether to maintain country mandates or not. Some States requested the elimination of country mandates or the definition of stricter criteria for their establishment.[222] These States argued that specific human rights situations could be considered in special sessions or within the UPR.[223] In contrast, other countries, including Argentina, supported their preservation.

During the last days of negotiations prior to the adoption of Resolution 5/1, the President proposed preserving both thematic and country mandates. In this context, China insisted on the need to establish a 2/3 majority of votes to establish new country mandates and, even threatened to oppose consensus to the whole institution-building package if this proposal was not taken on board. This proposal was fiercely opposed by the EU. Finally, China accepted a simple majority for the establishment of country mandates.[224]

Human Rights Council decision 1/104 A/HRC/3/4, Ibid, pages 4-5; Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 55.

[221] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 56-58.

[222] Those States include: the African Group, China, Cuba, Democratic Republic of Korea, Iran, Bangladesh, India and Malaysia.

[223] Megna, Abraham, "Building the New Human Rights Council…", Ibid, pages 27.

[224] Foot, Rosemary et al., "China's influence on Asian States…", Ibid, pages 856-858.

As a transitional phase, the Council decided that all country mandates inherited from the Commission would be maintained until the end of their six-year term and those that exceeded that term until the Council considered the review of the mandate.[225]

Nevertheless, as a result of the negotiations, there were important concessions in terms of country mandates. First of all, Resolution 5/1 established a different period for thematic mandates –three years- and country mandates –one year.[226] Also, as mentioned before, two of the mandates of the former Commission were excluded by the President of the Council in Appendix I of Resolution 5/1: the country mandates on Cuba and Belarus.[227]

II.3.3.2 Resolution 5/2. The Code of Conduct.

The possibility to adopt a code of conduct for special procedures started with the discussions concerning the reform of the Commission and its mechanisms. Since the mid-1970s, there were proposals of reform for the incipient system of special procedures. At the time, the Group of 77 (G-77)[228] suggested a radical reform: to replace the system of special procedures by working groups composed of Government representatives based in Geneva. The proposal was not accepted and the system became even stronger in the following years.[229]

However, during the 1990s, there was a new wave of proposals of reform at the intergovernmental level. In this sense, the Asian Group renewed the idea of changing the special procedures system and, in 1998, successfully managed to adopt a resolution calling for a report on the review of all the Commission's mechanisms and, as a result of this process, the idea of a code of conduct for special procedures emerged and was promoted by the Asian Group and the OIC.[230]

Finally, in November 2006, during the second session of the Council, Algeria, on behalf of the African Group, pushed for the adoption of a resolution which called for the elaboration

[225] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 60 and 62.
[226] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 60.
[227] Human Rights Council Resolution A/HRC/RES/5/1, Appendixes I-II.
[228] The G77 is an organization of developing countries established in 1964 to mainly promote the economic interests of the South at the international level Information about the group of G77 is available at: www.g77.org/doc.
[229] Alston, Philip, "Hobbling the monitors…", Ibid, pages 582-584.
[230] Alston, Philip, "Hobbling the monitors…", Ibid, pages 585-587.

of a code of conduct for special procedures mandate-holders.[231] This resolution –which faced strong opposition from the EU- was put to a vote and, as a consequence, was adopted with the support of all African and Asian States, Brazil and Ecuador, and some abstentions, including those from Uruguay and Argentina.[232]

In this context, in June 2007, the Council adopted Resolutions 5/1 and 5/2 on the institutional building package by consensus. Resolution 5/1 outlines the whole structure of the Council, including the selection and appointment of special procedures, and its review. Resolution 5/2 adopts a code of conduct for special procedures mandate-holders, accepted by all State members, including from the EU.

In the preamble of Resolution 5/2, one can observe many of the reasons alleged by the AG during negotiations to push for the adoption of the code: the need to enhance cooperation between Governments and mandate-holders; the contribution of the code to the enhancement of the moral authority, credibility, objectivity and expertise of mandate holders; and the recognition of the independence of mandate-holders, although it clearly limited their prerogatives to the scope of the mandate given by the Council as well as the UN Charter.[233] In its short operative part, resolution 5/2 urges States to cooperate with special procedures and to provide all information and to respond to communications in a timely manner, and adopts the code of conduct.[234]

The Appendix of Resolution 5/2 includes the text of the Code of Conduct. It affirms that its objective is to enhance an ethical conduct and professionalism of mandate-holders in the performance of their functions and indicates that the draft manual for special procedures – by the time in elaboration by mandate-holders themselves during their annual meetings- should be in conformity with the Code.[235]

It should be highlighted that, during negotiations, many States and NGOs indicated that there was no need to elaborate such a code of conduct because the special procedures would have their own manual once adopted in the framework of their annual meetings. However,

[231] Human Rights Council Resolution A/HRC/RES/2/1.
[232] Megna, Abraham, "Building the New Human Rights Council", Ibid, page 31.
[233] The preambular part also affirms that the provisions of the Code complement the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission. See Human Rights Council Resolution A/HRC/RES/5/2, preambular paragraphs 4-17.
[234] Human Rights Council Resolution A/HRC/RES/5/2, operative paragraphs 1-2.
[235] Human Rights Council Resolution A/HRC/RES/5/2, Appendix, Code of Conduct, articles 1-2.

the majority of States considered that this self-regulating manual was not the best way to ensure their ethical conduct and professionalism.

The Code of Conduct requires mandate-holders not to be influenced by any stakeholder; perform their activities having in mind the promotion of cooperation with States; act within the scope of their mandates; not to seek or accept instructions from any State or stakeholder; and not to accept honors, decorations, remunerations or gifts while performing their activities.[236]

Mandate-holders have to consider objective and reliable information from credible sources and cross check this information as well as to receive and assess in a comprehensive manner the responses of States in that regard. They can also bring proposals to enhance the mandate to the attention of the Council.[237]

The Code of Conduct also includes specific requirements for the admission of letters of allegations of individuals claiming human rights violations (e.g. should not be manifestly unfounded or politically motivated) and for urgent appeals made by special procedures to States (e.g. imminent damage of a very grave nature). Rules on urgent appeals were not negotiated in depth and the result was quite positive. There is also a specific provision in relation to country missions (e.g. they could only be carried out with the concerned State's consent).[238]

Regarding their conclusions and recommendations, mandate-holders should first inform the State concerned and consider their responses. If conclusions and recommendations are addressed to the Council, this body should be the first recipient of them. Formal communications between special procedures and States should be done through diplomatic channels. This changed a former practice of some mandate-holders who used to address local authorities directly.

Finally, the Code of Conduct established that mandate-holders are accountable to the Council for the fulfillment of their mandates.[239] Algeria (on behalf of the AG), Pakistan (on

[236] Human Rights Council Resolution A/HRC/RES/5/2, Appendix, Code of Conduct, article 3.
[237] Human Rights Council Resolution A/HRC/RES/5/2, Appendix, Code of Conduct, articles 4-7.
[238] Human Rights Council Resolution A/HRC/RES/5/2, Appendix, Code of Conduct, articles 9-11.
[239] Human Rights Council Resolution A/HRC/RES/5/2, Appendix, Code of Conduct, articles 12-15.

behalf of the OIC) and Cuba (on behalf of the G77) called for the establishment of an ethics committee to monitor compliance of the Code.[240] This initiative was excluded in the final version of the Code of Conduct.

II.3.3.3 Balance of reforms to the special procedures system.

The result of the institutional building package had a mixed result. On a positive note, there was a clear improvement in the system of nomination, selection and appointment of mandate-holders. Indeed, this process is now much more democratic and transparent than the one of the Commission. Moreover, the preservation of country mandates in a resolution adopted by consensus represented an achievement, even if it was not possible to include two of them and they have to be renewed annually.

Regarding the Code of Conduct, even if during negotiations the majority of States promoted a system of special procedures more limited and State-controlled, the final outcome of the Code was balanced and guaranteed the independence of mandate-holders as well as their immunities and privileges, particularly during country missions. Many controversial issues were finally excluded from the agreement (e.g. a committee to control experts).

At the same time, the debate demonstrated that the code was necessary. There were no specific rules to hold mandate-holders accountable for their work and this could lead to some undesirable situations. Even if the manual of special procedures –adopted in 2008, which aims at self-regulating the behavior and working methods of mandate-holders, is a useful tool, it is clearly not enough to ensure the ethical and professional behavior of experts.

The decision of having a code of conduct goes in line with a growing tendency to attribute responsibility for their actions to international actors, international civil servants, international members of treaty bodies and judges. If special procedures have the power to influence the internal situation of a specific country, then it is reasonable to hold them accountable for their actions.[241]

[240] Alston, Philip, "Hobbling the monitors…", Ibid, pages 566-567.
[241] Alston, Philip, "Hobbling the monitors…", Ibid, pages 618-628.

Scholars –even those who are critic of the result in this important pillar- highlight the fact that the system was preserved and has, therefore, the same potential to develop all the ways and means created by them during the time of the Commission.[242]

Nevertheless, there was no decision about the structural problems of the special procedures system relating to the overlapping of their mandates, the relationship with treaty bodies, the quality of their reports, and the implementation and the follow-up of their recommendations. The Council decided that all these issues would be discussed on a case-by-case basis while renewing each mandate. In the end, after the renewal of each mandate, almost no substantive changes took place. This is not surprising due to the ideological and political differences among States, the dynamics in inter-governmental negotiations at the Council and the complex participation of many stakeholders in a resolution regarding special procedures mandate-holders.[243]

II.3.4. The Advisory Committee.

II.3.4.1. From the Sub-commission on the Promotion and Protection of Human Rights to the Advisory Committee.

When negotiations began on the possible expert advice and its format, there were doubts about the need to have a standing body of experts to assist the Council. Indeed, the European Union proposed to have a roster of experts who could be called for specific purposes. On the contrary, the vast majority of countries from the South –including Argentina- pushed for a formal mechanism that could be the heir of the Sub-commission to technically assist the new Council in performing its mandate.

In the end, there was consensus to have a consultative body that was called the Advisory Committee, composed of 18 members –instead of 26 like the former Sub-commission- who would serve as the think tank of the Council. The vast majority of States wanted to ensure that the limits set to the power of autonomy to the Sub-commission in the last years of its work was kept.[244]

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[242] Spohr, Maximilian, "United Nations Human Rights Council…", Ibid, pages 185-187.
[243] Alston, Philip, "Hobbling the monitors…", Ibid, page 582.
[244] Human Rights Council Resolution A/HRC/RES/5/2, paragraph 65.

The election process for the experts of this Committee begins with the nomination by States of candidates of their own region and ends up with the election by secret ballot held in a specific meeting of the Council.[245] They have a three-year mandate renewable only once. [246]

The Advisory Committee is mandated to provide expertise at the request of the Council, focusing on studies and research advice, and to work on specific issues according to the Council's requests. The Committee can make proposals to enhance its efficiency and on research proposals for the consideration of the Council. It is mandated to elaborate guidelines for the elaboration of studies and should promote an "implementation-oriented" approach. This could implicitly be aimed at avoiding the development of standard-settings of the expert body unless the Council decides otherwise.[247]

The new expert body has two sessions each year for a maximum of 10 working days per year. It shall act collectively, in smaller groups or individually. It shall have contact with States and other stakeholders following the democratic and open tradition in terms of participation of the Commission.[248]

II.3.4.2 The fate of the previous mechanisms of the Sub-commission.

There is another major difference between the Advisory Committee and the former Sub-Commission. The new committee is not able to create subsidiary mechanisms unless the Council authorizes it to do so. In this context, Resolution 5/1 indicates that the fate of all subsidiary mechanisms of the former Sub-Commission would be decided by the Human Rights Council.[249]

Indeed, all mechanisms of the former Sub-Commission were renewed at a later stage with different formats but, in all cases, it was decided that they would all report directly to it. Consequently, at present, they do not have any link to the Advisory Committee. These

[245] Nominations of candidates by States is done in consultation with national stakeholders such as national institutions and NGOs. Consideration is given to gender balance and an equitable geographical distribution. See Human Rights Council Resolution A/HRC/RES/5/2, paragraphs 70-73.
[246] The experts should be independent, with recognized competence, experience and high moral standing. They cannot hold positions that may generate a conflict of interest and they cannot accumulate other responsibilities in the UN level in human rights. See in this regard, United Nations Human Rights Council Resolution 5/2, paragraphs 67-74
[247] Human Rights Council Resolution A/HRC/RES/5/2, paragraphs 75-78.
[248] Human Rights Council Resolution A/HRC/RES/5/2, paragraphs 79-83.
[249] Human Rights Council Resolution A/HRC/RES/5/2, paragraph 81.

mechanisms at the time that the Sub-commission ended its work were four: the working groups on Contemporary forms of slavery; Indigenous populations; Minorities; and the Social forum. Each of them followed its own path.

II.3.4.2.1 The Special Rapporteur on contemporary forms of slavery, including its causes and consequences.

The Working Group on slavery was established as early as 1975 by the Sub-commission and, in 1998, it was renamed Working Group on contemporary forms of slavery.[250] During its long existence, it made reports and recommendations considering the Slavery Convention of 1926, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956 and the ILO Convention No. 29 on Forced Labor of 1930.

The task of the Working Group was complemented by the decision of the GA to establish, in 1991, a UN Voluntary Trust Fund on Modern forms of Slavery.[251] The fund is managed by OHCHR, with the advice of a Board of Trustees composed of experts of all regions of the world. By the end of each year, the Secretary-General approves yearly grants, which are paid the following year.[252]

In 2007, the recently established Council decided to replace the former Working Group by a Special Rapporteur who would report directly to it.[253] The new Special Rapporteur gives careful consideration and recommendations on the issue using the existing legal framework as a basis of his or her work. The work of this mandate is valuable due to the unfortunate continuation of instances of modern slavery.

II.3.4.2.2 The Expert mechanism on the rights of indigenous peoples.

[250] United Nations Commission on Human Rights Resolution 1998/42.
[251] See United Nations General Assembly Resolution A/RES/46/122. This fund has supported more than 400 organizations in 95 countries and provided humanitarian, legal and financial assistance to thousands of victims who have suffered from modern slavery.
[252] Office of the United Nations High Commissioner for Human Rights, "The United Nations Voluntary Trust Fund on Contemporary Forms of Slavery. What the fund is", available at: https://www.ohchr.org/EN/Issues/Slavery/UNVTFCFS/Pages/WhattheFundis.aspx
[253] Human Rights Council Resolution A/HRC/RES/6/14, operative paragraph 7.

A working group, focusing on indigenous populations, was created in 1982 by the Sub-Commission and functioned on an annual basis. It reviewed developments related to indigenous populations, analyzed relevant UN information, and submitted its conclusions to the Sub-Commission. The working group was also mandated to give special attention to the evolution of standards on the issue.[254]

Gradually, this working group began to coexist with other mechanisms on indigenous issues. In 1998, the Commission on Human Rights decided to create a working group to define the modalities and functions of a forum for indigenous peoples in the United Nations. This decision was in conformity with the Vienna Declaration and Program of Action of 1993, in the context of the International Decade of the World's Indigenous Peoples.[255] As a result, in 2000, the ECOSOC created a permanent forum for indigenous issues, as a subsidiary body of the ECOSOC itself, giving more hierarchy to this particular mechanism than those which reported to the Commission or the Sub-commission.[256] Its 16 members have a 3-year mandate renewable only once.[257]

In addition to the working group and the forum, in 2001, the Commission decided to establish a Special Rapporteur on indigenous issues. The Commission followed the recommendation of the Sub-commission in this regard, while noting that there was no mechanism at the level of the Commission to protect the human rights of indigenous peoples. The Special Rapporteur has a specific purpose, different from the other mechanisms: he or she gathers information and communications from all sources, including Governments, on violations of their human rights and fundamental freedoms and makes recommendations to prevent and remedy those violations.[258]

This complex structure regarding indigenous issues existed at the time the Human Rights Council was established. In December 2007, the Council decided to replace the former Working Group on indigenous populations of the former Sub-commission by an expert mechanism reporting to it. This mechanism should focus mainly on studies and research-based advice and can make proposals to the Council for its consideration within the scope

[254] United Nations Economic and Social Council Resolution 1982/34, operative paragraphs 1-2.
[255] United Nations Commission on Human Rights Resolution 1998/20.
[256] Economic and Social Council Resolution 2000/22, operative paragraph 1.
[257] Economic and Social Council Resolution 2000/22, preambular paragraph 7 and operative paragraph 1.
[258] United Nations Commission on Human Rights Resolution 2001/57, operative paragraph 1.

of its work. To enhance cooperation and avoid duplication, there should be an annual meeting among this new mechanism, the Special Rapporteur and the forum.

The procedure for the selection of its five members is the one established for special procedures in Resolution 5/1, taking into consideration a gender perspective and candidates of indigenous origins as much as possible.[259] The current situation of indigenous peoples, who face structural discrimination in many regions of the world, fully justifies the consideration of the issue at the UN on different levels and, even today, much remains to be done to promote and protect their rights effectively.

II.3.4.2.3 The Forum on Minority Issues.

The Working Group on minorities of the Sub-commission was created in 1995 and was composed of five members of the Sub-Commission. Its objective was to promote the implementation of the Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities, as well as to examine possible solutions for the problems among minorities and States and to recommend further measures when necessary.[260] During 11 years, it helped preparing studies on the notion of minorities and specific issues such as education, participation in public life, inclusive development and conflict prevention.[261]

In 2005, the Commission decided to establish an Independent Expert on minorities to promote the Declaration as well as best practices on the issue, while avoiding duplication with existing mechanisms. At that moment, the Commission commended the role of the Sub-commission's Working Group on minorities as a forum but decided to amend its mandate so as to allow it to hold only three days of work during the annual session of the Sub-commission.[262]

That was the context at the institutional level on minority issues when the Human Rights Council was established in 2006. The Council decided to replace the former Working Group of the extinct Sub-commission by a forum for dialogue which promoted the exchange of

[259] Human Rights Council Resolution A/HRC/RES/6/36.
[260] Economic and Social Council Resolution 1995/31.
[261] Office of the United Nations High Commissioner for Human Rights, "The former Working Group on minorities," available at: https://www.ohchr.org/EN/Issues/Minorities/Pages/TheformerWGonMinorities.aspx
[262] United Nations Human Rights Commission Resolution 2005/79, operative paragraph 9.

different perspectives among minorities, and between minorities and States, and which would have to provide thematic contributions to the Independent Expert on minorities. The forum is open to the participation of all stakeholders, in accordance with UN rules, and meets once a year for two working days. The President of the HRC is requested to appoint a chairperson for the forum every year among experts on minority issues, who should prepare a summary of the discussion.[263]

II.3.4.2.4 The Social Forum.

The fourth and last mechanism of the Sub-commission was the social forum, established in 2002 to study the consequences of globalization in the enjoyment of economic, social and cultural rights.[264] It was mandated to exchange information in order to follow up on situations of poverty and destitution throughout the world; to propose standards and initiatives of a juridical nature, guidelines and other recommendations for consideration of the Commission and other mechanisms; and to follow up the agreements reached at the major world conferences and the Millennium Summit.[265] It had a two-working day annual session between 2002 and 2006 with the participation of States, NGOs and other interested stakeholders.

After the establishment of the Human Rights Council, the Social Forum continued to exist but now reports to the Council. The chairperson is a Government representative, elected respecting the principle of regional rotation, and has a three-day annual session, open to all interested stakeholders, to discuss topics related to the fight against poverty and the consequences of globalization.[266]

II.3.4.3 Balance of the work of the Advisory Committee.

The final result was somehow different from the proposal that in 2005 the own Sub-Commission made to the Commission about its own future. Indeed, the Sub-commission suggested that its successor body should be a collegial body composed of 25 experts from all regions with a mandate to develop standard-setting, taking into consideration the

[263] United Nations Human Rights Commission Resolution 2005/79, operative paragraphs 1-4.
[264] United Nations Sub-Commission on Human Rights Resolution 2001/24.
[265] United Nations Sub-Commission on Human Rights Resolution 2001/24, Ibid, operative paragraph 2.
[266] Human Rights Council Resolution A/HRC/RES/6/13, operative paragraphs 3-5.

contribution of the Sub-commission to the elaboration of principles on the fight against impunity and on the right of reparations, and to fill-in the existing protection gaps.[267]

In the end, the Council did create an expert body but with a smaller size and mainly to produce the studies it requested. The Council did not make any reference to the contribution of the new body to the development of standard-setting, although it did not expressly prohibited it.

In line with a consolidating trend, the Advisory Committee has no ability to submit any initiative on its own. This consolidated the limits that the Sub-Commission progressively faced during its last years of existence: in 2000, it lost its ability to adopt country resolutions, although it could still discuss country situations not dealt with by the Commission; in 2003, it lost the capacity to decide on its own the issues to be studied;[268] and both in 2003 and in 2004, the Commission reminded it of the prohibition to adopt country resolutions.[269]

It is clear that the new body has limited ability to promote standard-setting by itself, but it could do it if the Council requires it to do so. In practical terms, the results of the work of the Advisory Committee largely depends on the political will of the Council to give this expert body relevant thematic issues to develop. So far, as we will see later, its task has been useful in terms of contributing to the development of international human rights norms and standards at the request of the Council.

II.3.5. The Complaint Procedure.

II.3.5.1 Characteristics of the complaint procedure.

The decision on the future of the 1503 procedure was considered by GA Resolution 60/251, which requested the Council to assume, review and where necessary rationalize all mandates, mechanisms, functions and responsibilities of the Commission to maintain a series of mechanisms and procedures, including "a complaint procedure".[270] GA Member States

[267] United Nations Sub-Commission on Human Rights, Decision on the "Role of an independent expert body within the reform of the United Nations human rights machinery", UN Document E/CN/4/SUB/2005/114, 17 October 2005.
[268] United Nations Commission on Human Rights Resolution E/CN.4/RES/2003/59, operative paragraph 3.
[269] United Nations Commission on Human Rights Resolutions E/CN.4/RES/2003/59, operative paragraph 8 and E/CN.4/RES/2004/60, operative paragraph 9.
[270] United Nations General Assembly Resolution A/RES/60/251, paragraph 6.

decided to preserve a procedure of this nature in the Council but they did not specify if the new body would continue with the structure established by ECOSOC Resolution 1503 (i.e. two working groups, one within the Sub-commission and the other within the Commission).

The 1503 procedure had a series of shortcomings. Firstly, it was slow because both the Commission and the Sub-commission only met annually.[271] Secondly, the confidential nature prevented local actors -such as opposition parties or local NGOs- as well as international NGOs to participate in the process. Thirdly, it was not able to address specific cases, but only general situations where gross violations were committed. Finally, it did not involve the authors of the communication in any part of the process. The final result of the procedure, if the situation did not improve, was to make the situation public in the Commission.

Negotiations on the future complaint procedure were not particularly divisive and the decision taken by Member States of the Council in Resolution 5/1 was to establish a procedure "to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances".[272]

Resolution 5/1 also expressly indicates that it has taken as a basis the 1503 procedure adopted in 1970 as revised by Resolution 2000/3. This procedure was improved, where necessary, to ensure an objective and victim-oriented procedure, conducted in a timely manner. No change was, however, made to one of the main characteristics of this procedure. It kept its confidential nature. The reason argued was that this procedure would try to enhance cooperation with the State concerned. [273]

Any individual, group of individuals or NGOs can submit communications to the complaint procedure against a State. It has to address patterns of gross human rights violations, including breaches of international humanitarian law. It is a non-conventional mechanism and, as such, there is no requirement for a State to be obliged by a specific human rights treaty.

[271] Donnelly, Jack, "International human rights…", Ibid, page 53.
[272] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 85.
[273] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 86.

Following the 1503 model, there are two working groups which deal with those communications and take decisions by simple majority: the working group of communications and the working group of situations. The working group of communications is composed of five members of the Advisory Committee, appointed by this body and representing the five regional groups of the world, with gender balance. They have a three-year mandate, only renewable once.[274]

The chairperson of the working group on communications, together with the secretariat, undertakes an initial screening of communications received, based on the admissibility criteria established in Resolution 5/1 before transmitting them to the State concerned.[275] The chairperson can disregard those communications manifestly ill-founded and informed to the rest of the members of the working group in order to guarantee transparency.[276]

The working group on communications will assess the cases and will dismiss those which are considered inadmissible, may require further additional information to the State concerned or study the issue further. In any of those cases, it will keep a case under review until its following session. The working group on communications is also able to declare the admissibility of certain cases and make recommendations in this regard to the working group on situations.[277]

The working group on situations is composed of five State representatives from each regional group elected for one single year -renewable only once- and serving in their personal capacity. The group can decide to dismiss the cases, ask the State concerned for additional information and continue the consideration of the case in its next session or make recommendations to the Council. All decisions should be duly justified and, if needed, by the decision of a majority of votes.[278]

Both working groups meet at least twice a year in order to guarantee celerity in the process and a victim-oriented approach. This contrasted with the 1503 procedure which only held a yearly meeting. The reports sent to the Council are transmitted two weeks in advance for

[274] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 89-93.
[275] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 86.
[276] It should be noted that the Chairperson has to indicate the reasons of all decisions resulting in the rejection of a specific communication. See Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 94.
[277] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 96-97.
[278] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 98-99.

their consideration and the cases remain confidential. The Council may decide to have a public session if there is an evident lack of cooperation of the State concerned. The Council should deal with the case no later than 2 years since the communication was received.[279]

One remarkable difference with former 1503 Procedure is that in this revised mechanism the author of the communication is informed of some key stages of the proceedings. Resolution 5/1 expressly indicates that the author will be informed when the case is registered. Regarding the process, both the author and the State concerned will be informed about the inadmissibility of the communication or when it is being considered by the working group on situations; or when a communication is kept pending by one of the working groups or by the Council. They will also be informed about the outcome. The identity of the author could be kept confidential as per his or her request and, in that case, it will not be revealed to the State concerned.[280]

As in the 1503 procedure, the Council will dismiss the case, continue its consideration in a future session, appoint an expert to deal with the situation, deal with the case in a public session or provide technical cooperation and assistance, capacity building or advisory services to the State concerned through OHCHR.[281]

III.3.5.2 Balance of the complaint procedure.

It is clear that the HRC decided to preserve the 1503 procedure as reformed in 2000 with some improvements. There are some positive elements in this continuity.

First and foremost, the complaint procedure –as its predecessor procedure- is still the only universal procedure covering all human rights in all UN Member States. This is because it can be activated irrespective of the fact that a country has ratified or not one or more international human rights treaties. This could be an essential tool, in particular for victims of closed and undemocratic regimes where there are not many available resources at the international level for submitting claims of human rights violations.

[279] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 101-105.
[280] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 106-108.
[281] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 109.

Secondly, the chairperson of the working group on communications now has to justify the rejection of communications, thus making it difficult to disregard communications which have a legitimate claim. The same happens with decisions on each case taken by both working groups. Moreover, the author of the communication has the right to be informed during the different stages of the process. All these changes have addressed the criticisms relating to the lack of transparency of the 1503 procedure.

Thirdly, at present there is a time limit. The procedure cannot exceed two years to be considered by the plenary of the Council. In order to guarantee that both working groups deal with all communications within this period, the frequency of meetings have doubled, from one to two sessions per year.

Finally, public information is now available on the cases, for instance on the discontinuation of cases.[282] Nevertheless, there are still serious limits to the effectiveness of this procedure. Confidentiality in the process limits transparency, impedes the relevant action of NGOs and other stakeholders during the process, and not always guarantees the cooperation of the State concerned. Moreover, the existence of two working groups, while having an expert control at the beginning, makes the procedure long and complex. In any case, the most valuable aspect of this procedure is its potential to address grave situations when there is no other way or mechanism available to do so.

II.3.6 Other mechanisms.

The Council also created new fora since its inception, in addition to the social forum. They are composed of experts and open to all stakeholders, in accordance with UN rules for participation. One is on business and human rights and the other on human rights and the rule of law.[283]

In addition, Resolution 5/1 did not address the inter-governmental working groups which existed by the end of the former Commission and continued its functioning after the establishment of the Council. These working groups should not be confused with those

[282] Human Rights Council, "Complaint Procedures, Frequently asked questions", available at: https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/FAQ.aspx
[283] Human Rights Council, "Subsidiary expert mechanism", available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/OtherSubBodies.aspx

composed of experts within the system of special procedures. The two main types of IGWGs have had a role in the development of international norms and standards. This is why we will briefly describe them.

II.3.6.1 Intergovernmental working groups in charge of developing international human rights norms and standards.

The first category of intergovernmental working groups which exists in the Council –and existed before in the Commission- aims at developing international norms and standards. These mechanisms are sometimes created for the elaboration of international human rights law –i.e. hard law, international treaties of a binding nature- and in other cases to develop international standards –i.e. soft law, not binding, such as the ones contained in declarations, set of principles, guidelines and even certain resolutions. This type of IGWG has meetings to carry out its work and finishes its mandate once the instrument is adopted by the working group and sent to the Council for its consideration.

Generally, the Council decides to create an IGWG to discuss the convenience of the elaboration of an instrument related to a specific human rights issue. The IGWG focuses its first sessions on exchanges about the need –or not- to count with an instrument on the issue. It also discusses if this instrument should take the form of a binding international treaty or a declaration, principles or guidelines. Once this is decided, negotiations start on the basis of a text until there is an agreement to submit it to the Council. The instrument is adopted by the plenary of the Council, and later endorsed by its hierarchically superior body, the GA. From that moment on, the instrument is formally adopted and, in the case of international human rights treaties, open for signature and ratifications.

By the moment the Council was established, there were two IGWG of this kind: one with the task to elaborate an international convention against enforced disappearance and the other to elaborate a declaration on the rights of indigenous peoples. Both instruments were adopted by the Council in 2006 and later endorsed by the GA.

After the establishment of the Council, a number of other working groups of this type were created to negotiate international treaties or declarations, such as an IGWG to elaborate a Protocol to the Covenant on economic, social and cultural rights on a communications

procedure, and another IGWG to elaborate a Protocol to the Convention on the rights of the child on a communications procedure. They existed until the task was completed and transmitted to the Council for approval.[284] Both instruments were adopted by the Council, endorsed by the GA, and are currently in force.[285] At present, there is a specific intergovernmental working group at the Council dealing with the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.[286]

Other examples of progress could be found in the development of soft law. Indeed, the Council established working groups on the right to education, on the rights of peasants, and on the right to peace. They all ended up with declarations adopted on these issues.[287]

Finally, there is an IGWG on complementary standards to the Convention for the elimination of all forms of racism, racial discrimination, xenophobia and related intolerance. It is an initiative of the AG, which pushes for the recognition of new international standards on issues of international concern such as racial profiling and incitement to religious hatred.

The role of these IGWG has been remarkable. As we have seen above, the Commission greatly contributed to the development of international human rights law. The Council has successfully continued with this important task so far. New IGWG will be created in the future to address emerging human rights issues and challenges and it is expected that they would be able to continue contributing to the development of standard setting at the international level.

II.3.6.2 Intergovernmental working groups aimed at following up on existing instruments.

[284] Human Rights Council, "HRC bodies", "Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure", available at: https://www.ohchr.org/EN/HRBodies/HRC/WGCRC/Pages/OpenEndedWorkingGroupIndex.aspx

[285] The updated list is available on the website of the United Nations High Commissioner for Human Rights, under the title "The core international human rights instruments and their monitoring bodies" (https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx).

[286] The aforementioned working group was established under Human Rights Council Resolution A/HRC/RES/26/9, operative paragraph 1.

[287] All intergovernmental working groups are listed by the Office of the United Nations High Commissioner for Human Rights on its website, under the title "HRC Bodies", "Human Rights Council Subsidiary Bodies", (see https://www.ohchr.org/EN/HRBodies/HRC/Pages/OtherSubBodies.aspx).

In 2006, the Council inherited two IGWG in charge of monitoring existing instruments on human rights issues. The first one is the Working group on the Right to Development. It was established in 1998 mainly with the support of States from the South with the aim to monitor the implementation of the 1986 Declaration of the Right to Development, provide recommendations and further analysis on related issues, including reports submitted by States on the implementation of the right to development.[288] In 2007, the Human Rights Council decided to renew the mandate of the working group and it still exists.[289] This working group and a high-level task force of experts –which assist the mechanism- continue their work until present.[290]

The second one focusing on the implementation of a specific instrument is the IGWG in charge of the implementation of the Durban Declaration and Program of Action of 2001 on the elimination of racism, racial discrimination, xenophobia and related intolerance (DDPA). The DDPA is a comprehensive and action-oriented framework, offering a practical approach to ensuring the principle of non-discrimination. This working group was created by the Commission in 2002,[291] and constitutes a main priority for the AG, notably South Africa.[292] The mandate was renewed in the Human Rights Council in 2006 and it focused on two main issues: implementation of the DDPA and also elaboration of complementary standards to international instruments against racism.[293] In this way, this mechanism introduced a mandate which could lead to the development of standard setting but in practice it has focused on implementation.

This working group on the implementation of the DDPA coexists with a series of mechanisms at the expert level also created as follow up mechanisms to the DDPA, such as the Group of Eminent Experts and the Working Group on African Descent.

Regarding the Group of Eminent Experts, the DDPA requested OHCHR to cooperate with five independent eminent experts –one of each regional group- to follow up the

[288] United Nations Commission on Human Rights Resolution 1998/72, operative paragraph 10. See also Economic and Social Council Resolution 1998/269.
[289] Office of the United Nations High Commissioner for Human Rights, "The Intergovernmental Group on the Right to Development", available at: https://www.ohchr.org/en/issues/development/pages/wgrighttodevelopment.aspx
[290] See in this regard Human Rights Council Resolution A/HRC/RES/4/4.
[291] United Nations Human Rights Commission Resolution 2002/68, operative paragraph 7.
[292] Its latest session to date is available on the website of the Office of the United Nations High Commissioner for Human Rights (https://www.ohchr.org/EN/Issues/Racism/IntergovWG/Pages/Session16.aspx).
[293] Human Rights Council Resolution A/HRC/RES/1/5, operative paragraphs 2-3.

implementation of the provisions of this instrument. This group has also been in charge of monitoring the implementation of the DDPA, in cooperation with OHCHR, and has been assisting the High Commissioner to prepare the annual report on the issue, in coordination with all relevant stakeholders at the UN level.[294]

The Working group of African Descent is a specific special procedure established following the DDPA.[295] This special procedure studies the problems of racial discrimination faced by people of African descent living in the diaspora, proposes measures to ensure access to the justice system by people of African descent, and submits recommendations to eliminate racial profiling, among other issues.[296]

These two mechanisms existed in the Commission and continued in the Council.[297] After the DDPA, Durban-related mechanisms continued to grow. The Council decided to establish another mechanism related to the DDPA: the already mentioned Ad Hoc Committee on Complementary Standards, which is part of those IGWG in charge of developing standard setting.[298]

A final development regarding the DDPA process was the 2006 decision of the Council to review the DDPA in a World Review Conference in 2009. To that end, it created a Bureau and a working group to prepare this conference that met in Geneva in 2009. The Review Conference was a political priority for the AG. During negotiations, some contentious issues were discussed at the Council, including the issue of discrimination on the basis of gender and sexual orientation, which was finally excluded from the Outcome Document.[299]

II.4. Agenda, rules of procedure and methods of work of the Human Rights Council.

[294] Office of the United Nations High Commissioner of Human Rights, "Group of Independent Eminent Experts on the Implementation of the Durban Declaration and Programme of Action", available at: https://www.ohchr.org/EN/Issues/Racism/Pages/IndependentEminentExperts.aspx
[295] See in this regard, United Nations Human Rights Commission Resolutions 2002/68 and 2003/30.
[296] Office of the United Nations High Commissioner of Human Rights, "Working Group of Experts on People of African Descent", available at: https://www.ohchr.org/en/issues/racism/wgafricandescent/pages/wgepadindex.aspx.
[297] See in this regard, Human Rights Council Resolutions A/HRC/RES/9/14, A/HRC/RES/18/28, A/HRC/RES/27/25, A/HRC/RES/36/23.
[298] Office of the United Nations High Commissioner for Human Rights, "The Ad Hoc Committee on the elaboration of complementary standards", available at: https://www.ohchr.org/EN/ISSUES/RACISM/ADHOCCOMMITTEE/Pages/AdHocIndex.aspx
[299] "Outcome Document of the Durban Review Conference", Geneva, 20-24 April 2009, available at: https://www.un.org/en/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf

Negotiations on Resolution 5/1 also focused on the agenda, rules of procedure and methods of work for the new Council. It is interesting to briefly consider the situation of the Commission to be able to measure the relevant changes made in this regard. In 1998, the Commission adopted 21 points in its agenda after long negotiations. This agenda remained unchanged for almost 20 years so it was predictable and helped the participation of stakeholders during each session. The problem was its rigidity, which did not allow addressing pressing issues.[300] During negotiations of the institutional building package of the Council in 2006, there was a debate on the type of agenda –rigid, flexible, detailed or generic. After a long discussion, the compromise formula was to have a flexible and quite generic agenda.

A major political problem that arouse during the negotiations of the agenda was the inclusion of the Occupied Palestinian Territories (OPT) as a separated item. The EU and other countries, including Canada, failed to convince the OIC that this situation was already incorporated in item 4 related to all human rights situations. In the end, the WEOG decided to join consensus and accepted the proposal to single out the situation of the OPT in a separate agenda item. As mentioned before, it would have been desirable to count on a single item for all situations or to single out all those who require special attention.[301]

Apart from the political problem regarding the specific item on the situation of the OPT, the main disadvantage of this broad and flexible agenda has been that many issues can be raised during the sessions of the Council and, consequently, there is more uncertainty regarding the timing on the initiatives and challenges in terms of participation for stakeholders.[302] This issue was addressed during the review of the Council in 2011 and the situation improved.

Moreover, there were some specific provisions regarding the methods of work; including new formats of discussions in Council's sessions such as panels; an annual high-level segment; and the format of resolutions and decisions. Nevertheless, the main innovation was

[300] Abraham, Megna, "Building a new Human Rights Council", Ibid, page 16.
[301] The final format of the agenda includes the following items: organizational and procedural matters; annual report of OHCHR; promotion and protection of all human rights; human rights that require the attention of the Council; the human rights bodies and mechanisms; the UPR; the situation in Palestine and other occupied territories; the follow up to the Vienna Declaration and Program of Action; racism, racial discrimination, xenophobia and related intolerance and the follow up to the Durban Declaration and Program of Action; and technical assistance and capacity building. The framework of the program of work included in detail all mechanisms and procedural decisions of the Council based on the current agenda. See in this regard, Human Rights Council Resolution 5/1, Ibid, Part V.B)-C).
[302] Abraham, Megna, "Building a new Human Rights Council", Ibid, page 17.

the regulation of the special sessions of the Council. In this regard, Resolution 5/1 indicates that the provisions on special sessions complement what was established in GA Resolution 60/251. It also indicates that the request of a special session is made to the President at least two working days prior to the date and with the signature of 16 Member States of the HRC –a number that does not even represent a simple majority. Special sessions last in principle a maximum of three days. The President of the Council has to convene a consultation prior to the special session.

II.5 The 2011 Human Rights Council Review.

In Resolution 60/251, the GA decided that the status and functioning of the Council be reviewed five years after its establishment. Consequently, by 2011, there were two main issues to assess: if the Council had to change its status as main UN body or should be kept as a subsidiary body of the GA; and the result of its work and functioning. The first task was put to consideration of the GA while the second to the Council itself.[303]

The Council review process was a very intense exercise, which generated a lot of attention, reflection and debate among Member States and Observers of the Council. Indeed, there were a series of informal meetings and retreats in various cities of different regions of the world with the participation of many States and other stakeholders to discuss the modalities and content of the review.[304]

There was a retreat in Algiers with a wide representation of countries of all regions, including Argentina.[305] The retreat discussed substantive issues related, among other issues, to the UPR –e.g. submission of mid-term reports on a voluntary basis; the system of special procedures -e.g. the future of country mandates; and the complaint procedure -e.g. the option of abolishing it. In Mexico City, there was a smaller informal group of States chaired by Mexico and France, which included Argentina.[306] During this encounter, among other issues, some challenges were raised: the need to reinforce the Office of the President of the Council, the need to address effectively urgent situations and the need to work on cross-regional

[303] United Nations General Assembly Resolution A/RES/60/251, operative paragraphs 1 and 16.
[304] Human Rights Council, "About HRC", "HRC Review (2011)", "Human Rights Council Review", available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCReview.aspx
[305] Retreat of Algiers on the review of the work and functioning of the Human Rights Council. From 19 to 21 February 2010.
[306] Reflection Group on the strengthening of the Human Rights Council. First Working Session. Mexico City, 29-30 October, Preliminary Report, Under the Responsibility of the Co-Chairs.

initiatives as a way to avoid polarization. Discussions of this informal reflection group continued in Marrakech, Paris, Seoul and Buenos Aires.[307] There were also seminars, such as the one organized in Montreux, under the auspices of Switzerland.[308] The last informal international consultation was convened by then President of the Human Rights Council and it was open to all Members States of the HRC, at an ambassadorial level, in Bangkok.

The official setting for the review of the work and functioning was the Human Rights Council itself. To carry out this task, the Council decided to create a working group in October 2009. The working group was chaired by the President of the Human Rights Council and assisted by OHCHR. It held two sessions of five working days each during the following year.[309]

As it happened during the institutional building process, the President of the Council appointed facilitators to conduct negotiations on the review of the Council, the UPR, special procedures, other mechanisms, the agenda, program of work and the relationship with the review in the GA. All of them, in the end, contributed to the Outcome Document prepared by the President, which was finally adopted in 2011.[310]

At the time that the process began in the working group, there were serious criticisms to the work of the Council, particularly from civil society, because the body was unable to address all human rights situations and the new criteria for membership was not effective enough to ensure the participation of States seriously committed to the promotion and protection of human rights.[311] As a general reaction to all pillars under negotiations, Egypt –on behalf of the Non-Aligned Movement- indicated that they would oppose to any significant changes to the adopted institutional building package.

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[307] Reflection Group on the strengthening of the Human Rights Council. Second Working Session, Paris, 26 January 2010.
[308] Open ended Seminar on the Review of the Human Rights Council, Summary Report under the responsibility of the Chair, Montreux, 20 April 2010.
[309] The aforementioned working group was established under United Nations Human Rights Council Resolution A/HRC/RES/12/1, operative paragraph 1.
[310] Human Rights Council Resolution A/HRC/16/21.
[311] Rathberg, Theodor, "New Prospects for Human Rights. The Human Rights Council between the Review Process and the Arab Spring", Friedrich Ebert Stiftung, pages 3-5, available at: https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Weitere_Publikationen/New_Prospects_Human-Rights-Council-between_Review_Process_Arab_Spring.pdf

Regarding the UPR, reactions from States, including Argentina, and other stakeholders were more positive than in relation to the rest of the mechanisms. Nevertheless, many States were concerned about issues such as the periodicity –e.g. there was not enough time to evaluate all States in four years, the list of speakers –which presented some malpractices such as the possibility to block all interventions with early submissions of friendly States of the State under review, and the participation of national human rights institutions. All these issues were dealt with.

The system of special procedures was discussed again in similar terms as in 2006. Countries from the African Group and the OIC suggested including parameters for the establishment of country mandates, while other countries from Latin America –e.g. Argentina, Chile, Mexico- and WEOG were against this initiative. The proposal was not included in the end.

Moreover, South Africa suggested a legal committee to apply the Code of Conduct, but WEOG and some Latin American countries opposed. Some scholars have considered that, due to the existing Code of Conduct, a mechanism to implement it was desirable. They argued that in the absence of such mechanism, there was a growing feeling of intimidation among special procedures mandate-holders due to possible unjustified accusations.[312] However, in the end, there was no agreement and the Council decided not to include such a committee.

Other major concerns such as the membership criteria and the quasi-permanent nature of the Council were not changed. There were no substantial changes either in the other mechanisms.

Finally, in March 2011, the HRC adopted Resolution 16/21, whereby it took decisions concerning the review on the mechanisms of the Council, the special procedures, the agenda, the methods of work, and the UPR. Later, in June 2011, the Human Rights Council adopted a new decision (17/119 of June 2011), which was focused again on the UPR. Both resolutions were adopted by consensus, although the United States disassociated from consensus, in part because the agenda was not modified and remained a separate reference to the human rights situation in the Occupied Palestinian Territories. The HRC decided that Resolution 16/21 would form part of the institution-building package, together with

[312] Alston, Philip, "Hobbling the monitors…", Ibid, pages 643-644.

Resolutions 5/1 and 5/2 as well as other Council related resolutions, decisions and presidential statements.[313]

Regarding the UPR, the outcome document enlarged the periodicity for the second cycle of reviews starting in 2012 from 4 years to 4 years and half in order to consider 48 States; decided that the State report would focus on follow up of accepted recommendations and the current situation; and decided that the report of other stakeholders would include a separate section for national human rights institutions.[314]

Regarding the modalities of the UPR, an innovation was that national human rights institutions would be able to participate orally during the plenary before the adoption of the UPR report. There was also a decision that recommendations of the UPR outcome report would be clustered with the involvement of the State concerned and States that made the recommendations. This was a practical solution to the situation of a report with numerous recommendations which were very similar.[315] The implementation and follow up of the UPR included the possibility to submit on a voluntary basis a mid-term report and decided that national and regional UN offices would assist States to implement UPR recommendations.[316] Council Resolution 17/119 adopted guidelines regarding some aspects of the second cycle.[317]

A relevant decision related to the question of the list of speakers was finally resolved. There would be three minutes speaking time for Member States and two minutes for observer States. This will apply when all speakers can be accommodated within available time, if not the time would then be reduced and divided among all delegations registered so as to enable each and every speaker to take the floor. In addition, the list of speakers would be opened a week prior to every session, it would be arranged in alphabetical order, and the last Friday

313 Human Rights Council Resolution A/HRC/RES/16/21, operative paragraph 3.
314 Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraphs 1-9.
315 Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraphs 10-17.
316 Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraphs 18-21.
317 Those aspects were: explanation of the methodology and consultation process followed for the preparation of the report of the State concerned; developments since the previous review; human rights situation on the ground; presentation by the State concerned; identification of achievements, best practices, challenges and constraints in relation to the implementation of accepted recommendations and the development of human rights situations in the State; national priorities, initiatives and commitments that the State concerned has undertaken and intends to undertake to overcome those challenges; and constraints and needs of the State concerned in terms of capacity-building and requests, if any, for technical assistance. See in this regard, Human Rights Council Decision A/HRC/DEC/17/119, paragraphs 1-2.

prior to the commencement of the session there would be a drawing of lots to decide the order of the list. The allocated time would be strictly enforced.[318]

On Special Procedures, a decision was made to reinforce the selection and appointment with some additional requirements: a motivation letter from candidates, possible interviews of short-listed candidates, and the duty of the President to justify his or her decision to appoint a candidate different from the one selected by the Advisory Group. In addition, national human rights institutions can submit candidacies.[319]

Regarding the working methods, Resolution 16/21 emphasized the duty of States to cooperate with special procedures, and that recommendations of mandate holders should be action-oriented and take into consideration capacity-building and technical assistance. OHCHR will maintain updated information.[320]

The funding of mandate-holders was debated during the negotiations of the review. There were proposals to ensure that all mandates had resources. As the regular budget is limited, voluntary contributions were generally placed for those mandates which the contributing States are interested in. There were proposals to try to correct this, at least in part. Argentina and Chile proposed to use ten percent of all voluntary contributions as a pool to finance all mandate-holders. This was not accepted by some WEOG countries, but as a compromise, there was agreement in introducing a general reference to the importance to support all mandates and that the voluntary contributions should be to the fullest extent possible un-earmarked.[321]

Some small procedural changes were made to the Advisory Committee during the review to enhance its visibility. Its sessions would be held before the March and September sessions of the Council.[322]

Regarding the methods of work and rules of procedure, the Council decided to convene an annual panel with UN agencies and funds; called for the voluntary systematization of

[318] Human Rights Council Decision A/HRC/DEC/17/119, paragraphs 5-8.
[319] Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraph 22.
[320] Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraphs 23-30.
[321] Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraphs 31-34.
[322] Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraphs 35-39.

resolutions with the help of the Bureau; established the Office of the President of the Council, among other measures.[323]

The review on the status of the Council was conducted by the GA in 2011. In this case, contrary to what happened within the Council, the relevant resolution, Resolution 65/281, was put to a vote: 154 States voted in favor and Canada, United States, Israel and Palau voted against. The inclusion of the human rights situation of the Occupied Palestinian Territories was the main reason of the final position of the States that voted against.

The GA decided to maintain the HRC as its subsidiary body. There was no surprise with that decision because it was clear from the beginning of negotiations that the amendment of the UN Charter would bring many other issues such as the reform of the composition of the SC.[324]

The GA also decided that the calendar would change from June-May to January-December and, as a consequence, would coincide with the calendar year. This would solve financial problems arising from the need to count with the approval of the GA Fifth Commission to be able to work appropriately. Finally, the GA endorsed the outcome submitted by the Council through Council Resolution 16/21 and Decision 17/119.

The review was criticized by some scholars because it did not establish an independent non-State trigger to better respond to human rights emergencies (e.g. OHCHR suggestion for a special session as proposed by Argentina and other Latin American countries). Nevertheless, even critics recognized that, with the structure established in 2006, many positive things can be done with the right political constellation in the Council.[325]

Even if the 2011 review is officially over, the review of the Council has not finished completely. The GA provided that the status should be reviewed sometime between 2021 and 2026.[326] The GA did not request this time the Council to review its work and functioning as it did in Resolution 60/251. Nevertheless, the Council expressed its intention to re-assess some aspects of its work in September 2019. To this end, the President shall appoint in the

[323] Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraphs 42-62.
[324] United Nations General Assembly Resolution A/RES/65/281.
[325] Rathberg, Theodor, "New Prospects for Human Rights", Ibid, pages 7-20.
[326] United Nations General Assembly Resolution A/RES/65/281.

near future two facilitators to deal with the structure of the general debate during sessions and on the UPR, including the adoption of final outcomes. Consequently, the review of this still new body is not over.

II.6 Balance of the Human Rights Council's work more than a decade after its creation.

Almost fifteen years after its establishment, the Council consolidated its work and it has now some relevant attributes that give its own specificity and separate it from its predecessor body.

Firstly, even if it is not expressly defined as such, in practice it is a standing body. It has three annual sessions of a total of 10 weeks; it also has many inter-sessional working groups which work during the whole year, including three sessions of the WG of the UPR and sessions of all IGWG.[327] It also holds special sessions to address urgent human rights situations during the year when there is consensus to do so and, in the last few years, it began to hold thematic panels and events outside the regular sessions.

Secondly, even if the 2011 Human Rights Council Review did not upgrade its status to a main body of the United Nations, the Council has a higher position than its predecessor in formal terms (i.e. it is now a subsidiary body of the GA).[328] Indeed, having recognized all States that human rights is one of the three pillars of the United Nations, the only reason to officially avoid to upgrade the Council in an instrument of a binding nature was the impossibility of a reform of the UN Charter for motives that go well beyond human rights issues.

Having that in mind, the Council acts as a main body of the UN in practical terms, contributing to the development of international human rights law and creating mechanisms, including commissions of enquiry.[329] The GA confirmed several decisions almost as a formal procedural step and the Third Committee reproduced some political discussions but, in

[327] Human Rights Council, "HRC Bodies", "Human Rights Council Subsidiary Bodies", available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/OtherSubBodies.aspx.
[328] United Nations General Assembly Resolution A/RES/60/251, operative paragraph 1.
[329] Human Rights Council, "Independent Investigations", "International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding missions and other Investigations", available at https://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx.

reality, it does not control the enormous technical and political work of the Council and all its mechanisms.

Thirdly, the Council created a new mechanism, the UPR, destined to mitigate the politicization. The UPR demonstrated that the system could benefit from a democratic, non-selective procedure where all States, irrespective of their relative power, are examined by their peers in a public setting.

The UPR is also enriched by the contributions of OHCHR, which compiles both the recommendations of special procedures, treaty bodies and NGOs. On several occasions, States use them to make recommendations to their peers. In other words, the UPR has become an instrument to enhance conclusions and recommendations of special procedures mandate-holders and NGOs.

Furthermore, as a result of the UPR, there were a number of positive results. Many States ratified international human rights treaties, accepted open and standing invitations to special procedures mandate-holders, and established or strengthened national human rights institutions.[330]

The outcomes of the UPR are not particularly strong, but their adoption is not subject to the consent of the State concerned and no democratic State is ready to accept the cost of bad publicity and negative exposure of not following the recommendations. Consequently, there is a general tendency to accept the vast majority of recommendations. When States are not in a position to accept recommendations, they generally "take note" of those recommendations, without specifying that they are against them.

Some serious problems that affected the results of the outcome such as the list of speakers were solved during the review. Currently, the participation of all interested States in the exercise is guaranteed, not only those that are politically close to the State concerned. The review also corrected the periodicity of cycles and other practical issues, which improved the functioning of the mechanism. In sum, there are good motives to remain optimistic and to consider that this mechanism is able to make a relevant contribution to the system as it was thought at the time of the creation of the Council.

[330] Spohr, "United Nations Human Rights Council…", Ibid, pages 214-217.

Evidently, there are challenges to overcome in the future of the UPR. One of them is to maintain the high visibility and the relevant level of participation shown to date, where the majority of delegations participate at a Ministerial level. It is also a serious challenge to verify if States are prepared to monitor and follow up the recommendations made in previous cycles. A last and important factor is to ensure that civil society is able to participate in some way in this mechanism, for instance, during national consultations.

Furthermore, even if political negotiations during the institutional building were extremely difficult, the Council managed to preserve all the human rights mechanisms of the former Commission, in particular the system of special procedures. Generally recognized as one of the jewels of the former Commission, all mandates were finally renewed by the Council through the process of review and rationalization.

What is more, the system of special procedures continued to grow. Indeed, a number of thematic mandates were established since 2006, including new thematic mandates on the promotion of truth, justice, reparations and guarantees of non-recurrence, and on older persons, both promoted by Argentina with other countries.

Moreover, even if the country mandates were at risk since the institutional building process and some country mandates were suppressed during its establishment,[331] many country mandates were renewed ever since,[332] one mandate was re-established,[333] and new country mandates were established.[334]

Also, changes in nomination, selection and appointment represented a positive improvement of the special procedures system because they allow for greater transparency and a more careful consideration of the professional experience and academic background of every expert.

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[331] That was the case of country mandates on Cuba and Belarus.
[332] The country mandates renewed include: Cambodia, South Sudan, Somalia, Haiti, Myanmar, Democratic People's Republic of Korea.
[333] The renewed country mandate was on Belarus. List of all country mandates, including Belarus, are available on the website of the Office of the United Nations High Commissioner for Human Rights, under the title "Special Procedures", "Country Mandates": https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?lang=en.
[334]That was the case of the mandate on Iran. See Office of the United Nations High Commissioner for Human Rights, "Special Rapporteur on the situation of human rights in the Islamic Republic of Iran", available at: https://www.ohchr.org/en/hrbodies/sp/countriesmandates/ir/pages/sriran.aspx.

On the other hand, the highly contentious Code of Conduct, though a sui generis instrument in nature, has been a useful reminder to experts of their ethical duties and has also provided for accountability of special procedures mandate-holders. There was no consensus to establish a committee to interpret this code so its application remains open. The Coordinating Committee created by special procedures mandate-holders in 2005 –and later recognized by a former President of the Council- has the value to contribute to the effectiveness of the complex system, but it cannot be the interpreter of the Code of Conduct. This is because this committee cannot be judge and party at the same time.

The preservation of special procedures guaranteed a high level of expertise and monitoring in the UN human rights system. However, the way to review the mandates on a case-by-case basis did not solve the overlap, duplication and, sometimes, lack of efficiency of the system. As this exercise is very risky in political terms, it remains to be seen if it will happen sometime soon.

The rest of the mechanisms survived with different levels of success. Although the Advisory Committee did not retain the power of initiative of its predecessor –the Sub-commission- and it was specifically instructed to be "implementation-oriented", the expert body managed to continue contributing to the international development of international human rights standards, in conformity with some specific requests made by the Council. In this sense, the expert body prepared drafts that were the basis of future international instruments.[335]

Moreover, in more than a decade, the Advisory Committee was also able to prepare a series of studies that ended in the establishment of special procedures because of its importance on issues such as leprosy and albinism.[336] Thus, in practical terms, though more limited than

[335] Those instruments were: the 2011 UN Declaration on human rights education and training, the 2016 UN Declaration on the Right to Peace and the 2018 UN Declaration on the Rights of Peasants. See in this regard United Nations General Assembly Resolution 66/137; Human Rights Council Resolution A/HRC/RES/16/1; United Nations General Assembly Resolution A/RES/71/189; Human Rights Council Resolution A/HRC/RES/32/28. See also Office of the United Nations High Commissioner for Human Rights, "Open Ended Working Group on a Draft United Nations Declaration on the Right to Peace," available at: https://www.ohchr.org/EN/HRBodies/HRC/RightPeace/Pages/WGDraftUNDeclarationontheRighttoPeace.aspx

[336] Office of the United Nations High Commissioner for Human Rights, "Highlights of the work of the Advisory Committee. How research leads to action," available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/HowResearchLeadsAction.pdf

its predecessor, its main role during the Commission has been able to be performed in the Council and its contributions are significant.

The complaint procedure improved the original 1503 procedure in the sense that the victim is informed of the evolution of the process in some key stages. The reform was probably not enough to make it a more dynamic and efficient procedure. Nevertheless, it still has a potential because it continues to have a significant residual role: it is the only existing communications procedure applicable to all Member States of the UN, irrespective of their specific obligations under international human rights law.

Moreover, the participation of civil society is the same that existed in the Commission and is one of the widest in a UN body. This is a positive and distinctive characteristic of the Council. This body is enriched by civil society, which on some occasions has a very influential role during negotiations regarding country situations and also in the elaboration of specific human rights norms and standards.

There is a leading role of international NGOs and it would be desirable to strengthen the participation of national NGOs, particularly from the South, which would guarantee that civil society is represented in all its complexity.[337] Furthermore, the level of participation of national human rights institutions was also consolidated in the Council, for instance in the UPR. The main challenge in this regard is to ensure that these institutions are in conformity with the Paris Principles.[338]

[337] Mutua, Makau, "Standard Setting and Human Rights: Critique and Prognosis", Human Rights Quarterly 29, Johns Hopkins University Press, 2007, pages 589-604.
[338] United Nations General Assembly Resolution A/RES/48/134, "Principles relating to the status of national institutions" (Paris Principles).

III. THE ROLE OF INDIVIDUAL STATES IN THE HUMAN RIGHTS COUNCIL. THE ARGENTINE EXPERIENCE.

III.1 State engagement with the Human Rights Council.

At present, many stakeholders such as OHCHR, special procedures mandate-holders, NGOs, and organizations specialized in specific related issues, such as the ICRC, greatly contribute to the work of the Human Rights Council. Nonetheless, as in any other inter-governmental organization, the role of States in the Human Rights Council remains crucial. This is why the way States engage in the Council and contribute to its work continues to be fundamental to understand the outcome of this UN body.

The issue has been studied by Cox, who tried to explain States' interests in the creation and functioning of the Human Rights Council, taking into consideration four main theories of international relations: realism, neoliberalism, constructivism and a domestic-policies approach.[339]

Emphasizing that the realist theory focuses on power interests, Cox argued that, according to this position, the Human Rights Council was created and supported by States because it corresponded to their main interests. However, Cox correctly affirms that this theory fails to explain why the Council was established even when the main Power of the international community, the United States, was against it.

Cox also explained that neoliberalists consider cooperation from a different perspective -i.e. beyond military alliances. Indeed, an international organization provides space for cooperation because it gives more space and time for States to interact, understand their positions, and eventually move forward, irrespective of the will of the hegemonic State. Nonetheless, according to Cox, the neoliberalist theory has not taken into consideration that sometimes States are complex and their decisions at the internal level could have nuances and their positions change in time. Consequently, it is really challenging –and sometimes not possible- to converge with the position of other peers on certain issues under specific circumstances.

[339] Cox, Eric, "State interests…", Ibid, pages 89-97.

The constructivist theory, according to Cox, intends to fill the gaps of previous theories by focusing on the importance of international norms, institutions, and ways and means to persuade States to behave in a certain way with tools such as naming and shaming. However, this theory fails to explain the reason why these norms sometimes are not incorporated later in internal law and thus are not respected in practice by States.

The last theory explored by Cox is the domestic-policies approach, which focuses on the fact that a State decides to promote human rights issues considering a complex balance of domestic and international political gains. National interests are prioritized and also the possibility to benefit from the work and structure of international organizations. Cox follows Moravcsik, who explains how Eastern European countries embraced the European human rights system after the end of the Cold War as a way to prevent their countries returning to authoritarian regimes in the future. It was in their interest to be part of a system that monitors democracy and human rights.

In this context, Cox has affirmed that constructivist and domestic policy theories tend to better explain States' interests in the context of the Human Rights Council. Constructivism is applicable to the decision to create this body: it was in the States' interest to show commitment to reform a highly criticized universal human rights body.

At the same time, the domestic policy theory serves to explain better how national interests play a strong role in determining preferences relating to the way to shape a UN body, in this case the Council. According to this theory, States with better human rights records will push for a stronger body with the capacity to deal with thematic and country issues and they would probably not pay a high cost because of their good performance at the national level. On the contrary, States with poor records will promote an institution with less powers when it comes to dealing with human rights violations.[340]

In our opinion, the domestic policy approach could also be a tool to understand States' interest to push for some specific initiatives in the Human Rights Council, both as group of States and individually. Substantive issues in the Council –both thematic and country oriented- are a product of national human rights foreign policies which prioritize issues of

[340] Cox, Eric, "State interests…", Ibid, pages 93-97.

national importance while at the same time considering the characteristics and dynamics of the Council, its composition and other stakeholders that participate therein (States, NGOs, human rights experts).

III.2. Relevance of regional and other groups in the adoption of decisions and resolutions.

The Council quickly became a relevant body with a life of its own. Many stakeholders participate in its three annual sessions and in many other related settings during the whole calendar year: States, national human rights institutions, international and local NGOs and media. Even if it is a UN intergovernmental body, all these actors have a certain degree of influence in the decisions and actions taken by the Council.

In any case, this body remains State-centered and there is no significant influence of the Council itself to take actions beyond State interests so, as it could be expected in any UN body, sponsors of any initiative need to count with the support of the majority of Member States to adopt any resolution, decision, Presidential statement, declaration, set of principles or guidelines or international human rights treaties.

Since the Council began its work in 2006, several resolutions, decisions, statements, panels or discussions have been promoted by regional and other specific groups (e.g. the Organization of Islamic Countries), taking into consideration their political priorities. There are five regional groups: the Western European and other countries Group (WEOG), the African Group (AG), the Latin American and Caribbean Group (GRULAC), the Eastern European Group and the Asian Group.[341]

The composition of the Council is decided according to specific vacancies for each regional group.[342] Furthermore, regional groups decide the candidatures related to the Council and its mechanisms. For instance, the President of the Council is elected by a regional group every year on a rotational basis; each regional group appoints a member for the Consultative Group in charge of the nominations of special procedures for the consideration of the Council;[343]

[341] United Nations Department for General Assembly and Conference Management, "United Nations Regional Groups of Member States", available at: https://www.un.org/depts/DGACM/RegionalGroups.shtml
[342] United Nations General Assembly Resolution A/RES/60/251, operative paragraph 7.
[343] Human Rights Council Resolution A/HRC/RES/5/1, Ibid, Annex, Paragraph 49.

and each regional group elects a member for the Group of Communications on the complaint procedure.

Regional groups also discuss and exchange ideas, and sometimes positions, on different issues related to the work and functioning of the Human Rights Council. In some cases, these regional groups have similar positions and they are able to present common initiatives. During these years, the regional group which has been able to coordinate positions more often has been the AG.

Indeed, as we saw before, the AG has had a very clear and sound voice in many relevant issues.[344] During the institution-building process, for instance, the AG successfully pushed for the adoption of the code of conduct for special procedures mandate-holders. Later, the AG held a clear opposition to country resolutions or country mandates when an African country was concerned, unless such country was ready to cooperate. This unified position has changed over time, but not in all cases. The African Group has also been capable of submitting substantive initiatives, such as on the fight against racism.

Non-regional groups, namely the European Union (EU) and the Organization of Islamic Countries (OIC), have also played a significant role in the work of the Human Rights Council.[345]

The EU consolidated its political framework during this period, in particular after the entry into force of the Lisbon Treaty. During the institutional building, the EU was particularly interested in ensuring the preservation of country mandates within the system of special procedures. Later, it promoted the adoption of many resolutions to keep a number of country mandates as well as some special sessions on specific country situations. In several occasions, the EU was able to count with the sponsorship or support of some South American States for thematic resolutions and even for some country initiatives.

[344] In this regard, see Jordaan, Eduard, "The African Group on the United Nations Human Rights Council: Shifting geopolitics and the liberal international order", African Affairs, Volume 115, Issue 460, pages 490-515, available at: https://ink.library.smu.edu.sg/soss_research/2080. See also Ramcharan, Bertrand, "The UN Human Rights Council", Routledge, 2011, page 13.

[345] See, for instance, European Union External Action, "The EU as a strong supporter of the UN Human Rights Council", available at: https://eeas.europa.eu/headquarters/headquarters-homepage/60102/eu-strong-supporter-un-human-rights-council_en.

For its part, the OIC successfully pushed for the recognition of a permanent item on the Human Rights Council's agenda on the Occupied Palestinian Territories (OPT). It also sought to obtain recognition of the concept of defamation of religions in the context of the stigmatization of the Muslim religion at the international level.

There was also reciprocal support between different groups and individual States. On many occasions, the AG and the OIC achieved mutual support on issues of specific concern, such as the fight against racial and religious discrimination. In this context, the Ad Hoc Committee on Complementary Standards was created to explore if it was necessary to develop additional norms that could complement the International Convention against racial discrimination with emerging issues of specific concern for the Muslim community such as racial profiling and incitement to religious hatred. At the same time, many AG or OIC initiatives were strongly supported by single States like Cuba, Russia and China.

Three regional groups were not able to coordinate positions on substantive issues except on rare occasions: the Latin American and Caribbean States (GRULAC), Eastern European States and Asian States. These regional groups have heterogeneous compositions, different political systems, diverse national interests and, in some cases like the Asian Group, do not even have a common system of human rights protection at the regional level.

In any case, in the last few years, a group of Latin American countries, mainly from South America, have managed to lead initiatives on a number of country situations relating to their own region. As recent examples we could refer to the resolutions on the situation in Venezuela and in Nicaragua.[346] This position is remarkably different from the rest of the regional groups when dealing with a country of their own bloc, which in general is more defensive. These countries have also greatly contributed to progress achieved in moving forward the rights of LGBTI individuals.

[346] Office of the United Nations High Commissioner for Human Rights, "Human Rights Council closes fortieth session after adopting 29 resolutions, including on Syrian Arab Republic, Nicaragua, And Occupied Palestinian Territory", 22 March 2019, available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24400&LangID=E. See also Human Rights Watch, "UN Rights Body should probe Nicaragua", 19 March 2019, available at: https://www.hrw.org/news/2019/03/19/un-rights-body-should-probe-nicaragua-crackdown; Human Rights Watch, "Venezuela. Landmark UN Human Rights Council Resolution", 27 September 2018, available at: https://www.hrw.org/news/2018/09/27/venezuela-landmark-un-rights-council-resolution; Office of the United Nations High Commissioner for Human Rights, "Human Rights Council adopts 10 Resolutions and One Presidential Statement", 28 September 2018, available at: https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23652&LangID=E.

On other occasions, regional and other groups have only acted or reacted within the framework of the specific dynamics of the Council. For instance, when the group expressed a position in support or against conclusions, observations or recommendations of special procedures mandate-holders.

The dynamics based on regional or other groups have proved not to be healthy for the Council because they ended up being quite confrontational. This did not help to promote dialogue and enhance cooperation among countries of different cultures and religions. In order to solve this situation, there have been initiatives to deal with issues from a cross-regional perspective. This was the case, for instance, of the process that led to the successful adoption of the Declaration on human rights education and of the Protocol to the Convention on the Rights of the Child to establish a communications procedure. In those cases, an alliance of countries from different regions of the world contributed to a more cooperative and constructive dynamic and to achieve results by consensus.

III.3. The role of individual States.

III.3.1 The influence of Great Powers.

Not only regional or other groups have had a predominant role in the work and functioning of the Council. There have also been specific States which have had a particular influence in the still short life of this UN body, including main Powers at the international level. Foot indicates that this influence can be exercised offering incentives or threatening disincentives to act in a certain way. It can even exist without any particular action by the influential State. This happens because there are States which have a legitimate authority in international organizations. It can also happen if a State has the capacity to harm other States interests, even if they do not use this leverage. The chance to do so is enough to influence the other States' behavior.[347]

A significant example of an influential State is the United States. American foreign policy on human rights has been the object of detailed and careful study and exceeds the scope of this

[347] This position is sustained in Foot, Rosemary et al, "China's influence on Asian States during the creation of the UN Human Rights Council: 2005-2007", Asian Survey, Volume 54, N° 5, 2014, pages 858-861.

work.[348] The role of the United States in the Council will only be taken as an example of State influence.

The United States has had a cyclic position that radically changed on three occasions during the Council's rather short existence. The initial position of the US during the institutional building process under the G.W. Bush Administration was described earlier in general terms. It voted against the establishment of the Council and, after a few sessions, where it participated as an observer State, it directly disengaged from discussions and meetings of the body because it considered the new body as politicized and biased as its predecessor. Resolutions condemning Israel for human rights violations in the Occupied territories were a central factor to take this decision. The absence of the United States during the first period of the Council favored the positions in some specific issues of some groups such as the AG, the OIC, followed by single States such as the Russian Federation.

The United States changed its position under the Obama Administration. In fact, it returned to the Council in 2009, engaged in the Council's work constructively, and contributed to producing remarkable changes. One example is the work of the American Delegation to create an environment that eventually allowed to introduce the need to address violence and discrimination against LGBTI persons. The US was also a key actor for the creation of new country mandates such as the one on Iran.[349] The US also promoted the creation a new thematic mandate on freedom of association, together with Egypt, in the context of the Arab Spring, and opposed much more firmly than the EU to one the most important initiatives of the OIC, the issue of defamation of religions.

These resolutions and progress on specific issues would have been unthinkable only a few years before the US rejoining the Council. Many African and Arab countries were –and many of them still are- against the mere inclusion of the term sexual orientation in a UN document. Except for very limited cases –e.g. human rights violations by Israel- the OIC and the African Group, followed by other States, were reluctant to support the renewal or the creation of country mandates because they considered it was not a constructive approach. Nonetheless,

[348] See in this regard, Renouard, Joe, "Human Rights in American Foreign Policy. From the 1960 to the Soviet collapse", University of Pennsylvania Press, 2016, pages 7-279. See also, Hancock, Jan, "Human Rights and US Foreign Policy", Routledge Taylor and Francis Group, London and New York, 2007. See also, Donnelly, Jack, "International Human Rights…", Ibid, pages 11-16.

[349] The White House, President Barak Obama, "Fact Sheet: Obama Administration leadership on International Human Rights", 4 December 2013, available at: https://obamawhitehouse.archives.gov/the-press-office/2013/12/04/fact-sheet-obama-administration-leadership-international-human-rights

the American position on the human rights violations committed by Israel did not change. It rejected resolutions on Israel –e.g. on the Palestinian territories- and continued to maintain an isolated position.

A third change arrived in 2017. After the Trump Administration started, criticisms on the Council for its politicization, poor records in terms of the quality of membership, and the selective manner to deal with human rights violations of Israel, eventually led to a new withdrawal of the US from the Council in 2018.[350] The absence of the United States is to be regretted because of its strategic importance, the difficulties that like-minded countries will face to move some relevant human rights issues forward, and also because it sets a risky precedent which can be emulated by others.[351]

In sum, the presence or absence of a Great Power such as the US is relevant enough to produce substantive changes in a UN body like the Human Rights Council. In any case, State influence, even of a main Power, has limits in the Council. During the institutional building, for example, the United States was unable to include some strict requirements for the membership of the Council. During the Council review, it was not possible for the United States to convince others to suppress a specific item on human rights in the Middle East from the agenda. The decision-making process by majority of votes clearly contributed to this limit, which does not exist in other UN bodies such as the SC.

III.3.2 Contribution of individual States. National issues that become international initiatives.

Even if the influence of Main Powers in the Council cannot be underestimated, the size and power of States is not the only factor in the development of the human rights system, including international human rights norms and standards. This is because to have a strong human rights foreign policy is also a matter of choice, consequently there are some States that give a higher priority to this issue than others.[352]

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[350] The Washington Post, "The US withdrew from the Human Rights Council. That's not how the Council should work", by Susan Hannah Allen and Martin Edwards, June 26, 2018, available at: https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/26/the-u-s-withdrew-from-the-u-n-human-rights-council-thats-not-how-the-council-was-supposed-to-work/

[351] Freeman, Rose, "Why the US left the UN Human Rights Council and why it matters", in Theconversation.com, 20 June 2018, available at: http://theconversation.com/why-the-us-left-the-un-human-rights-council-and-why-it-matters-98644

[352] Donnelly, Jack, "International Human Rights…", Ibid, pages 110-114.

Since the creation of the Council, a number of individual countries have contributed to its work and to the development of norms, standards, policies and other measures with a relevant degree of success. In general, initiatives are related to domestic realities which in most cases are shared by other –if not all- countries of the same region and, sometimes, even with other regions.

For instance, for a long time now, South Africa has been the main actor behind all anti-racial discrimination initiatives at the UN level. The heavy past of the Apartheid gives this country an enormous international legitimacy to deal with the issue. In this sense, since the beginning of the work of the Council, South Africa has received strong support from the vast majority of countries to ensure the continuation of thematic mandates, such as the Working Group of African descent. The same level of support was shown to this African country during the 2009 Review Conference of the DDPA, except for a number of WEOG countries.

Norway is another valuable example. Being a European country outside the main regional bloc, the EU, it has usually sustained more flexible positions than its neighbors during debates and negotiations in the Council. Its work in this UN body has shown a national position with firm values and conviction about the importance of the issue at the international level. Its commitment to the universal system is clearly shown by the fact that it is the major world voluntary contributor to the work of OHCHR.[353] Norway has been able to successfully lead complex initiatives such as human rights defenders and business and human rights –together with other sponsors like Argentina- with a spirit of constructiveness, and to achieve the adoption of these resolutions by consensus. Moreover, Norway has positively engaged in different human rights processes, including the Durban review negotiations on racism.

Another example of the importance of an individual State is Cuba. This country undertook many efforts to end the country mandate, which dealt with the human rights situation in Cuba during the Commission era. This was clearly rejected by different States –mainly from WEOG- and NGOs. Nevertheless, Cuba finally managed to have the country mandate suppressed at the end of negotiations of the institution-building process of the Council. The

[353] Office of the United Nations High Commissioner for Human Rights, "United Nations Human Rights Report 2018", pages 84-94, available at: https://www.ohchr.org/Documents/Publications/OHCHRreport2018.pdf

Cuban role in the Council was not only restricted to this controversial question related to the national human rights situation in the Caribbean island. Cuba also submitted an exceptional quantity of draft resolutions per year in the three sessions of the Council on a wide variety of issues, such as the support to the independent expert on the negative effects on foreign debt in human rights and the establishment of a new independent expert on cultural rights.

Argentina has also made a valuable contribution to the work of the Council from the beginning in 2006. Argentina's dark past of gross human rights violations during the dictatorship in the 1970s and 1980s, as well as the recovery of democracy with human rights issues at the top of the national political agenda for almost four decades, had an impact not only at the domestic level but also internationally, including in particular in the Human Rights Council. Up next, the Argentine experience in the Council will be analyzed in depth in the present work to show an example of the importance of individual States in the Human Rights Council.

III.4 Argentina in the institution building process of the Council in 2006 and its review in 2011.

Argentina was a founding Member State of the Human Rights Council in 2006. In a decision taken by drawing of lots, the country had to leave the Council in 2007 to guarantee rotation.[354] As immediate reelection at the Council is not possible, Argentina had to wait until 2008 to present a new candidature. It then again won a seat and, as a consequence, became a Member State for the period 2009-2011.[355] After one year as an Observer during 2012, Argentina was

[354] Human Rights Council, "Presidency & Membership", "Past Members", "Membership of the Human Rights Council 19 June 2006 - 18 June 2007 by regional groups", available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/Group20062007.aspx

[355] Human Rights Council, "Presidency & Membership", "Past Members", "Membership of the Human Rights Council 19 June 2008 - 18 June 2009 by regional groups", available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/Group20082009.aspx. See also Human Rights Council, "Presidency & Membership", "Past Members", "Membership of the Human Rights Council 19 June 2009 - 18 June 2010 by regional groups", available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/Group20092010.aspx; Human Rights Council, "Presidency & Membership", "Past Members", "Membership of the Human Rights Council 19 June 2010 - 18 June 2011 by regional groups", available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/Group20102011.aspx.

elected for the period 2013-2015,[356] and later again for the period 2019-2021.[357] As a consequence, it could be affirmed that Argentina has had a long presence in the Council, being a Member State of this body 9 out of its 14 years of existence.

During these years, Argentina was a Member State during both the institution-building process between 2006 and 2007, and the review of the Council in 2011. From the beginning, the country was supportive of a strong and democratic new body able to promote and protect human rights and to deal with thematic issues and country situations.

Argentina participated actively in all negotiations in the format of working groups and facilitations during the institutional building process. In relation to the UPR, the South American country supported a strong and universal mechanism, with the active involvement of experts and civil society because it considered that the inclusion of such stakeholders could help mitigate politicization. Its position was near to the EU and other countries, such as Chile, and clashed with the AG and the OIC, which promoted a State-centered exercise to promote a cooperative approach. In the end, it joined consensus to the final outcome, which was more in line with the position supported by the AG, OIC and countries such as China, Russia and Cuba.

Argentina was also supportive of the preservation of an independent system of special procedures, including thematic and country mandates. It did not support the idea of establishing a qualified majority for country mandates. Its position again in this case was similar to that of the EU and other Latin American countries, such as Mexico and Chile, and more distant from the position of some regional groups such as the AG. The outcome of the system was in line with the Argentine position because it preserved thematic and country mandates as well as their independence.

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[356] Human Rights Council, "Presidency & Membership", "Past Members", "Membership of the Human Rights Council 1 January 2013 – 31 December 2013 by regional groups", available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/Group2013.aspx. See also Human Rights Council, "Presidency & Membership", "Past Members", "Membership of the Human Rights Council 1 January 2014 – 31 December 2014 by regional groups", available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/Group2014.aspx; Human Rights Council, "Presidency & Membership", "Past Members", "Membership of the Human Rights Council 1 January 2015 – 31 December 2015 by regional groups", available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/Group2015.aspx

[357] Human Rights Council, "Presidency & Membership", "Past Members", "Membership of the Human Rights Council 1 January 2019 – 31 December 2019 by regional groups", available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx

Regarding the Advisory Committee, Argentina promoted a body of experts, in line with its predecessor, with the capacity to contribute to the development of norms and standards. In this case, its position was closer to the AG, OIC, and many GRULAC countries, and opposed to the EU, which promoted the suppression of the expert body and the establishment of a roster of experts. The outcome of negotiations was in line with the Argentine position.

Argentina was also supportive of preserving the old 1503 procedure, now re-named complaints procedure, as well as to improve it. Moreover, in general terms, it was supportive of a more concise and general agenda and with the improvements proposed for the program of work. In general terms, the result of the institution-building process –reflected in Resolutions 5/1 and 5/2- was a product of consensus, accompanied by Argentina.

The Council review in a way re-opened many of the issues where main differences among countries existed for a long time. The agreement, in the end, was not to alter basic agreements and to avoid the re-opening of substantive and profound differences. Nevertheless, there was also progress.

First, by 2011, no country, including Argentina, questioned the importance of the UPR and the advantages of its inter-governmental nature, which allowed more cooperation among countries and a more constructive approach. As the rest of the countries, Argentina only made proposals to adjust the new mechanism (e.g. correcting the problem of the list of speakers). In the following years, the South American country committed to the work of the UPR: it was reviewed in the UPR in 2008, 2012, and 2017,[358] and submitted follow-up reports regarding the state of implementation of recommendations.[359]

Secondly, Argentina was in favor of not re-opening a "Pandora box" when it came to sensitive issues such as special procedures. It did not favor the establishment of a legal committee to apply the code of conduct and it promoted a fair distribution of voluntary contributions in all mandates.

[358] Human Rights Council, "HRC Bodies", "UPR Cycles", "Cycles of the Universal Periodic Review", available at: https://www.ohchr.org/EN/HRBodies/UPR/Pages/CyclesUPR.aspx
[359] Human Rights Council, "HRC Bodies", "UPR Mid-term information", "UPR Mid-term reports," available at: https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx

Finally, in relation to other sub-bodies, such as the Advisory Committee and the complaint procedure, Argentina supported its maintenance and also some specific proposals to enhance them. In relation to the program of work and the work functioning, Argentina –with the support of Mexico and Chile- suggested the possibility for OHCHR to suggest the Council the convening of a special session. This was an effort to reinforce measures to avoid selectiveness in dealing with country situations. Unfortunately, this specific proposal was not included in the final outcome of the review.

In sum, Argentina promoted the establishment of a strong, democratic universal human rights body able to deal with all relevant issues at the international level both thematic and country-related.

III.5 Main initiatives of Argentina in the Human Rights Council.

In the following paragraphs, the present work will describe how Argentina actively contributed to the work of the Council since 2006, notably through the promotion of international human rights norms and standards on many issues closely related to its national experience. These issues include the right to the truth; forensic genetics and human rights; enforced disappearances, business and human rights, the impact of foreign debt, in particular vulture funds, in human rights; and the rights of older persons and LGBTI individuals.

III.5.1 The right to the truth.

III.5.1.1 Commission on Human Rights Resolution 2005/66 and OHCHR study on the issue.

The right to the truth was recognized in international humanitarian law in the late 1970s to know the whereabouts of persons gone missing in international armed conflicts. Since the 1980s and 1990s, UN and regional human rights mechanisms, notably the Inter-American Commission and Court, interpreted that the right to the truth also exists in cases of gross human rights violations, even if there is no armed conflict.[360]

[360] Rosales, Sebastián, "El derecho a la verdad: desarrollo en el ámbito internacional y en la República Argentina", Serie Documentos de Trabajo del Instituto del Servicio Exterior de la Nación (ISEN), No. 40, 2005, pages 6-8.

Indeed, following its traumatic experience during the dictatorship, Argentina recognized the right to the truth within the framework of a friendly settlement facilitated by the Inter-American Commission in the mid-1990s. The recognition of this right contributed to an intense judicial work, which made it possible for many families to know the whereabouts of their relatives as well as to find out the circumstances of their disappearance and who were the responsible for those crimes. In 2005, after a long fight against impunity where significant progress was made at the national level, Argentina pushed for the elaboration, negotiation and adoption of the first resolution ever adopted at the United Nations on the issue: Commission on Human Rights Resolution 2005/66.[361]

In its preambular part, the resolution refers to IHL provisions, e.g. articles 32 and 33 of the Additional Protocol (I) to the 1949 Geneva Conventions,[362] which recognize the right of every person to know what happened to his or her loved ones after an armed conflict. This is because in many armed conflicts there are persons whose whereabouts are unknown; persons who are separated in war fronts; or war prisoners.

Moreover, the preamble of the resolution affirms that the right to the truth was gradually addressed by human rights treaty bodies, special procedures mandate-holders, and the Sub-commission. Indeed, the latter played a useful role when, in 1997, it prepared a Set of Principles against impunity, which was updated by an independent expert, Diane Orentlicher, in 2005.[363]

The principle 2 of the Updated Set of Principles against impunity affirms "Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations. Nevertheless, the aforementioned principles were not endorsed at the inter-governmental level neither by the Commission nor by the Council. Thus, the right to the truth was not recognized as such in international human rights law until the International Convention for the protection of all

[361] United Nations Commission on Human Rights Resolution 2005/66.
[362] Additional Protocol (I) to the Geneva Conventions, of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts, articles 32-33.
[363] United Nations Commission on Human Rights, Report of the independent expert to update the set of principles against impunity, Diane Orentlicher, Addendum, "Updated Set of principles for the protection and promotion of human rights through action to combat impunity", UN Document E/CN.4/2005/102/Add.1, 8 February 2005. See also UN Document E/CN.4/Sub.2/1997/20/Rev.1, annex II, 2 October 1997.

persons from enforced disappearance was adopted in 2006, a few years later than the resolution under study.

The preambular part of Resolution 2005/66 also makes reference to the fact that the right to the truth might be characterized as the right to information in some legal systems. This last reference was essential for the United States to join consensus on the resolution. However, this inclusion is to be regretted because both rights are clearly different: the right to access to information is mainly related to public information in the interest of transparency, which is essential in any democratic society, for instance to fight corruption. In cases of requests of information, the State is able to legitimately reject the request if that information is confidential on the different grounds, including national security. On the contrary, the right to truth generally deals with information which is deemed to be confidential, and that generally involves the action of State agents who committed or allegedly committed crimes. If equated to the right to access to information, it would be very easy to dismiss almost any request related to the right to the truth.

Finally, the preambular part of this resolution mentions the dimensions of the right to the truth. This right has an individual dimension that entitles every person, in particular relatives of victims of terrible crimes or their representatives, to know what happened to their loved ones after gross human rights violations or serious violations of IHL. It also has a collective dimension because, as it deals with terrible tragedies that affect a society as a whole, any person is entitled to know the truth about past violations in his or her country inter alia to prevent the recurrence of terrible tragedies and ensure memory.[364]

In the operative part, Resolution 2005/66 recognizes the existence of the right and highlights the importance to respect and protect the right to the truth. This operative part also welcomes the establishment of judicial and non-judicial mechanisms –including truth commissions- to implement the right and encourages States to comply with recommendations made by the non-judicial mechanisms. It also encourages States to establish, where appropriate, non-judicial mechanisms to complement the justice system. Finally, it requested OHCHR to prepare a study on the concept and scope of the right to the truth as well as best practices on the matter. It also invited special procedures mandate-holders to work on the issue within the context of their mandates.

[364] Rosales, Sebastián, "El derecho a la verdad…", Ibid, pages 1-2.

Following the request in Resolution 2005/66, OHCHR prepared a valuable study which made a great contribution to the interpretation of the right to the truth.[365] This study starts with the legal and historical basis of the right to the truth as a right. In this regard, it recognized the origin of the right in IHL in the context of international armed conflict as well as its extension to all situations of armed conflict, according to the interpretation of the International Committee of the Red Cross (ICRC), which also considered the right as having acquired the status of customary international law.[366]

The study also reminds that the right to the truth was recognized by the Working Group on Enforced or Involuntary Disappearances and the Human Rights Committee. It further indicates that the right was specifically recognized in the Set of principles against impunity, the Guiding principles on internal displaced persons, and the UN principles on reparations. It also mentions that the Outcome of the International Conference on the fight against Racism, Racial Discrimination, Xenophobia and Related Intolerance of Durban in 2001 highlighted the importance of historic truth with a view to dealing with the tragedies of the past. Moreover, it indicates that the right to the truth was recognized by the then Secretary-General, on the Bulletin on the observance by the UN forces of international humanitarian law, and also affirmed the importance of this right in peace processes. The High Commissioner has also affirmed the importance to respect the right to the truth, for instance, in a report on the situation of human rights in Colombia (E/CN.4/2005/10, para. 5). The study also recalls GA resolutions since the 1970s highlighting the importance of knowing the fate of the disappeared. The study also mentions that the SC and the GA have affirmed the importance to know the truth after genocide, crimes against humanity and other gross human rights violations. It also mentions some general references to the right in the former Commission when dealing with amnesties (e.g. Commission resolutions 1989/62, paragraph 7 (b) and Commission resolution 2002/60).[367]

The study also takes note of the fact that the right to the truth was recognized at the regional level in Europe, the Americas and the Southern Cone (MERCOSUR countries) and affirms

[365] Office of the United Nations High Commissioner for Human Rights, "Study on the right to the truth", UN Document E/CN.4/2006/91, 8 February 2006.
[366] Ibid, pages 4-5.
[367] Ibid, page 6.

that the right has also been recognized in some peace agreements and national courts. Nevertheless, it was in the Inter-American system where the right to the truth had a significant development thanks to the work of the Inter-American Commission and Court. This was so because the need to know the fate of the people who disappeared during the military regimes in the region became of the utmost urgency. In this context, the study indicates that international and regional bodies and courts have recognized the right to the truth in relation to gross human rights violations such as enforced disappearances, extrajudicial executions and torture and serious violations of IHL.[368]

Regarding the nature of the right, OHCHR affirms that it is an inalienable right and considers that it should be distinguished from the right to freedom of expression, including the right to information, because the right to the truth should not be restricted under certain cases as it happens with the right to information. It also indicates that this is the reason why the amnesty laws that prevent investigations affect the right to the truth that is essential in any democratic society.[369]

OHCHR's study also describes institutional and procedural mechanisms to implement the right to the truth, such as international tribunals, truth commissions, commissions of inquiry, national criminal tribunals, national and other administrative bodies, including human rights institutions. Accordingly, the right to the truth could be exercised through international criminal tribunals such as the International Criminal Court (ICC). Although these types of tribunals focus on the accountability of those responsible for crimes, they clearly strive to search the truth through rigorous evidence to establish facts. National criminal procedures can implement the right to the truth in a similar fashion. This would be the ideal way to satisfy the right because tribunals also guarantee other key rights in the fight against impunity, such as the right to justice and to reparation.[370]

Nonetheless, the study emphasizes that, in a large number of cases, the right can be exercised through truth commissions, without including in these mechanisms the prosecution and punishment of perpetrators. Since 1974, with the establishment of a truth commission in Uganda, non-judicial mechanisms have been a useful tool for the implementation of the right to the truth in more than 40 cases around the world. However, truth commissions can have

[368] Ibid, pages 7-10.
[369] Ibid, page 12.
[370] Ibid, page 13.

some limits: the timeframe which is investigated, the time actually available to the commission to conduct its work, and the material scope of what is investigated.[371]

Even though these commissions have to respect certain protection standards related to the due process, they do not have a jurisdictional character. This is a relevant point because in some countries the truth commissions have replaced the criminal processes for the judgment of alleged responsible people. However, truth commissions constitute a valuable help as they not only clarify events but they also compile information with the purpose of contributing to the justice system. Likewise, the commissions should keep evidence of the events, that is to say, they have to prevent documents or other pieces of evidence from being stolen, destroyed, shortened or forged.

Most of them investigate human rights violations and other crimes committed in the past. However, there are truth commissions, such as the ones of Rwanda and the Philippines, which have investigated violations being committed until their establishment and during their operation. Generally, the commissions investigate events committed in only one country but, in special cases, they have considered violations carried out abroad (e.g. in Chile or South Africa), and within different frameworks such as the disintegration of a country (e.g. the former Yugoslavia) or regional operations (e.g. Central Africa –Great Lakes Region, Latin American Southern Cone).

OHCHR indicates that in Latin America, the right to the truth was recognized by national courts at the highest level. The Constitutional Courts of Colombia and Peru and the Federal Criminal Courts of Argentina have developed important jurisprudence in this respect. Some peace agreements have also recognized the right of families to know the fate of their missing relatives. That was the case for example of the General Framework Agreement for Peace in Bosnia and Herzegovina.[372]

The study of the High Commissioner also affirms that national human rights institutions can also play a role in implementing the right to the truth through fact-finding investigations. Another way to implement the right to the truth is to have access to archives. In this sense,

[371] Ibid, page 14.
[372] Ibid, page 8.

it is interesting the work of the International Council of Archives, in coordination with UNESCO.

Taking into consideration all of the elements described above, OHCHR defines the content of this right as follows: "*The right to the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them. In cases of enforced disappearance, missing persons, children abducted or during the captivity of a mother subjected to enforced disappearance, secret executions and secret burial place, the right to the truth also has a special dimension: to know the fate and whereabouts of the victim.*" [373]

The study concludes that the right to the truth is an inalienable and autonomous right according to international treaties, instruments and international, regional and national jurisprudence. It also concludes that this right is closely related to the obligation of States to investigate gross human rights violations and serious violations of IHL as well as to provide reparations in this context. The study also affirms that the right is also related to the principle of rule of law, transparency, accountability and good governance, as well as to other human rights. The study also concludes that the right has also a collective dimension because society has a right to know the truth about the commission of heinous crimes in order to inter alia ensure reparation and avoid its recurrence. Furthermore, the study concludes that the right to the truth is a stand-alone right that admit no derogation and as such should not be subject to limitations. Amnesties should not deny or limit the right. Finally, the study reminds that the right can be implemented by various means, including tribunals and truth commissions.[374]

III.5.1.2 Human Rights Council Decision 2/105 and OHCHR report on the issue.

A new initiative on the issue was submitted by Argentina one year later in then recently established Human Rights Council. In 2006, the Council adopted Decision A/HRC/DEC/2/105 by consensus. The decision requested a new report from OHCHR on best national and international practices on the right to the truth and on individual and

[373] Ibid, page 15, paragraph 59.
[374] Ibid, pages 14-15.

societal dimensions of this right, taking into consideration the views of States, international organizations and NGOs. In this context, OHCHR submitted a second report.[375]

In its introduction, OHCHR indicates that a group of States made contributions to the report (including Argentina) and reminds the main conclusions of its first study on the right to the truth. Regarding the implementation of the right, the report mentions national experiences submitted by States for the report, which include: truth commissions (e.g. Chile, Morocco, Serbia, Paraguay), commissions of inquiry (e.g. Brazil, Ireland, Philippines), court proceedings (e.g. Argentina), and measures taken to preserve archives as evidence for the uncover of the truth (e.g. Argentina, Brazil, Colombia, Switzerland in relation to third countries).[376]

Regarding developments at the UN level, OHCHR mentioned, for example, that the Human Rights Committee has indicated the importance of truth commissions to ensure the right to the truth. At the regional level, OHCHR makes reference to a new development: in 2006, OAS and MERCOSUR recognized the right to the truth through a regional resolution and a sub-regional declaration, respectively. It is worth mentioning that both, the resolution and the declaration, were also promoted by Argentina.[377]

The report concludes that the right to the truth has been recognized in many treaties and other legal documents as well as in national legislation and international, regional and national jurisprudence. It also affirms that it is clear that it is a right that continues to evolve. In this context, OHCHR considered that would be interesting to further study the collective dimension of this right –e.g. the question of historical memory and records; the contribution of criminal proceedings to the right to the truth, in particular the role of victims and their families to guarantee the right to the truth in order to provide standards on the matter; and the question of records and the right to the truth in order to elaborate guidelines on the issue.[378]

III.5.1.3 Human Rights Council Resolution 9/11, the OHCHR report and a panel on the issue.

[375] Office of the United Nations High Commissioner for Human Rights, report on the "Right to the Truth", UN Document A/HRC/5/7, 7 June 2007.
[376] Ibid, pages 4-5.
[377] Ibid, pages 15-16.
[378] Ibid, pages 16-18.

In 2008, Argentina promoted a new initiative in the Council on the right to the truth. The new draft resolution was again elaborated by the South American country, which also led negotiations and pushed for its adoption. In this case, it was a substantive resolution which decided to take stock of the developments to date, and to request OHCHR further analysis of issues related to the implementation of the right to the truth, following recommendations of its last report, notably on the question archives. The initiative ended up adopted by the Council as HRC Resolution 9/11. In the preambular part, there was an important inclusion: the fact that the right was recognized in an international human rights binding instrument: art. 24.2 of the International Convention for the protection of all persons from enforced disappearance adopted in 2006. The new preambular part also highlighted the relevant conclusions of the first study on the right to the truth which, among other things, have recognized it as stand-alone right.

In its operative paragraphs, the resolution remarked the importance of cooperation and technical assistance in this matter. Following the Argentine proposal, there was also a new request to the Office to prepare a report focusing on the preservation of archives and witness protection programs. The Council also decided to convene a panel on the right to the truth during its thirteenth session.

Following this new request, OHCHR issued its third report. As requested, the High Commissioner dealt with two main issues: archives and witness protection. A number of countries contributed sending inputs to this report, including Argentina. Regarding archives, the Office begins by explaining that the archive system in a given State is made under a structure. If the structure changes, so does the archives system. In the aftermath of gross human rights violations or serious violations of IHL, the transitional period counts with its own archive which is very valuable for the history of a given country.[379]

OHCHR indicates that archives can be governmental or private-owned and records can originate from governments, international organizations, NGOs, churches or other sources. In general, records regarding gross human rights violations come from State archives. The report explains how to manage the archives at the national and individual levels, and

[379] Office of the United Nations High Commissioner for Human Rights, report on the "Right to the truth", UN Document A/HRC/12/19, 21 August 2009, pages 3-5.

recommends that all archives be kept in a national institution and copies in a separate place –e.g. an international criminal court, a mixed truth commission, which could be outside the country for security reasons.[380]

The report also mentions that, in transitional periods, the first step is to understand how the Government worked. Three issues –i.e. the structure, functions and nature of records- are relevant to ensure the authenticity of documents which could be used as evidence in judicial or truth commissions. In all cases, it is highly recommended for a State to have a single systematized archival system. If a part of those records has to be transferred to another place for a period of time, all originals should be kept together and a copy should be transmitted to a successor body.[381]

Regarding the issue of witness protection, OHCHR recalls its experience in dealing with witness protection and reports that it has incorporated the issue in a number of manuals. In the report, the High Commissioner links the need to protect witness with the obligation to investigate gross human rights violations and to provide effective remedy. It also informs that there are some provisions of international conventions against transnational crime and against corruption which could be considered in the human rights context because they regulate witness protection programs. However, there are also differences to consider between transnational crimes and gross human rights violations in terms of witness protection. While in the former witnesses tend to be insiders and the State is usually not involved, in the latter, witnesses are victims or a victims' relatives of gross human rights violations and State agents are involved in those violations.[382]

The report also affirms that all international criminal tribunals have provisions regarding witness protection, including protective measures and counseling. Witness protection programs provide a full range of physical protection and psychosocial support to program participants. Protected witnesses are able to give essential evidence regarding gross human rights violations when that evidence is not available elsewhere.[383]

[380] Ibid, pages 5-6.
[381] Ibid, page 6.
[382] Ibid, pages 9-11.
[383] Ibid, page 11-12.

OHCHR also reports that there are a relevant number of States that have enacted legislation on the issue. There are many issues to consider such as physical protection, relocation, change of identity, how and when to exit the program and protective measures –i.e. assistance to present in court, psychological support. OHCHR considers that witness protection' programs should be framed by law and include psychological assistance.[384]

A witness who participates in a program has to comply with severe requirements, which often include a certain level of isolation from his or her previous social environment. He or she could be dismissed if not complying with those requirements but he or she can leave the program on a voluntary basis, assuming the risks in terms of safety. In the long term, the objective of the program is to end it when the risk no longer exists.

The report concludes that archives are important to guarantee the right to the truth, for instance through truth commissions; to veto officials who could be involved in past crimes; and to make reparations. Archivists can help States to elaborate good access laws. In transitional periods after gross human rights violations and serious violations of IHL, archives of truth commissions tend to be national and, in some cases, there are hybrid situations, where the archives are in UN possession.[385]

In relation to witness protection programs, the Office further indicates that there is a need to have best practices and elaborate standards that would serve as guidelines for the protection of witnesses who participate in trials or quasi-judicial mechanisms. It would be important that national programs in this regard could be financed by the international community. It would also be relevant that witness protection programs are not managed by the police, the security forces or the military. Finally, it would be convenient to work on international relocation plans for witnesses in cases of gross human rights violations. This issue has already been addressed by various international and regional intergovernmental organizations in relation to transnational crimes.[386]

Finally, in conformity with what was requested by Council Resolution 9/11 promoted by Argentina, the Council organized a panel on the right to the truth, with the cooperation of

[384] Ibid, pages 13-15.
[385] Ibid, pages 17-18.
[386] Ibid, page 18.

OHCHR.[387] Argentina considered this event to be an important one to discuss the way to systematize all aspects regarding this right and participated actively in the organization of the panel. In this event, there were presentations from experts from different regions of the world, which were followed by a group of States highlighting the importance of the right and the convenience to consider its systematization in a specific UN declaration on the issue.

III.5.1.4 Human Rights Council Resolution 12/12, the OHCHR report and an expert seminar on the issue.

The next initiative on the right to the truth in the Council was presented in 2009 and was also prepared, negotiated and led by Argentina. The result was the adoption of HRC Resolution 12/12, which in the preambular part introduced references to the latest High Commissioner's report, the increase of ratifications to the International Convention on the protection of all persons from enforced disappearance, and the recognition of the right to the truth made by the Special Rapporteur on the independence of judges and lawyers.

In the operative part of the resolution, the Council requested OHCHR to elaborate a report considering the need to develop new standards and best practices on witness protection for their cooperation in trials regarding gross human rights violations. The Council also decided to request the High Commissioner to organize a seminar to elaborate guidelines on the preservation of archives. Both requests were included by Argentina as a follow up to the conclusions and recommendations of the previous OHCHR input.

In conformity with the new request, OHCHR made a new report on the right to the truth.[388] The report affirms that there is a significant number of witness protection programs in the context of organized crime in courts both at the national and international levels. The report lists three categories of witnesses: justice collaborators, victim-witnesses and innocent bystanders. In practice, programs limit protection to witnesses and their families or persons close to them. The Office recommends that the unit that implements the program is independent from State structure.[389]

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[387] Office of the United Nations High Commissioner for Human Rights, "News and events", "The right to the truth", 12 March 2010, available at: https://www.ohchr.org/EN/NewsEvents/Pages/Therighttothetruth.aspx.
[388] Office of the United Nations High Commissioner for Human Rights, "Report of the United Nations High Commissioner for Human Rights on the Right to the truth", UN Document A/HRC/15/33, 28 July 2010.
[389] Ibid, page 14.

The report informs that some countries –like Canada or South Africa- allow their competent authorities to cooperate with other States in relocation. Other countries started to cooperate in related issues among their sub-region like the Nordic States.[390] Finally, OHCHR concludes that there are not many experiences of national courts which implemented these programs in cases of gross human rights violations or serious violations of IHL so it could be useful to develop a normative framework aimed at enhancing common standards and best practices. It also affirms that it would be convenient to have a justice sector strategy, which provides appropriate training to the police, prosecutor and judicial institutions.[391]

Moreover, in conformity with Resolution 12/12, OHCHR organized a seminar on the right to the truth and the preservation of archives.[392] Argentina participated in this event, where there were experts and practitioners, who focused on four themes: the preservation of archives and the right to the truth; the use of archives in criminal accountability processes; the use of archives in non-judicial truth-seeking mechanisms; and the placement and management of archives of repressive regimes.

In the report of the event, OHCHR indicates that archives often have evidence for trials related to human rights violations and non-judicial truth mechanisms. This evidence is found in the public and private archives and in all physical formats. States have an obligation to have an archival policy both for archives in possession of the State and of individuals.

Participants of the seminar concluded that States should enact laws on archives establishing a framework for managing State records from their creation to destruction or preservation in an historical archive, and establishing criteria for access. Participants in the seminar also agreed that records of truth commissions and special courts and tribunals must be preserved. The International Council on Archives has elaborated many standards, including a guide for managing the records of NGOs. This is important because on many occasions victims and NGOs prefer to trust private archives.

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[390] Office of the United Nations High Commissioner for Human Rights, "Report of the United Nations High Commissioner for Human Rights on the Right to the truth", UN Document A/HRC/15/33, Ibid, pages 12-13.

[391] Ibid, pages 18-19.

[392] Office of the United Nations High Commissioner for Human Rights, "Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to the truth", UN Document A/HRC/17/21, 14 April 2011.

III.5.1.5 Human Rights Council Resolution 21/7.

In 2012, a new resolution on the right to the truth was adopted: A/HRC/RES/21/7. The initiative was once again submitted, negotiated and led by Argentina. In its preambular paragraphs, this resolution included the new developments, including the entry into force of the International Convention for the protection of all persons from enforced disappearance and a general comment of the Working Group on Enforced or Involuntary Disappearances on the right to the truth. This general comment, adopted by the Working Group in 2010, contributed to clarify even further the notion, content and scope of the right to the truth regarding enforced disappearances.[393]

In its operative paragraphs, the resolution refers to the need to cooperate with the new mandate-holder on issues related to truth-processes, calls States to consider the ratification of the International Convention against enforced disappearances, and requests States to consider the elaboration of comprehensive witness protection programs covering all types of crimes. It also encourages States to establish a national archival policy that ensures that all archives pertaining to human rights are preserved and protected, and to enact legislation that declares that the nation's documentary heritage is to be retained and preserved; and to create a framework for managing State records from their creation to destruction or preservation.

Finally, it requests OHCHR to invite all stakeholders to provide information on good practices in the establishment, preservation and provision of access to national archives on human rights, and to make the information received publicly available in an online database. As a consequence, the Office conducted consultations and included the information received on its webpage.[394]

III.5.1.6 General Assembly Resolution on the right to the truth 68/165.

The next and last specific initiative on the right to the truth submitted, negotiated and led by Argentina to date was in 2013. For the first time, the issue was dealt with and adopted at the

[393] United Nations Working Group on Enforced or Involuntary Disappearances, "General Comment on the Right to the Truth in Relation to Enforced Disappearances", available at: https://www2.ohchr.org/english/issues/disappear/docs/GC-right_to_the_truth.pdf

[394] Office of the United Nations High Commissioner for Human Rights, "Your Human Rights", "Right to the truth - National Archives on Human Rights", available at: https://www.ohchr.org/en/issues/truth/pages/truthIndex.aspx.

General Assembly through Resolution168/65. This resolution incorporated the new developments at the time.

In its preambular part, it recalls GA Resolution 65/96 of 21 December 2010, in which it proclaimed 24 March as the International Day for the Right to the Truth concerning gross human rights violations and for the dignity of victims. The proclamation of this international day was promoted by El Salvador –cosponsored by Argentina- taking into consideration the developments of the right to the truth at the UN level since 2005 and the legacy of Monsignor Oscar Arnulfo Romero in his country of origin.[395]

In its operative part, GA Resolution 168/165 refers to the important role of civil society in monitoring the implementation of recommendations of truth commissions, and encourages donors to make the training, support and strengthening of civil society organizations a priority. It also encourages UN agencies, Member States and NGOs to exchange experiences on the right to the truth, with a view to improving the effectiveness of relevant mechanisms and procedures empowered to seek information, assert facts and effectively reveal the truth about what happened after gross human rights violations and serious violations of IHL were perpetrated. Finally, the resolution requests the Secretary-General to organize an event in observance of the International Day for the right to the truth.

III.5.1.7 Balance of the development of the right to the truth and the contribution of Argentina in this regard.

Since 2005 to date, Argentina contributed decisively to the inter-governmental development of international norms and standards on the right to the truth. Indeed, it was one of the main promoters of the inclusion of this inalienable and autonomous right in the UN Convention against enforced disappearances, adopted in 2006 and in force since 2010. After this date, there could be no more discussion about the existence of the right in international human rights law as an autonomous right.

Secondly, at the UN level, through several resolutions adopted by the Commission, the Council and the GA, Argentina consolidated the intergovernmental recognition of

[395] United Nations, "International Day for the Right to the Truth Concerning Gross Human Rights Violations and for the Dignity of Victims 24 March", available at: https://www.un.org/en/events/righttotruthday/resources.shtml

international standards produced by the expert work of the former Sub-commission, special procedures, treaty bodies and regional bodies. In these resolutions, Argentina also took into consideration substantive recommendations and conclusions of expert reports. At the UN level, Argentina also promoted a panel on the right to the truth in the Human Rights Council and actively supported the establishment of an international day on the right to the truth.

Thirdly, at the regional level, the country submitted a series of OAS resolutions and, at the sub-regional level, contributed to develop a specific commission on the right to the truth, memory and justice within the human rights body of MERCOSUR.[396] All these initiatives have been in a way an "export" of successful policies and legislation on the issue at the national level, which were one of the most advanced in the world, as we will see in depth in the next chapter.

III.5.2 Forensic genetics and human rights.

III.5.2.1 The use of forensic genetics in cases of gross human rights violations and serious violations of international humanitarian law.

Both the phenomenon of missing persons in armed conflicts, violent situations or catastrophes, and the terrible crime of enforced disappearances committed by State agents under repressive regimes, caused a lot of suffering not only to those who are victims of this tragic situations themselves but also to their loved ones, who search them, dead or alive.

In many cases, following serious violations of IHL or gross international human rights violations, many people disappeared. The first systematic use of forensic science for the search of disappeared persons in Latin America took place in the 1980s. In the 1990s, the use of forensic genetics was extended to other regions of the world such as Europe (e.g. the Balkans region) or Africa (e.g. Rwanda). The International Committee of the Red Cross (ICRC) made a very relevant contribution to the issue through its work.[397]

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[396] MERCOSUR, Reunión de Altas Autoridades sobre Derechos Humanos, "Comisión Permanente Memoria, Verdad y Justicia", available at: http://www.raadh.mercosur.int/comisiones/memoria-verdad-y-justicia/.
[397] International Committee of the Red Cross, "The Missing and their families. Action to resolve the problem of people unaccounted for as a result of armed conflict or internal violence and to assist their families", 28th International Conference of the Red Cross and Red Crescent", 2-6 December 2003, available at: https://www.icrc.org/en/doc/assets/files/other/icrcreport_themissing_ang_final.pdf. See also International Committee of the Red Cross, "Missing People, DNA Analysis and Identification of Human Remains. A Guide

Argentina was pioneer in the use of forensic science, including genetics, to investigate the cases of enforced disappearance of its last dictatorship (1970s and 1980s) and to restore the identity of hundreds of children born in captivity or removed from their parents during that period, which also helped these children to re-establish links with their families of origin.[398]

The scientific technique of forensic genetics played an important role in the identification of victims of serious atrocities such as enforced disappearances. Nevertheless, there are legal and technical obstacles, such as data protection and consent, recovery of remains, DNA extraction, and collection of reference samples, all of which can be exacerbated by the number of people to be identified and the multiplicity of actors involved.[399]

By 2008, there were UN standards for specific situations –e.g. the manual for the use of forensic genetics in cases of extrajudicial executions and the Istanbul Protocol for the investigation and documentation of torture and ill treatment.[400] Nevertheless, there was no systematic guidance for the use of forensic genetics in the context of gross human rights violations and some aspects were not fully covered, such as some legal and ethical considerations.[401]

III.5.2.2 Towards the first Human Rights Council resolution on the issue.

On 23 November 2008, the then Argentine President, Cristina Fernandez de Kirchner, began her statement at the GA inauguration reaffirming the importance of the protection of human rights as a State policy in Argentina. In this context, she indicated that, on the basis of

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to best practice in armed conflicts and other situations of armed violence", 2nd ed., ICRC, Geneva, 2009, available at https://www.icrc.org/en/doc/assets/files/other/icrc_002_4010.pdf

[398] Comité Internacional de la Cruz Roja, presentación sobre la "Guía de Buenas Prácticas para el uso de la genética forense en investigaciones sobre derechos humanos y derecho internacional humanitario", XIX Jornadas del GHP-ISGP, Quito, Ecuador, 9-12 Septiembre de 2014, available at: http://www.gep-isfg.org/archivos/201410/quito-ghep-2014-guia-buenas-practicas-argentina_merce-salado.pdf?1

[399] Tidball-Binz, Morris et al ,"A good practice guide for the use of forensic genetics applied to human rights and international humanitarian law investigations", Forensic Science International: Genetics Supplement Series 4 (2013), e212–e213, available at: https://www.fsigeneticssup.com/article/S1875-1768(13)00110-8/pdf.

[400] American Association of Blood Banks (AABB), "Guidelines for Mass Fatality DNA Identification Operations", AABB, Bethesda, MD, 2010; National Institute of Justice (NIJ), "Lessons Learned from 9/11: DNA Identification in Mass Fatality Incidents", NIJ, Washington DC, 2006; M. Prinz, A. Carracedo, W.R. Mayr, N. Morling, T.J. Parsons, A. Sajantila, et al., "DNA Commission of the International Society for Forensic Genetics (ISFG): recommendations regarding the role of forensic genetics for disaster victim identification (DVI)", Forensic Sci. Int. Genet. 1, 2007, pages 3–12, in Tidball-Binz, Morris et al, "A good practice guide…", Ibid, pages e212-e213.

[401] Tidball-Binz, Morris et al, "A good practice guide…", Ibid, page e213.

Argentina's national policy on the pillars of memory, truth and justice in the aftermath of gross human rights violations, the country had decided to support three forensic teams of Argentina, Guatemala and Peru to promote the establishment of genetic banks to identify victims of gross human rights violations.[402]

To move this initiative forward, the Argentine Government decided to introduce the link between forensic genetics and human rights for the first time in the Human Rights Council. Clearly linked to its own past, Argentina decided to contribute to the universal human rights system with the elaboration of common standards for the use of forensic genetics as a tool to identify remains in the aftermath of gross human rights violations and serious violations of international humanitarian law. To this end, Argentina worked closely with the ICRC, which has vast experience in the field, as well as with the Argentine Forensic Team, a world prestigious organization that worked in several countries of different regions of the world.

It is clear that there is a strong link between the work of forensic experts and the use of forensic genetics and the right to the truth. In the case of Argentina, for instance, the work of the Argentine Forensic Team allowed identifying the remains of many people who were subjected to enforced disappearance first and later, in many cases, murdered by State officials from the last dictatorship.

The Argentine Forensic Team also helped to identify those children who were born in captivity and later separated from their abducted mothers and given to other families in irregular adoptions. The possibility to satisfy the right to the truth about the fate of the loved ones, including circumstances and the destiny of the remains, was key to give some relief to several families.

As it was quite a novel issue which had to be discussed and known by the international community, in 2009, Argentina decided to organize a special event within the framework of the Council on forensic genetics and human rights and invited special guests to make presentations: a representative of the ICRC, a member of the Argentine Forensic Team, and the President of the prestigious Argentine NGO "Grandmothers of Plaza de Mayo". It was

[402] Taquígrafos, Presidencia de la Nación, Palabras de la Presidenta de la Nación Cristina Fernández de Kirchner, en la Apertura de la Asamblea General de las Naciones Unidas, en la Ciudad de Nueva York, available at: https://www.un.org/en/ga/63/generaldebate/pdf/argentina_es.pdf

a valuable opportunity to raise awareness of this specific area and its importance in IHL and international human rights law.

III.5.2.3 Human Rights Council Resolution 10/26 and OHCHR report on the issue.

In 2009, Argentina decided to submit, negotiate and lead the first resolution adopted on forensic genetics and human rights: HRC Resolution 10/26, which was approved by consensus during the Council's 10th session. The preambular part of the resolution recalls the main instruments of IHL and international human rights law, which recognize the right to the truth, as well as Commission and Council resolutions adopted on this issue. It also recalls Commission resolutions on human rights and forensic science promoted by Finland between 1993 and 2005.

The preambular part of the resolution also makes a reference to GA Resolution 61/155 (2006) on missing persons, which emphasized the importance of genetics in identifying these persons, recognized the progress of this method and noted the 2002 report of the ICRC on missing persons. It also highlights the importance to restore the identity of the persons who were separated from their families of origin.

Furthermore, the preamble also recognizes the fact that forensic genetics may contribute to the identification of the remains of victims, to the restitution of the identity of those persons illegally taken away, and to address the issue of impunity. It also recognizes the importance of ethics on this issue and recalls a series of instruments related to bioethics and the human genome.

In its operative part, the resolution encourages States to consider the use of forensic genetics in cases of gross human rights violations and serious violations of IHL. It also stresses the importance of providing the results to competent authorities, including those in the justice system. Finally, it requests OHCHR to ask for information on best practices in the use of forensic genetics with a view to considering the drafting of a manual as a guide for the application of forensic genetics, including, where appropriate, the voluntary creation and operation of genetic banks.

In this respect, OHCHR submitted a report in 2010.[403] The report starts by recalling the three main objectives that Argentina was promoting with this initiative within the Council: to recognize the importance of forensic genetics in cases of gross human rights violations and serious violations of IHL; to promote cooperation on the issue to locate victims' relatives who moved from their places of origin; and to promote the development of international standards on the use of forensic genetics through a manual which could be used by national genetic databanks on the basis of technical and ethical considerations.[404]

OHCHR recognizes the important role of forensic science in criminal investigations and in the identification of disappeared persons in cases of human rights violations or other fatalities. Some countries have law and standard practices in this regard –e.g. Argentina, Spain, Portugal and Peru. At the international level, rules and practices are not systematized. OHCHR indicates that the forensic community agree that it would be convenient to have a general framework for the exhumation and identification processes, including the establishment of protocols for exhumation, autopsies, and reliable methods to produce evidence; appropriate way to involve families in this scientific activity; and procedures for handing over the remains to the family.[405]

The report describes the experience on the issue from El Salvador, Colombia and Argentina. The report also refers to jurisprudence of the European Court of Human Rights on the importance of the application of human rights standards in the use of forensic genetics and relevant international legislation on the issue. In addition to the description of national experiences, OHCHR highlights the importance of databanks of relatives of disappeared persons, in particular for large scale identification projects, and affirms that the more complete is the bank, the greater is the chance to identify remains that are found and considered to correspond to a victim. Those databanks would allow for future identifications as additional graves are discovered. [406]

The report also refers to the importance of defining issues such as procedures to be used, goals, restrictions, consent, and terms of confidentiality. In this sense, it is important to

[403] Office of the United Nations High Commissioner for Human Rights, "Report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights", UN Document A/HRC/15/26, 24 August 2010.
[404] Ibid, page 4.
[405] Ibid, pages 11-12.
[406] Ibid, pages 8-10.

confirm that the goal is to identify a genetic relation between victims and their relatives and there is no other motive –e.g. scientific, commercial. It is also relevant to establish that the donation should be voluntary and that there is a clear limitation in the use of samples of DNA.[407]

In this context, OHCHR supports the original initiative of Argentina in the sense of promoting genetic data banks and guidelines in this regard; and emphasizes that these data banks should have a board with the participation of NGOs and the relatives of the victims; its results must be confidential; and data banks have to be monitored on a regular basis.

OHCHR also addresses the possibility to have a manual or guidelines on the issue. In this regard, it indicates that the International Commission on Missing Persons (ICMP) had already held discussions on developing guidelines in identification measures on victims of disasters. ICMP had also consulted a series of organizations that work on this field to discuss the potential merits of a UN manual on this matter. These organizations unanimously supported the Council examining the application of forensic genetics to human rights because it is the most rigorously established scientific basis for identification. However, they suggested that it would be difficult to elaborate a manual because of the continuous technical development in the field, which would make it burdensome to maintain the manual updated.

In any case, the ICMP considered that it would be useful to elaborate a set of UN guidelines to raise awareness of the importance of forensic genetics beyond cases of missing persons; emphasized that efforts should be made to have objective scientific methods to the maximum extent possible; and to share best practices in the application of forensic genetics (e.g. laboratory accreditation, formal quality assurance mechanisms). These guidelines could be elaborated in consultation with the community of forensic genetic scientists. An area of high importance and value for such guidelines would be the issues of genetic data protection and informed consent, which can reveal unexpected family relationships.[408]

The report concludes supporting the Argentine initiative –included in Council Resolution 10/26- emphasizing the importance of the use of forensic genetics and national data banks.[409]

[407] Ibid, pages 14-15.
[408] Ibid, page 12.
[409] Ibid, page 16.

III.5.2.4 Human Rights Council Resolution 15/5 and OHCHR report on the issue.

The second resolution of the Human Rights Council on forensic genetics was adopted in 2010 (HRC Resolution 15/5). The initiative was again submitted, negotiated and led by Argentina and adopted by consensus. In its preambular part, the resolution makes reference to new developments and notes the general comment of the Working Group on Enforced or Involuntary Disappearances on the right to the truth, in which it highlighted the importance of identifying the victims of enforced disappearance through DNA analysis.

The operative part of the resolution includes an appreciation of the conclusions of the first OHCHR report on forensic genetics and human rights, and also requests the High Commissioner to submit a new report on the obligation of States to investigate serious violations of human rights and IHL in terms of identifying victims of such violations, including through the use of forensic genetics, with a view to considering further the possibility of drafting a manual on the issue, including, where appropriate, the voluntary creation and operation of genetic banks.

As a consequence, OHCHR elaborated a new report on forensic genetics in 2011.[410] In the introduction, it reminds that forensic genetics has a crucial role to play in investigations of gross human rights violations and serious violations of IHL. The report also recalls that Argentina, as main sponsor of Council resolutions on forensic genetics and human rights, decided to constitute a working group composed, among others, of geneticists, forensic anthropologists and experts in bioethics, with the support and technical assistance of the ICRC, to prepare a draft manual for the application of forensic genetics and the creation and management of genetic databases in the context of investigations of violations of human rights and international humanitarian law. Indeed, Argentina organized a meeting within the framework of the second Latin American Congress on Human Genetics, held in Costa Rica in May 2011, to move the issue forward.

The report further affirms that the State obligation to investigate human rights violations is enshrined in article 2(1) of the International Covenant on Civil and Political Rights; has been recognized and interpreted by the Human Rights Committee; and is included in articles 3

[410] Office of the United Nations High Commissioner for Human Rights, "Report of the United Nations High Commissioner for Human Rights on the obligation of States to investigate serious violations of human rights, and the use of forensic genetics", UN Document A/HRC/18/25, 4 July 2011.

and 12 of the International Convention for the Protection of all Persons from Enforced Disappearance and article 12 of the International Convention against Torture. The report also mentions that the obligation to investigate the individuals responsible for crimes is also contained in the Geneva Conventions of 1949, in the UN principles on reparations, the updated principles against Impunity, and in the Rome Statute of the International Criminal Court. According to OHCHR, this obligation is essential to guarantee the rights to the truth and to justice.

The report also recalls that the obligation to investigate is set out in the three regional human rights conventions (i.e. European, Inter-American and African). It also describes the jurisprudence of the European Court, the Inter-American Court and the African Commission in this regard. In this context, it concludes that the duty of States to investigate gross violations of human rights law and serious violations of IHL is well established.

III.5.2.5 Balance of the contribution of Argentina to the field of forensic genetics.

Argentina introduced in the universal human rights system the use of a scientific technique, forensic genetics, which has been widely welcomed by the Council, UN Member States, specialized international organizations and the scientific community. In this sense, the South American country also promoted the development of international human rights standards in the use of forensic genetics applied to human rights violations, including through the establishment of national data banks, building on its national experience. All Council resolutions and OHCHR reports support the development of these international standards.

After the second OHCHR report, Argentina, together with the ICRC and a team of forensic experts and anthropologists, worked towards the elaboration of draft guidelines on the issue, following HRC resolutions regarding the matter. The draft guidelines were elaborated by a group of forensic experts and comprise four sections: an introduction to forensic genetics and ethical issues faced when employing forensic genetics in this type of analysis; legal aspects of the identification of victims of violations of human rights, international humanitarian law and the right to identity; the use of bio banks and personal genetic databases in this type of casework; and technical aspects of undertaking an identification program.[411]

[411] Tidball-Binz, Morris et al, "A good practice guide…", Ibid, page e213.

The guidelines are thought to be used by national agencies and international and regional intergovernmental organizations. They include the extensive experience of several agencies in sensitive investigations, particularly from Latin America, where the problem of the disappeared has been wide and serious. It is hoped that the guidelines would provide a valuable reference in order to deal with the tragic legacy of armed conflicts and of gross human rights violations of human rights and humanitarian law.[412]

The guidelines were presented in a side event of the Human Rights Council during its 28th session and it would be desirable that Argentina and interested States could submit them for the Council's consideration and approval in the near future.[413]

III.5.3 The establishment of the UN Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence.

III.5.3.1. An Argentine-Swiss Initiative.

Since 2005, the very same year that Argentina submitted its first initiative on the right to the truth to the then Commission on Human Rights, Switzerland presented a general initiative regarding transitional justice on the basis of the updated Set of principles against impunity elaborated by the former Sub-commission and updated by the expert Diane Orentlicher, but not endorsed by UN intergovernmental bodies. The updated principles against impunity included the rights to the truth, justice, reparations and a concept related to prevention of future violations which was called guarantees of non-recurrence. These principles were conceived to be applied in the context of gross human rights violations and serious violations of international humanitarian law.

Since 2008, Argentina and Switzerland started to work, first in a coordinated manner during negotiations of both their initiatives and later in a bilateral exchange on the way to enhance their cooperation in the field of the fight against impunity within the Human Rights Council.

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[412] Tidball-Binz, Morris et al, "A good practice guide…", Ibid, page e213.

[413] See for instance Ministerio de Relaciones Exteriores, Comercio Internacional y Culto de Argentina, Misión Permanente ante los Organismos Internacionales en Ginebra, "Guía de Buenos prácticas para el uso de la genética forense en investigaciones sobre derechos humanos y derecho internacional humanitario, en el marco del 28 Consejo de Derechos Humanos", available at: https://eoirs.cancilleria.gob.ar/es/content/gu%C3%AD-de-buenas-prácticas-para-el-uso-de-la-genética-forense-en-investigaciones-sobre-derechos.

From the beginning, there was a common view to promote the protection of victims at the fullest extent possible. Nevertheless, there were also differences.

One was the main approach to the initiative: Switzerland promoted a comprehensive approach based on a toolbox applicable according to the case taking into consideration a general framework developed by experts and not adopted at the intergovernmental level, notably the updated set of principles against impunity. The same happened –and still happens- with the term transitional justice, which has not been recognized in any international human rights treaty.

Argentina emphasized the importance of a rights-based approach taking into consideration the development of the rights to the truth, justice and reparations in the country in the last three decades as it will be described in the next chapter. At the time, Switzerland found it difficult to recognize the right to the truth –characterized as an autonomous right by the first OHCHR study- because it did not include it in its legislation. This discussion is no longer valid because this right has been recognized in international human rights law since the entry into force of the international convention against enforced disappearances and Switzerland ratified this convention in 2016.[414]

After meetings of different formats at the expert and governmental level, and common efforts and flexibility from both partners, Argentina and Switzerland decided to establish a mandate which was a careful balance between two their different approaches: a rights-based approach more inclined to identify elements which could lead to the development of standard setting of the three rights of the mandate (truth, justice and reparations) and an implementation approach, based on a general framework not yet universally recognized but useful for specific cases.

The outcome of these fruitful negotiations was the decision to promote the establishment of a Special Rapporteur whose mandate shall include the pillars of the fight against impunity by their names (truth, justice, reparation and guarantees of non-recurrence), which reflect the main human rights at stake when dealing with gross human rights violations and the

[414] See United Nations Treaty Collection, "Depositary", status of the International Convention on the Protection of All Persons from Enforced Disappearance as at 30 January 2020, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&clang=_en

comprehensive approach looking to implement standards on the ground, through capacity building and technical assistance, according to national experiences.

After long and exhausting negotiations, Argentina and Switzerland managed to include as main sponsors to the initiative relevant countries from all over the world, namely, Morocco, Ivory Coast, Uruguay, Peru and Austria. The resolution had a very strong support and was adopted by the Human Rights Council on 29 September 2011 as Resolution A/HRC/RES/18/7.

This landmark resolution focuses on its preambular part on the legal framework of the new mandate, comprising international human rights treaties and also international humanitarian law; all resolutions on the right to the truth, on forensic genetics and on transitional justice, and article 24 of the Convention against enforced disappearances which enshrines the right to the truth.

The resolution also indicates that the Special Rapporteur could deal with truth, justice, reparations and guarantees of non-recurrence in cases of gross human rights violations and serious violations of IHL. It also indicates that strategies, policies and measures to address these situations should take into consideration the specific context. It emphasizes the importance of a comprehensive approach incorporating the full range of judicial and non-judicial measures to promote the rule of law.

Finally, the resolution establishes a Special Rapporteur for the period of three years with the following tasks: to provide technical assistance or advisory services; gather relevant information on national situations and study trends, developments and challenges and to make recommendations thereon; identify, exchange and promote good practices and lessons learned, as well as to identify potential additional elements with a view to recommend ways and means to improve and strengthen the promotion of truth, justice, reparation and guarantees of non- recurrence; develop a regular dialogue and cooperate with all relevant stakeholders; make recommendations concerning, inter alia, judicial and non-judicial measures when designing and implementing strategies, policies and measures for addressing gross violations of human rights and serious violations of international humanitarian law;

undertake a study on the ways and means to implement the issues pertaining to the mandate; conduct country visits; among others.[415]

The resolution also calls upon Governments to cooperate with and assist the Special Rapporteur in the discharge of his or her mandate and requests the Secretary-General and the High Commissioner to provide the new mandate-holder with all the assistance necessary for the fulfilment of his or her mandate. It also requests the Special Rapporteur to report annually to the Council and the GA. Not all mandate-holders report to both of these bodies and this creates an opportunity to combat impunity at the UN level.

The mandate has been renewed every three years ever since, with the support of main sponsors of the resolution.[416]

III.5.3.2 The first eight years of the mandate: the thematic work of the Special Rapporteur.

Due to the extensive work of the mandate and the long period under consideration, I will only focus on the substantive reports and not on other activities of the mandate, such as country missions. In August 2012, the Special Rapporteur on the issue, Pablo de Greiff, submitted his first thematic report to the Council, where he describes, what in his opinion should be, the foundations of the mandate and implementation strategies of the mandate.[417]

In the report, the mandate-holder defines the four pillars against impunity, truth, justice, reparations and guarantees of non-recurrence, as "measures" that emerged in the post-authoritarian experience of the Southern Cone –i.e. Argentina, Chile, Uruguay and the southern part of Brazil, Bolivia and Paraguay- and to a lesser extent of South Africa and Eastern Europe. He also says that at present, these "measures" are needed in post-conflict situations. Later, he introduces the expression "transitional justice", which he affirms he will use for short when dealing with the pillars against impunity. He clarifies that transitional justice is not a soft form of justice but a means to contribute to reconciliation and the rule of law.[418]

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[415] Human Rights Council Resolution A/HRC/RES/18/7, operative paragraph 1.
[416] See for instance Human Rights Council Resolution A/HRC/RES/36/7.
[417] Report of the Special Rapporteur for the promotion of truth, justice, reparations and guarantees of non-recurrence, UN Document A/HRC/21/46, 9 August 2012.
[418] Ibid, pages 5-6.

Before going further, it should be said that I do not agree with the word "measures" to refer to the rights to the truth, justice and reparations. They are not just tools for a comprehensive approach used, according to the case, to a still not consolidated concept of transitional justice. They are human rights expressly incorporated in international human rights treaties. This does not mean that a comprehensive approach is not useful, but it should not affect the real nature of three of the four pillars of the mandate, which are stand-rights and can be exercised independently of a specific framework. I prefer, therefore, to refer to the rights to the truth, justice and reparations. In my perspective, both concepts (truth, justice, reparations and guarantees of non-recurrence on the one hand, and transitional justice on the other hand) are not equivalent because the rights do not depend on the concept of transitional justice to exist.

The first report also describes the opinion of the first mandate-holder regarding the aim of his work: contribute to reconciliation; strengthen the rule of law, recognition of victims as persons and as right-holders; and the building of trust in society.[419] Even if I could agree with the goals in general terms, it is necessary to highlight that the goal of reconciliation is problematic. It was only preserved in the resolution by the specific request of some African countries. There is no doubt that the promotion of reconciliation is a desirable goal in ideal terms, in particular in the context of countries composed of different ethnic and religious groups, which have no other option than to coexist in a peaceful and civilized way. However, in some national contexts such as the Argentine one, this term was argued to promote the adoption of amnesty laws and to impede the prosecution of those responsible for gross human rights violations.

Apologies, memorials and even prosecution and punishment of perpetrators as "measures" suggested in the first report by the mandate-holder are clearly welcomed to recognize the victims and their suffering, but the act of reconciliation is a personal one and cannot be achieved through a specific law or decisions of a specific State institution. This is why I do not agree that a victim-centered approach should necessarily include reconciliation, even if clarifying that it is not a substitute for justice.

[419] See for instance Report of the United Nations Special Rapporteur for the promotion of truth, justice, reparations and guarantees of non-recurrence, UN Document A/HRC/21/46, Ibid, page 19, paragraphs 64-68.

In his implementation strategy, the first mandate-holder also focuses on the comprehensive approach, qualifies again the right to the truth, justice and reparation as "measures" and includes areas of work such as development and security.[420] In my opinion, the inclusion of development and security, the two other pillars of the UN together with human rights, shows the interest of the mandate-holder in having an approach that goes well beyond the human rights dimension, which should be the main focus of the work of a special rapporteur of the Human Rights Council. Such a wide inclusion of pillars and concepts in the mandate actually weakens it because it is prone to lose its precise substance.

In his second report of 2012, the mandate-holder decides to focus on the concept of rule of law and the relation and mutual interaction between transitional justice and the rule of law.[421] The report includes in this context the concept of transitional justice as a framework for strengthening the rule of law. The rapporteur interprets, consequently, that the comprehensive approach of the mandate of the special rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence calls for a framework of transitional justice.

It is worth stressing that this was not the name decided for the mandate and it was not by chance that it was not called transitional justice. It was the result of difficult negotiations and a delicate balance between different positions of two countries which, even if they share the same values and a strong commitment to human rights, have different backgrounds in terms of history and legal frameworks.

The report later includes the role of the four pillars against impunity in the contribution to the rule of law and decides to put it under the umbrella of transitional justice. In this conceptual context, with which I have reservations as mentioned above, the Special Rapporteur includes the contributions of truth-seeking mechanisms, reparations and justice. He concludes indicating that it is necessary to include a gender perspective and the specific needs of men, women and children.

In his third report in 2013, the mandate-holder insists with the framework of transitional justice –including the four pillars of the mandate in this context- and links it with

[420] Ibid, pages 15-18.
[421] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/67/368, 13 September 2012.

development.[422] In this regard, he affirms the importance of justice and rights considerations to development. He affirms that justice, security and development are inter-related and that the "measures" of truth, justice, reparations and guarantees of non-recurrence have particular developmental effects because they foster civic and institutional trust and build social capital.

In the following four reports submitted between 2013 and 2015, the first mandate-holder focuses on the four pillars of the mandate: the right to the truth, justice and reparations, and the guarantees of non-recurrence.[423] He decides to include them within the somewhat vague term of transitional justice, concept that he does not define.[424]

The first report on the pillars, regarding the right to the truth, makes a very brief and rather incomplete reference to the legal framework on the right, focusing on the international convention against enforced disappearances, the principles on reparations, Council resolutions, among other precedents. The rapporteur prefers to focus on the implementation of the "truth-seeking mechanisms" –e.g. truth commissions, commissions of inquiry.[425] In his following report, on the pillar of the right to justice, the expert decides to consider the right to the truth as "part of an effective right to remedy".[426]

To justify his opinion, he alludes to a previous report made by himself and to the set of principles on reparations, which legally speaking have the nature of recommendations. In this context, it has to be stressed that, as seen above, the right to the truth was recognized in international human rights law by article 24 of the convention against enforced disappearances. Also, OHCHR has clearly stated in its first study that it is an autonomous right, considering judicial and quasi-judicial decisions of many intergovernmental UN and regional bodies. These elements have been considered by scholars in recent works.[427]

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[422] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/68/345, 23 August 2013.
[423] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/HRC/24/42, 28 August 2013. See also reports of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence UN documents A/HRC/27/56, 27 August 2014; A/69/518, 14 October 2014; and A/HRC/30/42, 7 September 2015.
[424] Report of the Special Rapporteur for the promotion of truth, justice, reparations and guarantees of non-recurrence, UN Document A/HRC/21/46, Ibid, page 6.
[425] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/HRC/24/42, Ibid, pages 6-25.
[426] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/HRC/27/56, Ibid, page 6.
[427] Alston, Philip, "International Human Rights…", Ibid, pages 1406-1410.

Consequently, I consider that, at this stage, the nature and scope of the right to the truth cannot be considered as part of another human right.

The report on the right to the truth also describes practical aspects of truth commissions and some key national experiences, and calls the attention about the expansion of these truth mechanisms from victim-tracing to investigation of root causes that led to the terrible crimes, proposals for structural reform and even cases of corruption.

In conclusion, the report recommends the establishment of truth commissions with a gender perspective; the nomination of commissioners with high qualities; selection based on a balance between representativeness and competence; the need of caution about the inclusion of crimes other than gross human rights violations and serious violations of IHL; the way to staffing, budgeting and managing; the way to extend the lifetime of the commission archives; and cultural interventions including memorials.[428]

The second report on the pillars focuses on justice. The Special Rapporteur emphasizes that the element of "justice" is the most developed one and suggests prosecutorial strategies, in particular, prioritization in the investigation of abuses and violations.[429] In this sense, he describes different strategies on the basis of national experiences (i.e. easy cases, high impact cases, most serious violations, most serious crimes, most responsible perpetrators, symbolic or paradigmatic cases). The report also refers to criteria and arrangements for this prioritization (i.e. independence and impartiality of prosecutors, capacities, institutions and resources) and highlights the importance of the participation of victims in the prosecutorial strategy.[430] In the recommendations, the report calls to respect the duty to investigate and prosecute gross and serious violations, apply the universal jurisdiction for these cases, and insists in the definition of prosecutorial strategies to deal with the cases. These strategies include the consideration of a specific body to implement the task.

The third report, on the pillar of reparations, begins with recognizing that courts are unlikely to be the main avenue of redress in cases of gross human rights violations or serious

[428] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/HRC/24/42, Ibid, pages 27-29.
[429] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/HRC/27/56, Ibid, pages 3-9.
[430] Ibid, pages 4-17.

violations of IHL.[431] It also describes the legal background, including the UN principles on Reparations,[432] and affirms that until now no reparations program has had a comprehensive approach, including for instance reparations for violations to the freedom of association.[433]

Regarding the benefits of reparations, the report distinguishes between material (e.g. payments in cash) and symbolic reparations (e.g. official apologies, names of public spaces). The most frequent type of reparation has been material, but the use of symbolic reparations has been growing. The report rightly indicates that this tendency should not replace the other benefits. The report also reminds that reparations include medical services –e.g. psychological support, and other forms of rehabilitation.[434] The report also makes reference to collective reparations, which could be symbolic (e.g. public apologies) or material (e.g. construction of a hospital). The problem with the latter is that it does not constitute per se a real reparation for damages suffered as a consequence of terrible crimes.[435]

The report also refers to challenges and problems. One main challenge is to determine the magnitude of the reparation. Ideally, it should be integral but in general in cases of gross human rights violations and serious violations of IHL that does not happen and solutions to this problem vary from case to case. One essential problem is the lack of implementation. Regular justifications do not seem to be convincing: for instance, many States indicate that programs are unaffordable, while it has been proved that, when there is political will, a reparations program tend to be implemented even in countries with harsh economic conditions. In this context, the report recommends avoiding resorting to economic reasons to not implement a program, and to design and implement programs avoiding unjustified exclusions. The report also recalls the importance of including a gender perspective in reparation programs and the participation of victims in the design and implementation of these plans.[436]

[431] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/69/518, 14 October 2014, page 3.
[432] Ibid, pages 5-6.
[433] Ibid, pages 7-8.
[434] Ibid, pages 9-11.
[435] Ibid, pages 11-12.
[436] Ibid, pages 14-23.

The fourth and last report on the pillars of the mandate focuses on guarantees of non-recurrence.[437] According to the report, the term has been growing since 1993, when it was used in a specific UN report, and it has been included in the convention against enforced disappearances and developed by treaty bodies and by regional courts such as the Inter-American Court. Nevertheless, the report recognizes that it still needed to define guarantee, the content, the beneficiaries and the duty-bearer. It also makes "framing considerations" of transitional processes, which vary according to the case, and "institutional interventions" to indicate problems which could be addressed to prevent violations –e.g. judicial reforms, security sector reforms. It also highlights the importance to address legal reforms –e.g. statutes of limitation and retroactivity issues in accordance with international law.

As a way of prevention, the report also refers to "societal interventions" –e.g. measures to prevent attacks against civil society- and "cultural and individual interventions" –e.g. prevention measures taken at the education and arts and culture levels. One last intervention has to do with the counselling and psychosocial support which has to be provided to victims.

The following report of the mandate holder focuses on one specific guarantee of non-recurrence, which relates to the reform of the security sector, which is called "vetting" – removal of individuals from this sector related to the regime that committed gross violations- and provides strategies in this regard.[438]

In the next reports until the end of his term, the first mandate-holder directly focused on transitional justice: the importance of national consultations on the design and implementation of different "measures";[439] the victim participation in the design and implementation of those measures;[440] regional approaches on transitional justice, advances and challenges –where he continues developing his framework of transitional justice and even calls for the establishment of a group on the issue in the SC;[441] prevention in the UN system; the proposal of a framework approach in this regard which contains all the elements

[437] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/HRC/30/42, 7 September 2015.
[438] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/70/348, 16 October 2015.
[439] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/71/567, 25 October 2016.
[440] Report of the Special Rapporteur on the Promotion of truth, justice, reparations and guarantees of non-recurrence, UN Document A/HRC/34/62, 27 December 2016.
[441] Report of the Special Rapporteur on the Promotion of truth, justice, reparations and guarantees of non-recurrence, UN Document A/HRC/36/50, 21 August 2017.

and proposals of the report on guarantees of non-recurrence;[442] the differences between post-authoritarian regimes and post-conflict situations;[443] and a joint study with the Special Adviser to the Secretary-General on the Prevention of Genocide on the contribution of transitional justice to the prevention of gross and serious violations of human rights and IHL.[444]

In 2018, the newly appointed Special Rapporteur, Fabian Salvioli, submitted three reports: one on atrocity prevention and preventive initiatives in the institutional sphere,[445] a second one on areas of interest -i.e. fight against impunity, national and regional experiences on the four elements of the mandate, further development of guarantees of non-recurrence,[446] and a last one on priority lines on engagement of the second mandate-holder with the GA: transitional justice, prevention and sustaining peace, youth creative agency for transitional justice, gender perspective and human rights and the sustainable development goals in the context of the mandate.[447]

III.5.3.3 Balance of the work of the mandate promoted by Argentina and Switzerland.

Both Argentina and Switzerland share the same values in terms of the importance to promote democracy and human rights at the international level and have been committed to the fight against impunity for a long period of time. Having different legal backgrounds, national experiences, and levels of economic development, the approach to the issue also has differences as the ones already mentioned. However, both countries were able to reach consensus to establish a mandate in the Council, which could address this important objective. The existence of this mandate is most certainly welcomed and has the potential to make a relevant contribution not only in relation to specific cases of gross human rights violations, but also to the progressive development of international human rights law.

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[442] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/72/523, 12 October 2017.
[443] Report of the Special Rapporteur on the Promotion of truth, justice, reparations and guarantees of non-recurrence, UN Document A/HRC/36/50, 21 August 2017.
[444] Special Rapporteur on the Promotion of truth, justice, reparations and guarantees of non-recurrence and Special Adviser to the Secretary General on the Prevention of Genocide, "Joint study on the contribution of transitional justice to the prevention of gross and serious violations of human rights and international humanitarian law, including genocide, war crimes, ethnic cleansing and crimes against humanity and their recurrence", UN Document A/HRC/37/65, 6 June 2018.
[445] Ibid.
[446] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/HRC/39/53, 25 July 2018.
[447] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/73/336, 23 August 2018.

The first mandate-holder developed concepts and a framework that could be useful in certain cases. He emphasized a "comprehensive" approach, which included many cross-cutting issues such as development and security. However, I do not favor a such a wide approach as in the end it could weaken main human rights at stake in case of gross human rights violations.

Indeed, the rights to the truth, justice and reparations have been recognized in international human rights law and this should not be open to interpretation according to the specific national case under study or a comprehensive approach dealing with other UN mandates, such as development or security. All of the contrary, in my opinion, those rights should be further developed within the work of the mandate-holder on this issue. In this sense, some pillars analyzed by the first mandate holder should be revisited, notably the approach on the right to the truth for the reasons analyzed above.

III.5.4 Enforced disappearances. Cooperation between Argentina and France.

III.5.4.1 The International Convention for the Protection of All Persons from Enforced Disappearance.

In 2001, the former Commission decided to establish an intergovernmental working group to elaborate a binding instrument for the protection of all persons against enforced disappearances, taking into consideration the draft convention prepared by the Sub-commission in its resolution 1998/25.[448] In 2002, the Commission requested the working group to meet before its next annual session and to prepare a draft for the consideration of the GA.[449] At the time, at the UN level, there was a declaration on the issue adopted by the GA in 1992. Nevertheless, this instrument, as any other of its kind, was not legally binding.[450]

In this context, the working group in charge of the elaboration of the draft instrument met for the first time in January 2003. The country that promoted the issue at the Commission was France. This was also the case since the issue of enforced disappearances was introduced

[448] United Nations Commission on Human Rights Resolution 2001/46.
[449] United Nations Commission on Human Rights Resolution 2002/41.
[450] Declaration on the Protection of All Persons from Enforced Disappearances (United Nations General Assembly Resolution A/RES/47/133).

at the end of the 1970s within the context of Latin American dictatorships, which strongly opposed to the French initiative.

Fortunately, things radically changed in the region and, in 2003, France found a profoundly committed ally during the whole process of the promotion of the new convention: Argentina. Given its history, a strengthened democracy and a very engaged Government, the South American country strongly pushed for the elaboration and adoption of a valuable instrument, hand in hand with its European counterpart.

Indeed, the South American country participated in the majority of negotiations with a relevant delegation composed not only by officials from the Argentine Mission in Geneva, but also with a significant delegation coming from capital, both from the Ministry of Foreign Affairs and the Ministry of Justice and Human Rights. This political priority was shown during the process until the very adoption of the convention by the Human Rights Council in 2006, which counted with the participation of the then Minister of Foreign Affairs, Jorge Taiana –something exceptional for an event of this nature. This priority was later ratified with the participation during the signature of the convention of the then Senator and first lady, and later Argentine President, Cristina Fernandez de Kirchner.

During the first session of the working group, delegations discussed a number of key issues such as the definition of enforced disappearances; the offence in domestic law; cases in which it could be considered a crime against humanity; the subjective element of the crime; the measures of protection against impunity; domestic prosecution and international cooperation; measures of prevention; victims; and children of the disappeared.[451] From the beginning, the task was not easy because a few Western States were not convinced about the need of this instrument and expressed reservations about many proposals made during negotiations –e.g. detention conditions.

The second session of negotiations took place in January 2004 and there was a more comprehensive discussion on different topics. For instance, delegations discussed whether the crime could or not be committed by non-State actors, whether the crime was an

[451] United Nations Economic and Social Council, "Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance", UN Document E/CN.4/2003/71, 12 February 2003.

independent offence, and which were the accessories to the crime and the penalties.[452] Argentina promoted the definition of an autonomous crime and emphasized that the crime should not include non-State actors.

During the second session, delegations also discussed the crime of enforced disappearance as a crime against humanity. Some delegations considered that it was unnecessary for the new instrument to include a provision on enforced disappearance as a crime against humanity because it was already included in the Rome Statute of the ICC. Others, like Argentina, defended the inclusion and indicated that it was fully compatible with the provisions of the Rome Statute.[453]

The fight against the impunity of such crime was also a major point of discussion. One element to consider was whether or not to impose a statute of limitations. Another element to consider was whether there could be a justification for the crime –i.e. an order from a superior- or if it could be legal to provide amnesties or similar measures. Argentina strongly supported the need to avoid a provision on statute of limitations and the prohibition of justification for the crime and the possibility to dictate amnesties or other similar measures. In contrast, some delegations considered the importance of amnesties and other measures to promote reconciliation.[454]

Other elements considered were: prosecutions in domestic courts; international cooperation; prevention; victims of enforced disappearances, including children of the disappeared; and the convenience of establishing a treaty body to monitor compliance with treaty obligations.[455] Argentina had a strong and progressive position in all these elements. It supported the importance of strengthening prosecution in courts; promoting international cooperation -including the possibility to provide asylum to victims and also to include appropriate exceptions in extradition agreements; and including specific provisions relating to the children of the disappeared. It also supported the establishment of an autonomous treaty body.

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[452] United Nations Economic and Social Council, "Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance", UN Document E/CN.4/2004/59, 23 February 2004, pages 5-11.
[453] Ibid, pages 8-9.
[454] Ibid, pages 11-14.
[455] Ibid, pages 14-25.

The last part of discussions of the second session included the functions of the future treaty body and the coordination with the already existent working group on enforced disappearances, the first thematic special procedure created in 1980 by the Commission.[456] Argentina supported all functions of the committee and saw no incompatibility between the work of the future committee and the one of the existent working group on enforced disappearances because the latter only focused on the clarification of cases of every country of the world due to its non-conventional nature. Not all delegations were as supportive. Some of them preferred to use an existing committee to supervise the obligations of this instrument –e.g. the Human Rights Committee. Some delegations supported some but not all the functions proposed for the future monitoring body and a number of delegations defended the need to have a retroactivity clause.

The third session took place in 2005 and discussions were based on the draft convention prepared by the Chairperson. The preamble proposed by the Chairperson included the 1992 Declaration, the seriousness of the crime under negotiation, and the right to the truth.[457] Argentina and many other delegations supported the language proposed, welcomed the inclusion of the right to the truth, and suggested the inclusion of other international human rights treaties. Other Delegations voiced doubts about the existence of the right to the truth and suggested to refer to the obligation of information.

Finally, the preamble of the adopted text of the convention included a reference to some international human rights instruments; the seriousness of the crime, to justice and reparation; and, in a separate paragraph, the right to the truth.[458] In this way, the right to the truth was recognized by international human rights law, as a separate right from that of justice and reparations, at least in relation to enforced disappearances.

Moreover, Argentina, together with various other delegations, strongly supported the definition of enforced disappearance proposed by the French Chairperson (i.e. deprivation of a person's liberty by State agents or persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation and the whereabouts of the person, placing that person outside the law), and made some minor

[456] Ibid, pages 25-30.
[457] Economic and Social Council, "Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance", UN Document E/CN.4/2005/66, 10 March 2005, pages 5-6.
[458] International Convention for the Protection of All Persons from Enforced Disappearance, Preamble.

suggestions of change. In relation to the definition of the crime, Argentina reiterated its opposition to the inclusion of non-State actors made by one delegation because such a proposal would rob the force to the instrument and would change its nature: the scope would include any abduction already punishable by law and a treaty body would only make sense if it was related to State violations.[459]

The Argentine position prevailed and the adopted convention recognized the right not to be subject to an enforced disappearance and defined the crime by an act of State agents or individuals who act with the acquiescence from the State. The final definition also included the rejection to recognize the act and the placement of the person under the protection of the law. In any case, as a compromise formula, the adopted convention recognizes in a separate article the obligation of States to investigate acts as defined by article 2 of the convention (which provides for the definition of enforced disappearance) committed by non-State agents without the acquiescence of the State.[460]

Argentina also supported the need to ensure that enforced disappearances would be considered as an offence under criminal law. Its position contrasted with other States, which preferred to have flexibility to include a crime as an independent offence or not. In the end, the crime was considered an independent one in the adopted convention and States Parties are obliged to incorporate this crime in their national laws.[461]

Argentina also raised its voice to support in general terms the inclusion of enforced disappearances as crimes against humanity in accordance with international law as it was finally included in the adopted convention.[462] The South American country explained also in detail during negotiations the national experience in relation to superiors who ordered the crimes and the importance of ensuring that these persons assume criminal responsibility for such acts.[463] Negotiations in the third session also discussed attenuating –e.g. helping to find the victim alive- and aggravating circumstances -e.g. the commission of enforced

[459] United Nations Economic and Social Council, "Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance", UN Document E/CN.4/2005/66, Ibid, page 9.
[460] International Convention for the Protection of All Persons from Enforced Disappearance, articles 1-3.
[461] International Convention for the Protection of All Persons from Enforced Disappearance, article 4.
[462] International Convention for the Protection of All Persons from Enforced Disappearance, article 5.
[463] International Convention for the Protection of All Persons from Enforced Disappearance, article 6.

disappearance of pregnant women or children, which were included in the adopted convention.[464]

Regarding the statute of limitations, the Chair's proposal was indeed a very good one, and Argentina strongly supported it. It shall depend on national legislation, but it should be substantial and proportioned to the serious nature of the crime and will operate only after the establishment of the fate of the disappeared person. This is because it is a crime of continuous effect that only ceases when it is possible to establish the fate of the disappeared person. The adopted convention included this provision and it was a victory for the protection of victims of this horrendous crime.[465]

Negotiations during the third session also included provisions on issues such as jurisdiction; extraditions; and judicial cooperation, which generated less debate than other provisions and, consequently, were included, with some changes, in the adopted convention.[466] On the contrary, provisions regarding specific conditions of detention (including the express prohibition of secret detention centers, access to information of detained persons, training of law enforcement personnel, and ways to ensure freedom to people after detention), all key issues of the subject under negotiation, gave place to a long and exhausting debate. Argentina and other delegations made proposals in order to ensure that these provisions were as stricter and complete as possible as a means of prevention of enforced disappearances. Many of these proposals were included in the final version of the adopted convention.[467]

Negotiations in the third session also focused on the victim. Argentina and other States supported the inclusion of a broad concept, which included not only the disappeared person but also any individual who has suffered harm as direct a consequence of this crime. This concept was included as such in the adopted convention.[468]

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[464] International Convention for the Protection of All Persons from Enforced Disappearance, article 7.
[465] International Convention for the Protection of All Persons from Enforced Disappearance, article 8.
[466] International Convention for the Protection of All Persons from Enforced Disappearance, articles 9-15.
[467] International Convention for the Protection of All Persons from Enforced Disappearance, articles 17-23. See also United Nations Economic and Social Council, "Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance", UN Document E/CN.4/2005/66, Ibid, pages 19-22.
[468] International Convention for the Protection of All Persons from Enforced Disappearance, article 24 (1).

Immediately after the discussions on the victim, Argentina –seconded by many other States- strongly supported the inclusion of the right to the truth. Some others preferred to refer to the obligation of States to inform about the fate of the disappeared. In the end, the Argentine position prevailed and the right to the truth was enshrined also in the operative part of the adopted convention.[469] In a separate paragraph of the same provision, negotiations also included the right to reparation, which includes restitution, rehabilitation, satisfaction and guarantees of non-recurrence. Those elements were finally included in the adopted convention.[470]

The final version of the convention also included relevant provisions that Argentina strongly supported for the families of the disappeared in order to protect their economic, social and family rights as well as to guarantee the right to associate in order to establish the circumstances of the enforced disappearances, the whereabouts of the disappeared and to assist the victims.[471]

The discussion during the third session of the working group related to a series of proposals to criminalize of the appropriation of children subject to wrongful removal. It also criminalized the falsification or concealment of the true identities of those children. It included the right of children to their identity and the obligation of States to consider void the adoptions made under these circumstances. These proposals were firmly supported by Argentina and Uruguay. The latter helped the chairperson with a formula which included all elements in a single article and was included in the adopted convention.[472]

The last part of negotiations considered the functions of the future treaty body in charge of monitoring the provisions of the convention.[473] Indeed, the main negotiations of the fourth session were based on the functions of the future committee on enforced disappearances, composed of ten experts with a four-year mandate, elected by a specific conference to that end, as it was finally agreed and reflected in the adopted convention.

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[469] International Convention for the Protection of All Persons from Enforced Disappearance, article 24 (3). See also United Nations Economic and Social Council, "Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance", UN Document E/CN.4/2005/66, Ibid, pages 26-28.
[470] International Convention for the Protection of All Persons from Enforced Disappearance, article 24 (4-5).
[471] International Convention for the Protection of All Persons from Enforced Disappearance, article 24 (6-7).
[472] International Convention for the Protection of All Persons from Enforced Disappearance, article 25.
[473] United Nations Economic and Social Council, "Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance", UN Document E/CN.4/2005/66, Ibid, pages 30-39.

The working group also agreed that the committee would cooperate with all UN mechanisms and human treaty bodies related to the issue.[474] There was also consensus to include a report mechanism and the individual and inter-State procedures as functions of the new committee.[475] The convention, as one of the most modern instruments of international human rights law, also included other functions for the new committee, such as country visits or the possibility to call the attention of the GA in cases of a systematic practice of enforced disappearance. [476]

Argentina supported all these functions of the new treaty body and, in relation to the principle of non-retroactivity, it affirmed, together with Chile and Italy, that even if the treaty was expected to be applied for future cases, the right to the truth, to justice and to reparations for past crimes would be applied, taking into consideration the continuous character of the crime until the fate of the disappeared is known.[477]

Later, there was a discussion about the possibility of establishing or not a new treaty body in light of the proposal by the then High Commissioner of having a single treaty body for all human rights treaties. Argentina affirmed that it was premature to accept that proposal and promoted an autonomous treaty body. This option prevailed in the adopted convention.[478]

During the last discussion on the entire text, the United States was particularly active regarding the first part of the instrument on the substantive issues. It manifested itself against the right to the truth and indicated that it preferred to include the right to information. It also indicated the difficulty of a federal country to include the crime as an independent one; it proposed the deletion of the article on enforced disappearances as a crime against humanity; and opposed to the inclusion of the continuous character of the crime because of

[474] International Convention for the Protection of All Persons from Enforced Disappearance, articles 26-28.
[475] International Convention for the Protection of All Persons from Enforced Disappearance, articles 29-32.
[476] International Convention for the Protection of All Persons from Enforced Disappearance, articles 33-34.
[477] United Nations Economic and Social Council, "Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance", UN Document E/CN.4/2006/57, 2 February 2006, page 15.
[478] Ibid, pages 16-18. See also International Convention for the Protection of All Persons from Enforced Disappearance, articles 26-36.

its law on statute of limitations. None of these proposals were included by the French chairperson.[479]

Negotiations ended with a special gratitude to Ambassador Mr. Bernard Kessedjian, the French Chairperson, who was particularly committed to adopt a strong and valuable convention, as it was finally the case.[480] The convention was finally adopted a year later at the Human Rights Council and the General Assembly, and entered into force in 2010. Argentina was the second State in the world to ratify the convention –after Albania- and made a declaration voluntarily accepting the competence of the committee to receive individual and inter-State communications.[481]

III.5.4.2 Human Rights Council resolutions on the issue, including the mandate of the Working Group on Enforced or Involuntary Disappearances.

As mentioned before, France promoted the establishment of a Working Group on Enforced or Involuntary Disappearances, which was finally established by the former Commission on Human Rights on 29 February 1980.[482] It was the first thematic mandate of the Commission and it was composed of five members of different regions who were in charge of assisting families in determining the whereabouts of persons who have disappeared.

The mechanism has been a channel between families and States. It receives communications and maintains them outstanding until the fate or whereabouts of the disappeared person are known. The Working Group monitors the implementation of the 1992 Declaration on enforced disappearances; conducts country visits; and provides advisory services.[483] Since the entry into force of the convention against enforced disappearances in 2010, the working group and the committee have coexisted, as other thematic human rights issues, with a different scope.

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[479] United Nations Economic and Social Council, "Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance", UN Document E/CN.4/2006/57, Ibid, pages 18-26.
[480] Ibid, pages 27-52.
[481] United Nations Treaty Collection, "Depositary", International Convention on the Protection of All Persons from Enforced Disappearance, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&lang=en
[482] United Nations Commission on Human Rights Resolution 20 (XXXVI), 29 February 1980.
[483] Office of the United Nations High Commissioner for Human Rights, "Your Human Rights", "Disappearances", "Working Group on Enforced or Involuntary Disappearances", "Mandate", available at: https://www.ohchr.org/en/issues/disappearances/pages/disappearancesindex.aspx

When, after negotiations and the adoption of the convention against enforced disappearances in 2006, France proposed Argentina to share the leadership of its traditional resolutions in the Human Rights Council on enforced disappearances, Argentina accepted willingly. It was an important recognition of its commitment to the protection of human rights, in particular the fight against enforced disappearances, both at the national and international levels, in particular taking into consideration its dark past of human rights violations.

In this way, many Council resolutions counted with the leadership of France and Argentina. To make it a cross regional initiative, gradually Morocco and Japan also joined the initiative as co-sponsors a few years later. There have been two kinds of resolutions on the issue: thematic resolutions and resolutions extending the mandate of the Working Group every three years.

The thematic resolutions of the Council to date were negotiated and adopted under the leadership of both Argentina and France in 2009,[484] 2010,[485] and 2012.[486] These thematic resolutions dealt with a number of issues, including the need of States to cooperate with the working group; the promotion of the signature and/or ratification of the convention against enforced disappearances; and the establishment of 30 August as the international day on the victims of enforced disappearance.

Resolutions extending the mandate of the Working Group were adopted in 2008,[487] 2011,[488] 2014,[489] and more recently in 2017.[490] In these resolutions, there is a clear and precise mandate for the working group as well as political support for its work regarding thousands of cases in different regions of the world and also for its general comments on different issues, such as the right to the truth.

[484] Human Rights Council Resolution A/HRC/RES/10/10
[485] Human Rights Council Resolution A/HRC/RES/14/10.
[486] Human Rights Council Resolution A/HRC/RES/21/4.
[487] Human Rights Council Resolution A/HRC/RES/7/12.
[488] Human Rights Council Resolution A/HRC/RES/16/16.
[489] Human Rights Council Resolution A/HRC/RES/27/1.
[490] Human Rights Council Resolution A/HRC/RES/36/6.

III.5.4.3 Balance of the contribution of Argentina and France and of the work made by the committee and the working group in relation to the fight against enforced disappearances.

In the last forty years, much has been done to protect persons from enforced disappearances at the international level. France introduced the issue at the Commission in the 1980s and has been a great promoter of the initiative ever since. For its part, Argentina, during its last dictatorship, was one of the reasons for the establishment of a mandate concerning enforced disappearances in the former Commission. However, since its return to democracy in 1983, it has made a great transformation and turned into the main supporter of the fight against enforced disappearances at the United Nations. It has clearly contributed to the recognition of this serious crime in international human rights law. This is probably one of the best examples of how a country can turn from a negative to a positive example in relation to the same specific human rights issue.

Indeed, Argentina, jointly with France, contributed to the development of international human rights law in the field of enforced disappearance through the elaboration, negotiation and adoption of the convention on the issue. After the adoption of this instrument, both countries led together an international campaign towards its ratification.[491]

The convention against enforced disappearances entered into force in December 2010, and the Committee started its work, first establishing the way to deal with all its functions, and later monitoring the international obligations of State parties to the instrument. In its first years of work, this new treaty body has been contributing to fill the gaps on issues relating to enforced disappearances.

For instance, it made a broad interpretation of article 35 of the Convention in the sense that it could deal with enforced disappearances committed before the entry into force of the convention but only in relation to the reporting mechanism.[492] It also had its first individual

[491] See for instance Comunicado de Prensa de la Cancilleria Argentina 059/2013, "Los Cancilleres de Argentina y Francia realizan una campaña para la ratificación de la Convención sobre la Desaparición Forzada," available at: https://www.cancilleria.gob.ar/es/actualidad/comunicados/los-cancilleres-de-argentina-y-francia-realizan-una-campana-para-la.

[492] Committee on Enforced Disappearances, "Statement on the *ratione temporis* element in the review of reports submitted by States Parties under the International Convention for the Protection of All Persons from Enforced Disappearance", available at:

communication, which concerned Argentina, where it established that the duration of an enforced disappearance is not relevant to be qualified as such.[493] Moreover, recently, the committee adopted guidelines on the search for disappeared persons, which will probably be a useful tool in the field. Argentina contributed to the elaboration of this set of guidelines.[494]

On the other hand, the Working Group, the first thematic mandate that has been operating for the last four decades, has an extensive and valuable experience in contributing to the identification of disappeared persons and providing relief to their families. Even today, this mechanism deals with thousands of cases of disappearances still pending to be clarified, country missions and the elaboration of general comments. It remains a valuable tool for many countries, in particular for those that have not yet ratified the convention against enforced disappearances and experience serious cases of enforced disappearances.

III.5.5 Business and human rights.

III.5.5.1. The establishment of a Secretary-General Special Representative on the issue. A cross- regional initiative.

In 2003, the former Sub-commission adopted a resolution related to business and human rights,[495] whereby it approved the draft norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.[496] It was part of the Sub-commission's work to prepare future instruments, which could be at a later stage negotiated and adopted by the Commission. It was not the case this time because there were a number of controversial issues. The main one was the role of non-State actors in human rights, because international human rights law only attributes responsibility to States for human rights violations. Any other abuse of human rights could not be framed in the same

https://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/1_Global/INT_CED_SUS_7250_E.pdf.

[493] Office of the United Nations High Commissioner for Human Rights, "Enforced disappearance, even if brief, still a crime, UN experts say in findings on Argentina case", Press Release, 21 March 2016, available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=18494&LangID=E

[494] Committee on Enforced Disappearances, "Guiding principles for the search for disappeared persons", UN Document CED/C/7, 8 May 2019.

[495] United Nations Sub-Commission for the Promotion and Protection of Human Rights Resolution 2003/16.

[496] United Nations Sub-Commission for the Promotion and Protection of Human Rights, "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights", UN Document E/CN.4/Sub.2/2003/12/Rev.1, 4 August 2003.

way. Another problem was how to deal with extraterritoriality in cases where the responsibility is attributed to companies that commit abuses outside their country of origin.

Beyond conceptual differences such as the examples mentioned above, there was also a difference in the way to move this issue forward. Many States –in particular from the North- were not convinced about the need to promote law-making initiatives on the issue, while other countries –in particular, South Africa, considered that it was necessary to do it with a view to addressing abuses committed by multinational corporations in developing countries. As a way to reaching a consensual decision, Argentina joined a cross-regional group originally formed by the United Kingdom –later replaced by Norway, the Russian Federation, India and Nigeria.

This cross regional group adopted a traditional approach in terms of responsibility of State actors for human rights violations, but at the same time recognized that a responsible operation of transnational corporations and business enterprises can assist in channeling the benefits of business and can contribute to the enjoyment of human rights, inter alia, through investment, employment creation and the stimulation of economic growth.[497]

Following the adoption of the first resolution in 2004 in the Commission and a report of the OHCHR,[498] the cross regional group submitted in 2005 an initiative to create a Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises for two years. This mandate-holder would be in charge of identifying and clarifying international standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights; elaborating on the role of States in regulating the issue; researching and clarifying the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence"; to develop materials and methodologies for undertaking human rights impact assessments of the activities of these companies; and to prepare a compendium of best practices of States and companies.

[497] United Nations Commission on Human Rights Resolution 2005/69, preambular paragraphs 3-4.
[498] United Nations Commission on Human Rights Resolution 2004/116. See also Office of the United Nations High Commissioner for Human Rights, report "on the responsibilities of transnational corporations and related business enterprises with regard to human rights", UN Document E/CN.4/2005/91, 15 February 2005.

This initiative was adopted by the Commission on Human Rights by 49 votes in favor, 3 against and 1 abstention.[499] The United States and South Africa voted against for opposite reasons: the former did not want the development of a mechanism on the issue and the latter considered the initiative insufficient. John Ruggie was appointed as special representative.[500]

Ruggie not only submitted reports to the Commission and the GA as part of his mandate. He also contributed to the UN Global Compact framework adopted by then Secretary-General, Kofi Annan, on 12 August 2005, a public-private and multi-stakeholder process that intended to mobilize a global movement of sustainable companies so as to contribute to international goals, including human rights, labor, environment, and anti-corruption. The initiative has developed and adapted its governance framework in line with the 2020 Global Strategy and the UN 2030 Agenda for Sustainable Development.[501]

III.5.5.2 The extension of the mandate of the Special Representative.

In 2008, the cross regional group, including Argentina, promoted the renewal of the mandate of the Special Representative, the first initiative on the issue in the newly established Human Rights Council. The group held several meetings in different formats, including some encounters with the mandate holder, in order to decide the content of the resolution and the specific needs to move the issue forward. Finally, the group was able to push for the adoption of a Council resolution, after constructive negotiations with different stakeholders, including those which did not support the first initiative like South Africa. This time, the result was a text adopted by consensus.[502]

In the resolution, the Council recognizes that enterprises have a responsibility to respect human rights; shows concern that weak legislation and implementation cannot mitigate the impact of globalization on vulnerable economies; and realize that transnational corporations have benefits and therefore the need to make efforts to bridge governance gaps at national and international levels.[503]

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[499] United Nations Commission on Human Rights Resolution 2005/69, operative paragraph 1.
[500] Office of the United Nations High Commissioner for Human Rights, "Your Human Rights", "Business", "Special Representative of the Secretary-General on Transnational Corporations and other business enterprises", available at: https://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx.
[501] United Nations Global Compact, "Who we are", "Our Governance", available at: https://www.unglobalcompact.org/about/governance
[502] Human Rights Council Resolution A/HRC/RES/8/7.
[503] Human Rights Council Resolution A/HRC/RES/8/7, preambular paragraphs 5-7.

The resolution also welcomes the report of the Special Representative, in particular the identification of a framework based on three overarching principles: the State duty to protect all human rights from abuses by or involving transnational corporations and other business enterprises; the corporate responsibility to respect all human rights; and the need to have effective remedies. Moreover, the resolution recognizes the need to operationalize this framework and welcomes the broad range of consultations made by the mandate-holder.[504] Through this resolution, the Council decides to extend the term of the mandate for a period of three years to promote the framework proposed by the mandate holder.[505]

III.5.5.3 The Guiding Principles on Business and Human Rights.

After working on the framework based on three overarching principles, namely protect, respect and remedy; making exhaustive consultations with different stakeholders in different regions of the world; and taking into consideration the results of the process called Global Compact; the mandate-holder submitted for consideration of the Human Rights Council the "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" (Guiding Principles on Business and Human Rights).[506]

The guiding principles were structured on the basis of the three parts of the above-mentioned framework. The first part of the Guiding Principles is related to the State responsibility to protect. This part includes two founding principles. The first, on the responsibility of States in relation to human rights abuses within their territory/jurisdiction by third parties, including business enterprises. This responsibility involves the obligation of the State to prevent, investigate, punish and redress such abuses. The second founding principle is the obligation of States to set out the requirement for all business enterprises domiciled in their territory and/or jurisdiction to respect human rights throughout their work. These founding principles are accompanied by operational principles to guide measures to be taken by States in order to comply their obligations in this regard.[507]

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[504] Human Rights Council Resolution A/HRC/RES/8/7, operative paragraphs 1-3.
[505] Human Rights Council Resolution A/HRC/RES/8/7, operative paragraph 4.
[506] "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework", UN Document HR/PUB/11/04, 2011, available at: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
[507] Ibid, pages 3-12.

The second part of the guiding principles is related to the corporate responsibility to respect human rights. The first founding principle in this second part affirms that the business enterprises should respect human rights and, as a consequence, should refrain from activities that could affect them and should deal with the adverse impacts that they could have on them in performing their activities. This responsibility includes the respect of human rights contained in the Universal Declaration, the 1966 Covenants on civil and political rights and on economic, social and cultural rights, and also the rights set out in the ILO Declaration on Fundamental Principles and Rights at work.[508] The second founding principle of the second part resides in the affirmation that the responsibility to respect human rights includes: to avoid negative impacts in human rights when performing their activities and to address them if they exist. The third founding principle is that this instrument should be applied to all enterprises without exception.[509] The fourth founding principle is that enterprises should have a policy commitment to respect human rights; establish a human rights due diligence process to identify, prevent, and mitigate and of accountability and should count with processes to remedy adverse human rights impacts of their business operations. To contribute to the implementation of these four founding principles related to the second part of the guiding principles, the document provides for operational principles.[510]

The third and last part of the Guiding Principles is related to access to remedies. It establishes one single founding principle: States have the obligation to ensure remedies –e.g. judicial measures- to protect individuals from business-related human rights abuses. The document includes operational principles to ensure that this obligation is implemented through State judicial and non-judicial grievance mechanisms as well as non-State grievance mechanisms – which are the ones that could be implemented for instance by enterprises alone- or through international or regional human rights bodies.[511]

III.5.5.4 The establishment of a working and a forum on business and human rights.

The cross regional group, including Argentina, continued its work on the issue of business and human rights at the end of 2011. Ruggie ended his valuable work with the submission of a last report and the presentation of the Guiding Principles. After numerous consultations

[508] Ibid, pages 13-14.
[509] Ibid, pages 14-15.
[510] Ibid, page 16-26.
[511] Ibid, page 27.

with different formats and at different levels, the cross regional group decided to promote a new initiative in the Council.

As a result, the Council adopted HRC Resolution 17/4, whereby it endorses the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Moreover, it commends the Special Representative for his work.[512] In this context, for this new stage, the Council decides to replace the special representative by a working group on transnational corporations and other business enterprises, consisting of five experts of all regions of the world, to promote the Guiding Principles; exchange good practices; provide support; promote capacity-building; and conduct country visits; among other functions.[513]

The resolution also establishes a forum on business and human rights under the guidance of the new working group to discuss trends and challenges on the implementation of the Guiding Principles. The forum is open to all stakeholders, including enterprises, and holds a two-day session per year.[514] Finally, the resolution requests the Secretary-General to prepare a report on the work of the UN on business and human rights. [515]

One year later, in 2012, a new resolution promoted by the cross-regional group was adopted by the Council as HRC Resolution 21/5. This resolution focuses on the report of the SG on the contribution of the UN system as a whole. In this regard, it underscores the need to adopt a coordinated strategic approach to ensure the integration of business and human rights into relevant aspects of the UN; recognizes the role of the new working group and of resident coordinators and country teams of the UN to implement the Guiding Principles; encourages all relevant entities of the UN to apply the Guiding Principles and to develop training and capacity building with relevant stakeholders to this end; and requests a report of the Secretary-General and a study to explore the establishment of a global fund to enhance the capacity of stakeholders to advance the implementation of the Guiding Principles. It also decides to organize a panel on business and human rights in the Human Rights Council.

[512] Human Rights Council Resolution A/HRC/RES/17/4, operative paragraphs 1-4.
[513] Human Rights Council Resolution A/HRC/RES/17/4, operative paragraph 6.
[514] Human Rights Council Resolution A/HRC/RES/17/4, operative paragraphs 12-14.
[515] Human Rights Council Resolution A/HRC/RES/17/4, operative paragraph 11.

III.5.5.5 The extension of the mandate of the working group and a new initiative on a future treaty on transnational corporations.

In 2014, the cross regional group, including Argentina, promoted a new initiative in the Human Rights Council to renew the mandate of the working group on human rights and transnational corporations and other business enterprises. The resolution, as all other initiatives on this issue during the Council era, was adopted by consensus and, as a result, the working group saw its mandate renewed for three years.[516]

The resolution also acknowledges the important role of national plans; recognizes the need to enhance remedies; recognizes the implementation of the Guiding Principles; welcomes the decision of the working group to develop a database with the level of implementation of the Guiding Principles; requests OHCHR to prepare a report on legal options for remedies; and extends the annual work of the forum.

At the same Council's session, Ecuador and South Africa promoted another initiative also relating to the question of business and human rights, which led to the adoption of a resolution by vote with a clear division in positions: 20 in favor (African States plus Ecuador, Cuba, Venezuela, Russia and China), 14 against (European countries, the United States and Japan) and 13 abstentions (Argentina, Brazil, Chile, Costa Rica, Mexico, Peru, Botswana, Gabon, Kuwait, Maldives, Saudi Arabia, Sierra Leone and United Arab Emirates).[517]

The main goal of the resolution promoted by Ecuador and South Africa was to establish an intergovernmental working group in charge of the elaboration of a legally binding instrument to regulate in international human rights law the activities of transnational corporations and other business enterprises. The decision of the main sponsors to push for the adoption of the resolution without exhaustive consultations with the cross regional group and the rest of the members of the Council ended with the consensus approach on the issue of business and human rights that had existed in the Council since its creation. The initiative somehow returned to the original proposal of the Sub-commission in this regard.

[516] Human Rights Council Resolution A/HRC/RES/26/22.
[517] Human Rights Council Resolution A/HRC/RES/26/9.

Beyond the divisive approach, there is merit in considering an international human rights treaty relating to business and human rights because of the impact of enterprises. On the other hand, there are also major challenges in doing so, such as to define the role of non-State actors in terms of responsibility for human rights violations. It is still a well-established principle of international human rights law that States are the only subjects of responsibility in terms of human rights violations. Even if human rights abuses perpetrated by non-State actors have been recognized in soft law (i.e. resolutions of the Commission and the Council), this development has not modified for the time being the main principle in an instrument of a binding nature. Another main challenge is how to implement an instrument of this nature at the national and international levels.

The working group has had four sessions until mid-2019. The first session was held in July 2015. During the session, then High Commissioner recalled the responsibility of enterprises when human rights have been abused as recognized by the Guiding Principles and indicated that there was no incompatibility between the efforts made until that moment and the discussion on a future treaty. In negotiations, the EU opposed to the initiative while some other States supported it. There were also expert panels and the participation of the Special Rapporteur on indigenous peoples, who supported the idea of developing a treaty.[518] The second session was held in October 2016. It had a segment of general interventions and expert panels on different issues.[519]

The third session was held in March 2018 and delegations discussed some elements proposed by the Chairperson. Two main positions were expressed: those States which considered that such an initiative was premature and those States which found it essential to move forward. The Chairperson decided to request comments from all stakeholders and to submit a draft legal instrument at the following session.[520]

[518] Human Rights Council, "Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument", UN Document A/HRC/31/50, 5 February 2016.
[519] Human Rights Council, "Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument", UN Document A/HRC/34/47, 4 January 2017.
[520] Human Rights Council, "Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument", UN Document A/HRC/37/67, 24 January 2018.

In its fourth session, in March 2019, there was a draft of a legally binding instrument to be discussed. According to the report, the text expressly recognizes that the primary responsibility to respect, protect and fulfil human rights lies with States, which was welcomed by many delegations. However, some delegations asked if that was really the case because throughout the text they found references to human rights violations as a direct consequence of business enterprises' activities. Another delegation and several NGOs considered unproblematic to impose direct obligations on companies under international law. Finally, the Chairperson indicated that the text was based on four interrelated pillars: prevention; access to justice; international cooperation; and monitoring mechanisms, in particular in the draft protocol to the future instrument. After a first reading of the proposed text, the Chairperson expressed his intention to have a new meeting during 2019 to continue negotiations.[521] The issue will continue to evolve in the future.

III.5.5.6 Latest Human Rights Council resolutions on business and human rights.

In parallel to the process on a binding instrument, the cross-regional group continued its consensus approach in the Council. In 2016, in a resolution adopted by consensus, the Council focused on improving accountability and access to remedies in cases of business involvement in human rights abuses.[522]

Indeed, in the 2016 resolution, the Council welcomes the work of OHCHR on improving accountability and access to remedies; recognizes the implementation of the Guiding Principles; encourages States to consider the level of effectiveness of local legislation on remedies; invites States to develop a strategy on the issue; calls business enterprises to respect the Guiding Principles and to share publicly the information regarding their human rights policies and procedures to enhance stakeholder engagement with respect to business operations and prevention measures that businesses can take; recognizes the work of the working group on transnational corporations and other business enterprises; and requests OHCHR to convene consultations on State-based non-judicial mechanisms for issues which are related to a cross-border context.[523]

[521] Ibid, paragraphs 12-93.
[522] Human Rights Council Resolution A/HRC/RES/32/10.
[523] Human Rights Council Resolution A/HRC/RES/32/10, operative paragraphs 1-13.

Moreover, in 2017, the group pushed for the adoption of a new Council resolution, A/HRC/35/7, which, among other things, recognizes the work of the working group on business and human rights and of the forum. In this context, this Council resolution extends the mandate of the working group for three years.[524] The last resolution to date on the issue was adopted in 2018 whereby the Council, among other things, requests the working group to analyze the role of national human rights institutions in facilitating access to remedy for business-related human rights abuses and to OHCHR to continue its work in this area.[525]

III.5.5.7 Balance of the work of the cross regional group on business and human rights.

Much has been done since 2005 when the first resolution was submitted in the former Commission. The first mandate-holder created by the Council, and promoted by the cross regional group, including Argentina, was able to elaborate the Guiding Principles, which have emerged as a very useful tool to implement measures against transnational corporations and other business in cases of human rights abuses.

Since then, many countries –e.g. from Europe and North America- have implemented national action plans that are based on the guiding principles on business and human rights. The objective of these plans is to promote transparency and accountability for activities which transnational corporations performed by themselves or through third parties in their countries of origin and abroad. France has even enacted legislation on the issue of due diligence of enterprises.[526]

The approach chosen by Ruggie in the principles was one of consensus, founded on three pillars. These are not the traditional State obligations in relation to human rights –i.e. respect, protect and fulfill. Instead, they are adapted to the reality of the important power of transnational corporations and their potential to produce serious human rights abuses, such as modern forms of slavery, trafficking, terrible damages to the environment or dissemination of information of their clients, which affects their right to privacy.

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[524] Human Rights Council Resolution A/HRC/RES/35/7, operative paragraph 11.
[525] Human Rights Council Resolution A/HRC/RES/38/13, operative paragraphs 8-9.
[526] Nolan, Justine, "Business and human rights. The challenge of putting principles into practice and regulating global supply chains", UNSW Australia and Australian Human Rights Centre, Alternative Law Journal, 2017, Vol. 42 (I) pages 42-46. See also "Attività finanziaria e d'impresa. Piano nazionale italiano su impresa e diritti umani e l'attuazione dei Principi guida ONU del 2011", Diritti Umani e Diritto Internazionale, vol. 11, 2017, n 1, pages 277-293.

As we have seen, the first principle focuses on the State duty to ensure that enterprises do not affect human rights in its jurisdiction. The second principle of the Guiding Principles relates to the duty to respect human rights by enterprises. Even if the guiding principles on business and human rights cannot be considered an international legal obligation, it represents a useful tool to encourage many important business enterprises to develop their own codes of conduct. This responsibility entails the need to avoid human rights abuses and also to pay due diligence to the action of third parties in the whole trade chain, in particular in cases of enterprises operating globally. Finally, the third pillar is related to remedies. The State has the obligation to provide mechanisms in this regard, as described above.

Once the Council adopted these Guiding Principles, the cross-regional group continued its commitment towards their implementation through the establishment of a new special procedure at the Council, the working group on business and human rights. This initiative co-exists now with the one pushed by Ecuador and South Africa in the sense of elaborating a human rights treaty, still under negotiation, which at least until now has not been able to reach consensus.

In sum, the cross regional group, including Argentina, has contributed in the last few years to the elaboration of international standards related to the protection of human rights in relation to the activities of business enterprises. This has had a practical impact in many countries, which have adopted measures in line with the Guiding Principles, and even in transnational enterprises, some of which have adopted their own codes of conduct to respect human rights. It seems highly probable that the issue will continue to be developed in the universal system in the next few years.

III.5.6 The effects of foreign debt on human rights, in particular the activities of vulture funds.

III.5.6.1 A Cuban initiative: the mandate on foreign debt and human rights.

Cuba was effectively leading the issue of the effects of foreign debt in human rights, in particular economic, social and cultural rights, in the Human Rights Council long before Argentina decided to introduce an initiative on the impact of vulture funds in human rights

in the context of foreign debt. Indeed, the Central-American country introduced this initiative in the Commission more than two decades ago.

In 1997, the Commission established the mandate of the independent expert on structural adjustment policies and, a year later, in 1998, the same body created the mandate of the special rapporteur on the effects of foreign debt on the full enjoyment of economic, social and cultural rights. In 2000, both mandates were merged on what became an independent expert on structural adjustments policies and foreign debt in the full enjoyment of all human rights, particularly economic, social and cultural rights. In 2005, the Commission replaced the reference "effects of structural policies" with "effects of economic reform policies".[527]

After the institution-building process of the Council, Cuba pushed for the adoption of a resolution whereby the mandate was renewed in the new body but its name and scope were changed. The mandate holder was then named "Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights." [528] Among his activities, the expert prepared Guiding Principles on debt and human rights,[529] which were endorsed by Human Rights Council Resolution 20/10 of June 2012.

Thus, during more than two decades, the issue was included in the UN human rights agenda, including the analysis of the legal framework of international human rights law applicable in this regard –e.g. the International Covenant of economic, social and cultural rights. It was also raised in the concluding observations of various treaty bodies, which have highlighted the consequences that foreign debt posed in the enjoyment of human rights, in particular in developing countries.[530]

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[527] Office of the United Nations High Commissioner for Human Rights, "Your Human Rights", Development", "Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights", "Evolution of the mandate", available at: https://www.ohchr.org/EN/Issues/Development/IEDebt/Pages/Overview.aspx

[528] Human Rights Council Resolution A/HRC/RES/7/4.

[529] Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, "Guiding principles on foreign debt and human rights", UN Document A/HRC/20/23, 10 April 2011.

[530] Office of the United Nations High Commissioner for Human Rights, **"**Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights", "Human Rights and Foreign Debt", "United Nations concern with foreign debt and human rights", available at: https://www.ohchr.org/EN/Issues/Development/IEDebt/Pages/HRightsAndForeignDebt.aspx.

Even if the impact of foreign debt and human rights is quite strong in heavily indebted developing countries –and affects many essential human rights such as the rights to food, to health, or to education,[531] a number of Western countries rejected the consideration of the issue in the Council arguing that it should be dealt in another forum. The decision to oppose to this initiative taken by EU countries and the US has been criticized by scholars, mainly because it affects the universality, interdependence and inter-relatedness of all human rights, in detriment of economic, social and cultural rights.[532] In this context, all resolutions on the issue have been adopted by vote, with a vast majority voting in favor, in particular States from Latin America, Africa and Asia.

III.5.6.2. The main activities of the mandate-holder in relation to vulture funds until 2014. The mandate-holder's mission to Argentina and a thematic report.

The work of the independent expert on the issue has been extensive. Nevertheless, as the object of the present study focuses on the contribution of Argentina to the impact of foreign debt and human rights, in particular the activities of vulture funds, since the establishment of the Council, I will only focus on two main activities with relevance in this regard.

First, the mandate holder made a specific report on the effects of the activities of vulture funds on debt relief and on the satisfaction of human rights in 2010.[533] In the introduction of this report, he affirmed that measures to relief debt in heavily indebted poor countries (HIPCs) have helped to channel those resources to social spending essential for the observance of human rights –e.g. health care, education. At the same time, the mandate holder recognized that the non-binding nature of debt relief measures provided the chance to some creditors to affect those efforts and recover the full value of debt through litigation in tribunals.

In this context, the independent expert referred to a specific category of creditors known as "vulture funds". He defined these funds as private commercial entities that acquire defaulted or distressed debts with the aim of achieving a high return. These funds generally acquire sovereign debts of poor countries on the secondary market at a price far less than its actual

[531] Bantekas, Ilias, "Sovereign debt and human rights", Oxford University Press, 2018, pages 186-247.
[532] Bantekas, Ilias, "Sovereign debt and human rights", Ibid, pages 171-177.
[533] Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, UN Document A/HRC/14/21, 29 April 2010.

value and later seek repayment of full price plus penalties, interests and legal fees through litigation, seizures or political pressure. The expert emphasized that there is no limit nor regulation to the amount of interest or profits that such funds can collect.[534]

After describing a few national cases where human rights were severely affected by the activities of vulture funds[535] as well as initiatives taken to mitigate the problem,[536] the mandate-holder concluded that the excessive claims made by vulture funds against poor countries with unsustainable levels of debt affect their capacity to guarantee economic, social and cultural rights, including the rights to health, education, water and sanitation and adequate housing.[537] Among the recommendations, the independent expert indicated that the international community should adopt legally binding standards on responsible lending and borrowing, including limits to the rights of creditors to unilaterally assign debt obligations to third parties without the prior consent of the debtor.[538]

The second activity to highlight in relation to activities of vulture funds and its impact in human rights is the expert's mission to Argentina. It is not surprising that the then mandate-holder on foreign debt, Cephas Luminas, decided to visit the South American country, taking into consideration the enormous foreign debt which led Argentina to a default in 2001, with really devastating economic and social consequences. This visit took place in 2013 and, in the summary of the report, the then independent expert affirmed that from mid-1998 to mid 2001, Argentina faced a critical recession and that a combination of questionable lending and policy advice by the International Monetary Fund (IMF) and lending from international credit markets plus a global recession pushed the country to a situation of unsustainable debt and big default with terrible social consequences. Argentina promoted debt restructurings in 2005 and 2010 that reduced significantly its debt and provided some space for the realization of human rights. Indeed, the expert describes how Argentina, since 2002, has recorded

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534 As an example, he mentions that the African Development Bank has reported that these funds can have recovery rates of approximately 3 to 20 times their investments, which means returns of 300 to 2,000 per cent. See in this regard, Report of the Independent Expert on the effects of foreign debt, UN Document A/HRC/14/21, Ibid, page 5.

535 The Independent Expert described the cases of Liberia, Democratic Republic of the Congo and Zambia. See in this regard, Report of the independent expert on the effects of foreign debt, UN Document A/HRC/14/21, Ibid, pages 7-10.

536 The Independent Expert mentioned as examples the national legislation in the United Kingdom and Belgium. See in this regard, Report of the independent expert on the effects of foreign debt, UN Document A/HRC/14/21, Ibid, page 23.

537 Report of the Independent Expert on the effects of foreign debt, UN Document A/HRC/14/21, Ibid, page 20.

538 Ibid, page 21.

impressive economic growth, with an increasement of social spending. The result was a significant decrease of the level of poverty and also of unemployment although the level of inflation was high. These commended achievements by the expert were recorded even at a hard time for the country, with difficulties to access international capital markets, little foreign investment and a long litigation by vulture funds against Argentina.[539]

The expert also reminded that much of Argentina's debt was contracted during its last cruel dictatorship (1976 to 1983) and considered that those who lent the regime should accept their responsibility and help to cancel the debt. At the same time, the expert called Argentina to conduct a transparent debt audit to promote accountability in debt management and inform future borrowings as well as strategies for the realization of human rights.[540]

In the same report, Luminas referred to Argentina's challenges on the issue in 2013 and affirmed that, among other factors, as a result of the refusal of a minority of creditors to participate in debt restructurings, Argentina still faced difficulties in accessing capital markets, had been denied some export credits, and foreign direct investment had been small and, as a consequence, rely on domestic sources of finance. In this context, the expert describes a litigation faced by the South American country in the United States court by a group of vulture funds.[541] In this context, Luminas supported the need to limit the "…*the ability of unscrupulous investors to pursue immoral profits at the expense of the poor and most vulnerable through protracted litigation. Such legislation has been enacted in the United Kingdom of Great Britain and Northern Ireland and the Channel Island of Jersey. It will not affect legitimate participants in the secondary debt market but will help address the predatory behavior of vulture funds*…"[542] Finally, the report

[539] Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Addendum, Mission to Argentina (18–29 November 2013), UN Document A/HRC/25/50/Add.3, 2 April 2014, pages 1-2.
[540] Ibid, page 2.
[541] In the aforementioned case, on 21 November 2012, on the basis of the interpretation that bondholders and vulture funds have to be treated equally following a "pari-passu" clause, Argentina was required to pay the vulture funds their full 1.3 billion claim. The decision forced Argentina to choose whether to pay these vulture funds or to default on the exchange bonds. The expert does not refer to the merits of the lawsuit but highlights two issues: one, is that the vulture funds were not the original lenders to Argentina; they purchased most of the debt that they are claiming at a significant discount in the aftermath of the default. For example, the expert mentions NML Capital, which claims an amount that would represent a profit of 1,380 per cent. The second issue is that the case raises broader issues beyond the Argentine case, in particular the judicial decision reinforces the notion among creditors that refusing to participate in debt restructurings and suing for full value plus interests is the path to follow. These affects indebted countries and human rights of persons who live in their jurisdictions. See in this regard, Report of the Independent Expert on the effects of foreign debt Mission to Argentina (18–29 November 2013), UN Document A/HRC/25/50/Add.3, Ibid, pages 9-10.
[542] Ibid, page 9.

concluded with recommendations to Argentina and to the country's international lenders, including the need to enact legislation to combat extortionate litigation from vulture funds.[543]

III.5.6.3 Human Rights Council resolution on vulture funds and their impact on human rights.

Argentina's position on foreign debt and human rights changed over time. Since the establishment of the Human Rights Council until 2016, the South American country voted in favor of all resolutions promoted by Cuba on this issue, both the thematic resolutions as well as those relating to the renewal and scope of the mandate of the independent expert.

In 2014, in the context described by Luminas during his mission to Argentina, the South American country decided to submit a new initiative in the Council regarding the impact of activities of vulture funds in the enjoyment of human rights. This initiative was fully in line with the efforts of Argentina at the GA level towards a fair regulation of sovereign debt processes. Indeed, a few resolutions were submitted by the G-77 plus China since 2014 and led to the adoption of the Basic Principles on Sovereign Debt Restructuring Processes in 2015 with 136 votes in favor, 41 abstentions and 6 votes against.[544]

In the Council, however, the emphasis was placed on the human rights dimension of the problem. The resolution promoted by Argentina was entitled "Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights: the activities of vulture funds" was adopted by vote with the support of a large majority: 33 in favor, 5 against and 9 abstentions.[545]

The main reason argued by some Western countries during negotiations to oppose was based on the argument that it was not the right forum to discuss it. In any case, in a different forum dealing with the issue from a wider perspective, at the GA level, many of these States also voted against the resolution that adopted the principles on debt restructuring.

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[543] Ibid, page 22.
[544] United Nations General Assembly Resolution A/RES/69/319. See also United Nations General Assembly Resolutions A/RES/68/304 and A/RES/69/247.
[545] Human Rights Council Resolution A/HRC/RES/27/30.

The preambular part of the Council resolution recalls international human rights instruments; recalls GA resolution 68/304 towards the framework on the restructuring of sovereign debts; and reaffirms all resolutions on foreign debt and its impact in human rights, in particular in economic, social and cultural rights, adopted by the Commission and the Council.[546]

The preambular part also welcomes the report of the independent expert on the issue of vulture funds described above; affirms the importance of avoiding the possibility that vulture funds could stop the debt restructuring efforts of developing countries and affect the States right under international law to protect its people; recognizes that States have a sovereign right to restructure their debt; affirms that foreign debt contributes to extreme poverty and hunger; encourages States to take into consideration the Guiding Principles on Foreign Debt and Human Rights; notes that at the time there was no framework to restructure foreign debt; expresses concerns that vulture funds take profit of the voluntary nature of debt relief processes; takes into account that vulture funds, through litigation and other means, affect the capacity of States to comply with their human rights obligations.[547]

The operative part of the resolution condemns the activities of vulture funds for the effect that the repayment to those funds has in human rights obligations of States; reaffirms that vulture funds show some of the problems of the financial system, which affect human rights of debtor countries; encourages all States to participate in the framework to restructure sovereign debt, which was later adopted in 2015 at the GA; and requests the Advisory Committee to prepare a research-based report on the issue and to seek the views of different stakeholders for the preparation of this report.[548]

III.5.6.4 The research-based progress report of the Advisory Committee on the issue.

In 2016, the Advisory Committee submitted a research-based progress report to the Council taking into consideration the contribution of different stakeholders.[549] The research-based progress report echoes the definition of vulture funds made by then Independent Expert on

[546] Human Rights Council Resolution A/HRC/RES/27/30, preambular paragraphs 1-5.
[547] Human Rights Council Resolution A/HRC/RES/27/30, preambular paragraphs 6-14.
[548] Human Rights Council Resolution A/HRC/RES/27/30, operative paragraphs 1-5.
[549] Human Rights Council, "Report of the Human Rights Council Advisory Committee on the activities of vulture funds and the impact on human rights", UN Document A/HRC/33/54, 20 July 2016. See also Human Rights Council, "HRC Bodies", "Advisory Committee", "Mandates", "Vulture Funds", available at: https://www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Pages/VultureFunds.aspx.

foreign debt on his thematic report, and elaborates further on these funds. The Advisory Committee also clarifies that these private hedge funds are not lenders, they purchase debt in secondary market distressed debt at discounted prices and then sue the debtor for a much higher amount. Moreover, according to the Committee, the vulture funds target distressed economies with challenges for legal defense; refuse to participate in restructuring processes; sue the country for very high amounts; try to enforce the decision in jurisdictions where they can win their case; obtain exorbitant profits; and operate in jurisdictions which allow financial secrecy.[550]

Moreover, the research-based progress report addresses case studies, including Zambia, Democratic Republic of Congo and Argentina. It also focuses on disruptive litigation, a general trend to obtain exorbitant profits, being African and Latin American countries the most affected. The new trend indicates that almost all lawsuits are now against middle-income countries. In addition, as a positive trend, the report describes the cases of Belgium and the United Kingdom, which have national legislation discouraging disruptive litigation of vulture funds in their jurisdictions.[551]

The research-based progress report also describes the raising awareness of the problem at the international level and a growing consensus in the sense of condemning the abuses of these funds, such as pronouncements of the Parliamentary Assembly of the Council of Europe and Meetings of the G77 and China.[552]

The document also describes how the activities of vulture funds undermine States capacities to comply with essential obligations regarding economic, social and cultural rights –e.g. health, water and sanitation, food, housing and education. It also describes how the vulture funds jeopardize poverty reduction initiatives and how they contribute to increased debt service. In this context, the Advisory Committee concludes that:

"…vulture funds are inherently exploitative, since they seek to obtain disproportionate and exorbitant gains at the expense of the full realization of human rights, particularly economic, social and cultural rights, and

[550] "Report of the Human Rights Council Advisory Committee on the activities of vulture funds and the impact on human rights", UN Document A/HRC/33/54, Ibid, pages 3-5.
[551] Ibid, pages 6-13.
[552] Ibid, pages 13-14.

the right to development. Seeking the repayment in full of a sovereign debt from a State that has defaulted, or is close to default, is an illegitimate outcome. In a debt crisis, more than financial obligations are at stake.

The duty to observe due diligence to prevent a negative impact on and potential violations of economic, social and cultural rights applies to all States and stakeholders, including the management of vulture funds. Therefore, assessments of the impact of their activities on the enjoyment of economic, social and cultural rights should be made systematically…" [553]

The Advisory Committee also make recommendations to the Council, including to keep the issue on the agenda and to study good practices further. It also recommends Member States to enact legislation on the issue and to adopt measures to limit disruptive litigation of vulture funds on their jurisdiction. In addition, it refers to the need to adopt measures to guarantee that vulture funds pay taxes and ensure that adjudication bodies, including the International Centre for Settlement of Investment Disputes and the Permanent Court of Arbitration, make a proper assessment of the bona fide in case of claims by vulture funds.[554]

III.5.6.5 Current state of the initiative on the impact of the activities of vulture funds on human rights at the Council and contribution of Argentina in this regard.

Before the presentation of the research-based progress report of the Advisory Committee, there was a change of Administration in Argentina in December 2015. In 2016, the new Government decided to pay the remaining foreign debt related to the 2001 default, ending a longtime litigation with the remaining creditors, which constituted a minority of the total of creditors existent by the time of default.[555]

The issue at the Council, however, continued beyond the Argentine case. Indeed, the Independent Expert on foreign debt and human rights –whose mandate was renewed again in 2017 through a resolution promoted by Cuba-,[556] addressed the consequences of sovereign debts restructurings and the role of the investment procedures in two recent reports.[557]

[553] Ibid, page 21.
[554] Ibid, pages 21-22.
[555] Ibid, pages 8-9.
[556] Human Rights Council Resolution A/HRC/RES/34/3.
[557] Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, UN Document A/70/275, 4 August 2015. See also Report of the Independent Expert on the effects of foreign

In the same resolution that extended the mandate of the independent expert in 2017, the Council requested the Advisory Committee to present a final report on vulture funds in a successive Council session.[558] By the time this resolution was adopted at the Council, Argentina was an Observer State and, consequently, did not vote. The Advisory Committee is still preparing its new report on vulture funds. In a thematic resolution adopted by vote in March 2018, the Council takes note of the progress report and expects a final one for the June session in 2019.[559]

In a new thematic resolution on foreign debt and human rights pushed by Cuba and adopted by the Council by vote in March 2019, there is a new reference taking note of the final work of the Committee on vulture funds and expecting this report to be submitted later this year.[560] In this last resolution, Argentina was again a Member State of the Council but changed its position and voted in abstention of the Cuban initiative.

In any event, the role of Argentina and Cuba has been key to the development of the study on the impact of activities of vulture funds in the enjoyment of economic, social and cultural rights. In this case, once again, Argentina promoted international standards on an issue with relevance at the domestic level. Even if the country changed its position during the Macri Administration and its current position remains to be seen at the outset of a new Administration which began in December 2019 after Presidential elections, the South American county contributed to develop an issue with great importance for the developing world.

The final report on the issue was adopted by the Advisory Committee ad referendum during its last session in February 2019 and will be submitted for the consideration of the Council in the near future.[561] By that time, the Human Rights Council should decide if it continues to deal with the issue of the impact of the activities of vulture funds in human rights.

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debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, UN Document A/72/153, 17 July 2017.

[558] Human Rights Council Resolution A/HRC/RES/34/3, operative paragraph 7.

[559] Human Rights Council Resolution A/HRC/RES/37/11, operative paragraph 18.

[560] Human Rights Council Resolution A/HRC/RES/40/8, operative paragraph 12.

[561] Human Rights Council, "Media", "News", "Human Rights Council Advisory Committee concludes its twenty-second session", Press Release, 22 February 2019, available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24200&LangID=E.

III.5.7 Human rights of older persons.

III.5.7.1 A growing interest on the issue of older persons at the UN level.

The need to protect older persons has been part of the international agenda at least since the 1980s. In 1982, the GA endorsed the Vienna International Plan of Ageing, adopted at the First World Assembly of Ageing.[562] Two decades later, in 2002, the GA also endorsed the Political Declaration and Madrid International Plan of Action, adopted in the Second World Assembly of Ageing.[563] Moreover, in 1991, the GA adopted the UN Principles for Older Persons.[564] In the same direction, since the establishment of the Human Rights Council, the issue was also addressed by some Council mechanisms.[565]

The tendency to look into the rights of older persons has continued to grow in the present decade. The GA also created a working group on ageing for the protection of human rights of older persons in 2010.[566] The Council adopted a resolution whereby it requests the Special Rapporteur on the right to health to prepare a thematic study on older persons.[567]

Furthermore, in 2012, OHCHR submitted a report on older persons to the ECOSOC.[568] In this report, the High Commissioner affirms that population ageing is one of the most important transformations of the XXI century. At present, world population reaches approximately 700 million people, where 10 percent is already over the age of 60. It is expected that by 2050, this percentage will double, reaching 20 per cent.[569]

All regions of the world will experience this phenomenon: Africa is expected to grow fast, reaching 215 million people by 2050, almost a fourfold of current numbers; Western Asia will quadruple its population over 60 years and will reach 69 million in 2050, which will represent an increase of 19 percent; Asia-Pacific will increase from 414 million people in

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562 United Nations General Assembly Resolution A/RES/37/51, operative paragraph 2.
563 United Nations General Assembly Resolution A/RES/57/167, operative paragraph 2.
564 United Nations General Assembly Resolution A/RES/46/91.
565 Information in this regard can be consulted at the website Office of the United Nations High Commissioner for Human Rights, title "Older Persons", "Historical background of the establishment of the mandate", available at: https://www.ohchr.org/EN/Issues/OlderPersons/IE/Pages/Background.aspx
566 United Nations General Assembly Resolution A/RES/65/182, operative paragraph 28.
567 Human Rights Council Resolution A/HRC/RES/15/22, operative paragraph 11.
568 United Nations Economic and Social Council, "Report of the United Nations High Commissioner for Human Rights", UN Document E/2012/51, 20 April 2012.
569 Ibid, page 3.

2010 to 1.25 billion by 2050, an increment from 10 to 24 percent; Latin America and the Caribbean countries will increase from 10 to 25 per cent the number of older persons, reaching 188 million persons; and Europe is expected to reach 236 million by 2050, with an increase of 34 per cent.[570]

The human rights situation of older persons has not been developed enough neither at the national nor international levels despite broad agreement on their vulnerability to isolation and abuse. After an exhaustive description of the human rights challenges faced by older persons, OHCHR concludes that current arrangements to protect them are not enough and proposes States to explore the elaboration of a new international instrument, a new special procedure of the Human Rights Council and mainstreaming of the issue within existing mechanisms, programs and policies.[571]

In this context, the Human Rights Council adopted its first thematic resolution related to the human rights of older persons in September 2012.[572] In this document, it refers to the existence of the GA working group aimed at strengthening the protection of older persons including by considering the existing legal framework and gaps on the rights of older persons.[573] It also notes that older persons suffer multiple forms of discrimination when they are part of different vulnerable groups because of their race, disability, among other conditions.[574] The resolution also requests the High Commissioner to conduct consultations on the rights of older persons with States and other stakeholders and prepare a summary for the Council.[575]

In conformity with the request, OHCHR convened open consultations on 15 April 2013. Argentina contributed to the event of the High Commissioner by providing a written submission and also with the presentation of the Argentine Director for Policy on Older Persons in the first panel of challenges for older persons.[576]

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[570] Ibid, page 3.
[571] Ibid, page 17.
[572] Human Rights Council Resolution A/HRC/RES/21/23.
[573] Ibid, preambular paragraph 1.
[574] Ibid, preambular paragraph 7.
[575] Ibid, operative paragraphs 9-10.
[576] Office of the United Nations High Commissioner for Human Rights, "Summary report of the consultation on the promotion and protection of the human rights of older persons", UN Document A/HRC/24/25, 1 July 2013.

The summary concludes that ageing is a global phenomenon and the group of older persons is growing in all regions. Consequently, action is needed to protect them. Even if existing human rights treaties are applicable to them, special needs related to age discrimination, access to work, health services, social protection, protection from abuse and violence require more attention.[577]

III.5.7.2 The establishment of an Independent Expert on older persons. An Argentine-Brazilian initiative.

Following the increasing interest on the need to enhance the protection of older persons at the UN level, Argentina and Brazil decided to push for the establishment of a new mandate on older persons in the Human Rights Council. This initiative took place only a few months after the consultations organized by the OHCHR in conformity with the first resolution on older persons of the Council described above.

In September 2013, the Council adopted a resolution on older persons by consensus.[578] The resolution recognizes the challenges that older persons face to enjoy their human rights[579] and, among other things, calls upon States to take measures on age discrimination, abuse and violence, social integration and health care of older persons.[580] The resolution also decides to appoint an independent expert on older persons, with the mandate to assess the implementation of existing international instruments with regard to older persons while identifying both best practices and gaps in the implementation of existing law; to take into consideration the views of stakeholders; and to raise awareness of the challenges faced by older persons.[581] The Council requests the Independent Expert to report to the Council on an annual basis and to present a comprehensive report at the end of his or her term to be transmitted to the working group on Ageing at the GA level.[582] Finally, in a clear demonstration of the growing importance of the issue, in the same session, the Council decided that the Social Forum would address the rights of older persons in its meeting during 2014.[583]

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[577] Ibid, page 16.
[578] Human Rights Council Resolution A/HRC/RES/24/20.
[579] Human Rights Council Resolution A/HRC/RES/24/20, operative paragraph 1.
[580] Human Rights Council Resolution A/HRC/RES/24/20, operative paragraph 3.
[581] Human Rights Council Resolution A/HRC/RES/24/20, operative paragraph 5.
[582] Human Rights Council Resolution A/HRC/RES/24/20, operative paragraph 6.
[583] Human Rights Council Resolution A/HRC/RES/24/25, operative paragraph 6.

III.5.7.3 Thematic reports of the Independent Expert until 2016.

The first annual thematic report of the first mandate-holder, Ms. Rosa Kornfeld-Matte, was issued in 2014.[584] It focuses on the foundations of the mandate, the context at the international level, international standards and initiatives. In this sense, it affirms that, although there is no specific instrument, many international human rights treaties have implicit obligations towards older persons (e.g. the International Convention on migrant workers, article 7) and a number of treaty bodies have dealt with the issue at a certain extent. It also identifies the existence of provisions in regional human rights treaties and the two world documents of ageing in Vienna and Madrid as well as the existence of mechanisms such as the working group of ageing within the GA.[585]

In this context, the mandate holder indicates that the lack of a comprehensive instrument, has significant implications (i.e. lack of coherence).[586] The expert highlights the relevance of a series of human rights such as non-discrimination and the right to legal personality and capacity.

The second report of the mandate-holder in 2015 focuses on the right to autonomy and care.[587] According to the mandate-holder, autonomy *"…is the principle or right of individuals or group of individuals to determine their own rules and preferences…"*[588] Autonomy includes an individual element, i.e. the capacity to make decisions, and an economic and financial element, which provides for a friendly environment for older persons. Autonomy is different from independence, which implies the ability of an individual to be able to live his/her life without assistance.

The term care, according to the report, *"…aims at maintaining the optimum level of physical, mental and emotional wellbeing and to prevent or delay the onset of disease…"*[589] In this context, the mandate holder refers to settings that are key for care, i.e. home and family; quality control and accessibility in care settings as one of the main challenges related to the issue; elder abuse

[584] Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Document A/HRC/27/46, 24 July 2014.
[585] Ibid, page 7.
[586] Ibid, pages 7-8.
[587] Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Document A/HRC/30/43, 13 August 2015.
[588] Ibid, page 9.
[589] Ibid, page 13.

and violence against older persons; geriatric service and palliative care; and the importance of groups of older persons when designing policies, including women, persons with disabilities, among others.

Regarding the existing legal framework with regards to autonomy, the second report indicates that this term is a core principle of the International Convention on the Rights of Persons with Disabilities, including the right to make their own choices (i.e. articles 3(a) and 25(b)). The term independence has been mentioned in the UN principles for older persons in relation to the right of older persons to health care, food and water, among others. At the regional level, both the rights to independence and autonomy have been included in the Inter-American Convention on older persons while the Charter of the EU has included the right to independence of older persons.[590]

Regarding the legal framework of the term care, the UN set of principles on older persons focuses on family, community and institutional care, access to health care and to social and legal services to enhance the autonomy of older persons. The International Convention on the rights of persons with disabilities refers to universal design, which could benefit older persons. At the regional level, the African Charter refers to the rights of older persons and their specific needs to cover their physical and moral needs. The Inter-American Convention on older persons recognizes the right to receive long-term care, while maintaining independence and autonomy.[591]

The second report concludes referring to the importance for States to count with a legal, institutional and policy framework on older persons, as well as to the importance of adopting specific measures to protect the rights of older persons to be autonomous and to receive care. [592]

The third report of the mandate-holder, issued in 2016, assesses the implementation of existing instruments in relation to older persons, including the 2002 Madrid International Plan of Action of Ageing, identifying best and good practices as well as gaps.[593] In this document, the mandate-holder concludes that by 2050, for the first time, there will be more

[590] Ibid, page 6.
[591] Ibid, pages 7-8.
[592] Ibid, pages 16-21.
[593] Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Document A/HRC/33/44, 8 July 2016, pages 7-18.

population of older persons than children under the age of fifteen years. It is essential to guarantee the rights of older persons. Older persons face challenges in the areas of care, work, social security, equality, access to justice, violence and abuse, education, among others.[594]

The report also recognizes that there are still protection gaps. It reminds that OHCHR had already suggested that the issue requires a special legal instrument of protection and that this same proposal had been discussed in the working group on ageing at the GA level. In this regard, the report welcomes the positive creation of this mandate that allows to address this important issue.[595]

III.5.7.4 The renewal of the mandate of the Independent Expert.

Upon the completion of the work of the mandate-holder in her first three years of mandate, Argentina and Brazil decided to present an initiative to push for the renewal of the mandate. In this way, the Council adopted by consensus a new resolution in 2016 that has guaranteed the work of the mandate holder until present.[596]

In its preambular part, the resolution welcomes the reports of the mandate-holder and of the Working Group on Ageing at the GA level; acknowledges the efforts made to strengthen the rights of older persons, including the possible elaboration of a legal instrument on the issue; recognizes the importance of older persons in the 2030 Agenda; notes the adoption of two new instruments at regional levels: the Inter-American Convention on the protection of human rights of older persons and the Protocol to the African Charter on Human and Peoples' Rights on the rights of older persons in Africa; notes that by 2030, the number of persons aged 60 years or over is expected to grow by 56 per cent; and shows concern at the multiple cases of discrimination which can affect older persons, among other things.[597]

In its operative part, the resolution recognizes the challenges to the enjoyment of human rights of older persons in some specific areas; emphasizes the need for a comprehensive approach to care; recalls the need to fight against the violence that affects older persons;

[594] Ibid, page 20.
[595] Ibid, pages 20-21.
[596] Human Rights Council Resolution A/HRC/RES/33/5, operative paragraph 6.
[597] See Human Rights Council Resolution A/HRC/RES/33/5, preambular paragraphs 7, 10, 12 and 13.

highlights the importance of poverty and lack of income security as major concerns for older persons; and emphasizes the importance of consultation with older persons in the elaboration and adoption of measures related to their concerns and needs.[598]

In practice, the scope of the work of the independent expert was strengthened. Now, the mandate-holder has the capacity to gather, exchange and send communications to States on issues of importance to older persons and is also able to provide technical assistance, capacity building and advice to States which require so. The mandate still retains a flexible wording, which allows the expert to focus on the best ways and means to promote and protect the rights of older persons.

III.5.7.5 Recent thematic reports of the Independent Expert.

After the renewal of the mandate and until May 2019, the independent expert issued two additional reports. The first report focuses on the impact of automation on the human rights of older persons.[599] In the report, the expert affirms that undoubtedly, robots and artificial intelligence will make a profound transformation in daily life, including in older persons' lives. In the case of this particular group, assistive and robotics technology is and will be used to assist older persons.[600]

The mandate-holder studies the existing legal framework on the issue and affirms that there exists a reference in the Convention on persons with disabilities, but no explicit reference at the regional level. In this context, she concludes that much more can be done with regards to legislating on assistive technology. Nevertheless, the independent expert cautions about the proper limits of automation, taking into consideration the autonomy of older persons and also the possibility to isolate them with these new methods of assistance. Assistive technology and robotics will have an impact on the right to privacy and informational self-determination (the right of an individual to decide what information of his personal life is disclosed). Even if technology can enhance privacy (intimate activities such as bathing or dressing), it has the potential to harm users, misusing the information collected. The independent expert also recognizes implications for other rights, such as the right to have

[598] See Human Rights Council Resolution A/HRC/RES/33/5, operative paragraphs 1-5.
[599] Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Document A/HRC/36/48, 21 July 2017.
[600] Ibid, pages 4-5.

equal access to these new products; the right to liberty and security; the right to health; the right to be protected from violence and abuse; and the right to integrity.[601]

The report concludes, among other things, that assistive technology has a positive impact and provides a better life for older persons but it cannot replace interactions with humans. At the same time, it alerts about the need for responsible use and also the need to guarantee that advanced technology does not affect the promotion of low technology assistive products available to everyone. It also stresses the importance of universal access; a human rights-based approach in the design; the need to have informed consent of the user about the risks that technology causes; the convenience to include older persons in the design and development of assistive technology; and the need to create appropriate mechanisms of accountability.[602]

The second and last report to date of the mandate holder after the extension of her mandate is related to social exclusion.[603]According to the expert, this is a complex process because it involves the denial or lack of resources, services, rights, and goods as people age, and the inability to participate in specific activities. In the case of older persons, this situation is less prone to change than the social exclusion of younger adults. Many consequences come with social exclusion such as living alone, ethnicity or being very old. The independent expert also affirms that one of the barriers to ensure social inclusion is the deeply rooted discrimination against older persons. Ageism is socially accepted and it is necessary to combat it, in line with the campaign launched by the World Health Organization in 2016.[604] In this context, the expert concludes, among other things, that it is necessary to adopt a human rights-based approach to ageing and emphasizes the importance to develop a comprehensive legal instrument to protect the rights of older persons to address many of the challenges faced.[605]

III.5.7.6 Balance of the work of Argentina and Brazil on the mandate on older persons.

[601] Ibid, pages 5-17.
[602] Ibid, pages 16-18.
[603] Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Document A/HRC/39/50, 10 July 2018.
[604] Ibid, pages 6-7.
[605] Ibid, page 17.

The initiative of Argentina and Brazil towards the establishment of a mandate on older persons has proved to be a very valuable tool to move forward a pressing human rights issue. Older persons suffer from ageism, a socially accepted and widespread form of discrimination, and also face challenges in the enjoyment of their human rights, in particular the right to health, care, work, and social protection.

The work of the two biggest South American countries is coordinated with the work of the working group on ageing functioning at the GA level, and is compatible with the world conferences held in Vienna and Madrid on Ageing in 1982 and 2002 respectively.

At the same time, it reflects the work that has been done at the regional level, in the Inter-American system, where Argentina and Brazil strongly supported the relatively recent adoption of a legal instrument of a binding nature entitled Inter-American Convention on Protecting the Rights of Older Persons. Argentina already ratified the instrument, which entered into force in 2017.[606]

As mentioned above, OHCHR and the Independent expert have highlighted the importance of having a comprehensive framework to enhance the protection of older persons. It remains to be seen in the near future if the Argentine-Brazilian initiative moves towards a new human rights treaty in the Council that can contribute to the enhancement of the rights of older persons in international human rights law.

III.5.8 The rights of LGBTI persons.

III.5.8.1 A long path towards recognition at the United Nations.

Even if deeply-rooted discrimination, brutal violence (including killings), and institutional criminalization against LGBTI (lesbian, gay, bisexual, transgender and intersex) persons is not a new phenomenon, concerns about these human rights violations only started to be

[606] Organization of American States, Human Rights Instruments, Older Persons, available at: http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons_signatories.asp.

raised by United Nations human rights treaty bodies and special procedures since the early 1990s.[607]

At the turn of the new millennium, the issue was also gradually raised at the intergovernmental level. A first step was taken at the UN within specific resolutions related to summary, extrajudicial and arbitrary executions. At least since 2002, these resolutions adopted by the General Assembly included a paragraph that expressly urged States to investigate killings of persons on the basis of their sexual orientation and prosecute those responsible for committing the crimes.[608]

In 2003, Brazil unsuccessfully tried to introduce the issue in the agenda of the former Commission. It pushed for a draft resolution which called for the application of the principle of non-discrimination with respect to any person on the basis of his or her sexual orientation, taking into consideration the human rights contained in the Universal Declaration. The text was not adopted because of the strong opposition of a relevant number of States, particularly from Africa and Asia.

The impossibility to even include the issue in the agenda left the impression at the UN level that it would be very difficult, if not impossible, to push for a specific intergovernmental initiative on the right of any person not to be discriminated against on the basis of his or her sexual orientation or gender identity.

It was neither possible to include the protection of persons on the basis of their sexual orientation and gender identity within the discussions on the fight against racism, racial discrimination, xenophobia and related intolerance. At the UN, the main conference against discrimination, namely, the World Conference against racism, racial discrimination, xenophobia, and related intolerance of 2001, did not include any reference to sexual

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[607] See in this regard, Office of the United Nations High Commissioner for Human Rights, "Speak Up, Stop discrimination, Combating discrimination based on sexual orientation or gender identity", available at: https://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx.

[608] See United Nations General Assembly Resolution 57/214, operative paragraph 6. The resolutions on summary, extrajudicial and arbitrary executions, adopted in 2002, 2004, 2006, 2008, 2010, 2012, and 2014, all contained a similar paragraph as the one mentioned above and, since 2012, they also included the term "gender identity". These inclusions were rejected by many States, mainly from Africa, which voted against them, but the majority of States supported them. These resolutions are available in the website of the United Nations High Commissioner for Human Rights, "Your Human Rights", "Discrimination", "LGBT UN Resolutions", available at: https://www.ohchr.org/EN/Issues/Discrimination/Pages/BTUNResolutions.aspx

orientation or gender identity because there was no consensus. The same happened during the Durban Review Conference in 2009.[609] The issue was not included either in the Ad Hoc Committee on Complementary Standards, which is mandated to discuss possible gaps to the International Convention against racism.[610]

Since the 2000s, the recognition of the rights of LGBTI individuals started to improve substantially in some regions of the world. A growing number of countries recognized the right of LGBTI individuals to get married, including Argentina. In 2010, the South American country was the tenth country in the world and the first in Latin America to enact legislation recognizing the right for same sex persons to marry and adopt children.[611]

Nevertheless, even today, around 70 countries criminalize same sex activities.[612] These laws come from former British and French colonial systems of justice or from particular interpretations of Sharia or Islamic law.[613] In any case, fortunately, the rights of LGBTI individuals have evolved greatly in the last few years at the international and regional levels from a human rights perspective.

Gradually, in parallel to the creation of the Council in 2006, there was a growing interest in dealing with LGBTI rights at the international level. Many countries, including Argentina, Brazil, United States and the EU started a process of consultations with different stakeholders and made statements at the plenary of the Council. The most important one was delivered in March 2011 by Colombia, on behalf of more than 80 States.[614]

III.5.8.2. The first Human Rights Council resolution on LGBTI individuals. The role of South Africa and OHCHR.

[609] World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, "Declaration and Programme of Action", 2001. See also, Outcome Document of the Durban Review Conference.
[610] Information on the work of this mechanism is available at the website of the Office of the United Nations High Commissioner for Human Rights, "Your Human Rights", "Racism", "The Ad Hoc Committee on the Elaboration of Complementary Standards", available at: https://www.ohchr.org/EN/Issues/Racism/AdHocCommittee/Pages/AdHocIndex.aspx
[611] Law No. 26618 "Civil Marriage", available at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/165000-169999/169608/norma.htm
[612] Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Document A/HRC/38/43, 11 May 2018, page 12.
[613] Ibid, page 12.
[614] "Over 80 Nations Support Statement at Human Rights Council on LGBT Rights", US Mission to International Organizations in Geneva, 22 March 2011, available at: https://geneva.usmission.gov/2011/03/22/lgbtrights/

In June 2011, South Africa (a very significant country because of its tragic past of racial discrimination, its progressive National Constitution which recognizes same sex unions, and the region to which it belongs) decided to join the group of States that promoted the human rights of LGBTI persons.

This African country, together with Brazil, led the submission of a draft resolution at the Council on LGBTI persons focusing on the need to end violence and discrimination against them. The resolution had the support and sponsorship of the group of friends of the issue, including Argentina, but was strongly rejected by a group of countries, notably from Africa and Asia. It was, nonetheless, adopted by vote and represented a landmark in the recognition of the LGBTI community at the international level.[615]

The preambular part of the resolution recalls the universality, interdependence and indivisibility of all human rights, as set out in the Universal Declaration, the 1966 International Covenants and other core instruments; recalls that every individual is entitled to enjoy his or her human rights without discrimination; reminds the mandate of the Council; and expresses grave concern about the acts of violence and discrimination against individuals due to their sexual orientation or gender identity.[616]

In the operative part, the Council requests OHCHR to prepare a study by December 2011 on discriminatory laws and practices and acts of violence against LGBTI individuals. It also decides to convene a panel in a successive session of the Council to discuss the appropriate follow up to the recommendations of the study prepared by the High Commissioner and decides to remain seized of the matter.[617]

The response of the then High Commissioner, Navi Pillay, was fast and robust. Her Office issued the requested report in November 2011.[618] The document is comprehensive and starts by emphasizing that in all regions of the world there were people experiencing violence and discrimination on the basis of their sexual orientation or identity. It also affirms that UN

[615] Human Rights Council Resolution A/HRC/RES/17/19.
[616] Human Rights Council Resolution A/HRC/RES/17/19, preambular paragraphs 1-4.
[617] Human Rights Council Resolution A/HRC/RES/17/19, operative paragraphs 1-4.
[618] Report of the High Commissioner for Human Rights and the Secretary General, "Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity", UN Document A/HRC/19/41, 17 November 2011.

treaty bodies and special procedures have been documenting violations for almost two decades and those violations include, but are not limited to, killings, rape, torture, and arbitrary detention. Moreover, the report reminds that, in 2010, the then SG Ban Ki Moon emphasized the importance not to discriminate on the basis of sexual orientation or gender identity and asked to repeal laws criminalizing homosexuality.[619]

In this context, the High Commissioner reminds that States are obliged to respect and protect human rights of all persons irrespective of their sexual orientation.[620] In this context, the report describes violence suffered by persons on the basis of their sexual orientation.[621] She also described the discriminatory laws criminalizing same-sexual relations between consenting adults and other laws used to penalize them, including in some cases, with death penalty.[622] The report also described discriminatory practices in work spaces, health care, education, family and community and also restrictions to freedom of association and assembly. It also describes the denial to the recognition of rights as families, to the recognition of gender identity.[623]

At the national level, the report recommends to investigate killings and other acts of violence and to establish a system to report those crimes; to adopt measures to prevent torture and other degrading treatment against LGBTI individuals and prosecute those responsible for those crimes; to ensure the no return of a person claiming for asylum to a country where his or her life is in danger; to repeal laws which criminalize same-sex conduct and harmonize the age of consent between heterosexual and homosexual activities; to enact anti-discrimination legislation; to conduct training programs for security officers and support public information campaigns; among other measures.[624]

Following the issuance of her report in July 2013, the High Commissioner also launched a world campaign in favor of LGBT rights at the international level. At the time, a press conference was held in South Africa with the High Commissioner, the Archbishop Desmond

[619] Ibid, page 3.
[620] Ibid, page 4.
[621] Ibid, pages 8-13.
[622] Ibid, pages 13-15.
[623] Ibid, pages 6-22.
[624] Ibid, pages 24-25.

Tutu, and South African Judge Edwin Cameron. The campaign had a great impact and a series of activities were organized in different regions of the world.[625]

III.5.8.3 A South American initiative: the second resolution on the rights of LGBTI individuals and a new OHCHR report.

In 2014, South Africa decided to disengage from the initiative. The new draft resolution was submitted by Brazil, Chile, Colombia and Uruguay. Argentina also co-sponsored the resolution. The text was adopted by vote and represented a step forward in consolidating the protection of LGBTI individuals at the UN level.[626] The adoption of the resolution was not easy. Many Arab countries presented several amendments to the resolution, but these proposals failed and did not affect the content of the resolution.

The preambular part, among other issues, welcomes positive developments in the fight against discrimination on the basis of sexual orientation and gender identity, and welcomes the efforts of OHCHR in the fight against discrimination.[627] The operative part of the resolution takes note of the report made by OHCHR on discriminatory laws and practices and on the panel held in the nineteenth session, and requests the High Commissioner to update the report and to submit it in a successive session. Finally, it decides to remain seized of the matter.[628]

As a result, OHCHR issued a second report.[629] This document focuses on recent developments on the fight against discrimination and violence on the basis of sexual orientation and gender identity and includes positive developments such as the elaboration of anti-discrimination and hate crime laws, the legal recognition of same sex relationships, the protection of intersex children, and other measures to guarantee the recognition of

[625] United Nations Free & Equal Campaign for LGBT Equality, "UN Free & Equal Campaign First Year Impact Report 2013-2014", available at: https://www.unfe.org/wp-content/uploads/2017/05/2014-UNFE-Report.pdf
[626] United Nations Human Rights Council Resolution A/HRC/RES/27/32.
[627] United Nations Human Rights Council Resolution A/HRC/RES/27/32, preambular paragraphs 7-8.
[628] United Nations Human Rights Council Resolution A/HRC/RES/27/32, operative paragraphs 1-4.
[629] Office of the United Nations High Commissioner for Human Rights, Report on "Discrimination and violence against individuals based on their sexual orientation and gender identity", UN Document A/HRC/29/23, 4 May 2015.

gender identity.[630] Nevertheless, the report affirms that LGBTI individuals still face violence, harassment and discrimination.[631]

In its conclusions and recommendations, the report, among other things, calls on States to repeal laws that criminalize same sex conduct and propaganda laws. It recommends to enact legislation to ensure equality for LGBTI persons; investigate hate crimes; ban forced conversion treatments; provide recognition for same sex couples and their children; make sure that transgender persons have legal identity without the need to undergo abusive treatments; and guarantee refugee status to persons who escaped from countries where their sexual orientation or gender identity is criminalized.[632] It is important to mention that the report notes that, since 2011, three countries had decriminalized same sex relationships; fourteen countries had reinforced their anti-discrimination laws; twelfth countries had introduced marriages or civil unions for same sex couples; and ten had changed gender recognition laws.[633]

III.5.8.4 A Latin American initiative: the establishment of an Independent Expert on the protection against violence and discrimination on sexual orientation and gender identity.

In June 2016, Argentina, Costa Rica and Mexico joined Brazil, Chile, Colombia, and Uruguay as main promoters of the third initiative of the Human Rights Council regarding LGBTI individuals. The proposal needed a strong political support because it was difficult to achieve. Fortunately, it ended up in the adoption of a new groundbreaking resolution of the Council adopted by vote: the appointment, for the first time in history, of an independent expert on protection against violence and discrimination based on sexual orientation or gender identity.[634]

Negotiations were tough and the debate before the adoption was extensive. There were numerous proposals of amendments, but the process ended with relatively positive results.

[630] Ibid, page 19.
[631] Ibid, pages 7-18.
[632] Ibid, pages 23-24
[633] Ibid, page 3.
[634] Human Rights Council Resolution A/HRC/RES/32/2.

In the process, South Africa, a former supporter of the initiative, abstained because it argued that the proposal was divisive and confrontational.[635]

The preambular part of the resolution, refers to the Vienna Declaration and Program of Action, which highlights the universality, interdependence and inter-relatedness of human rights; the mandate of the Council; previous resolutions on sexual orientation and gender identity; the need to maintain joint ownership and to address issues in a non-confrontational manner; and the need to have a balanced agenda which includes all forms of discrimination.[636]

It also affirms the importance to consider different regional, cultural and religious value systems and the importance to respect national debates in sensitive issues; deplores external influences in national debates; expresses concern by attempts to undermine the international human rights system, to impose concepts in social matters, including in individual conducts, which affects the universality of human rights; and recognizes the sovereign right of a State to elaborate its own legislation but the need to respect the principle of universality of human rights.[637]

The operative part of the resolution reaffirms that all human beings are born equal in rights and freedoms; deplores acts of violence and discrimination against persons based on their sexual orientation and gender identity; and establishes the mandate of the independent expert which includes activities such as: assessing the implementation of international human rights instruments to overcome violence and discrimination against LGBTI individuals while identifying both best practices and gaps; raising awareness and identifying the root causes of violence and discrimination; engaging in dialogue with and consulting different stakeholders; cooperating with States; addressing multiple and aggravated forms of discrimination; and conducting or supporting advisory services to protect LGBTI rights. The resolution also requests the mandate-holder to submit reports to the Council and the GA; asks States,

[635] United Nations Web TV, "Vote on Draft Resolution - A/HRC/32/L.2/Rev.1 – "Protection against violence and discrimination based on sexual orientation and gender identity"", 30 June 2016, available at: http://webtv.un.org/search/ahrc32l.2rev.1-vote-item3-41st-meeting-32nd-regular-session-of-human-rightscouncil/5009164455001/?term=&lan=english&cat=Regular%2032nd%20session&sort=date&page=4.
[636] Human Rights Council Resolution A/HRC/RES/32/2, preambular paragraphs 1-5.
[637] Human Rights Council Resolution A/HRC/RES/32/2, preambular paragraphs 6-10.

OHCHR and other stakeholders to cooperate with the mandate-holder; calls on States to accept country visits and decides to keep the issue under the Council's agenda.[638]

III.5.8.5 Thematic reports of the Independent Expert.

Vivit Muntarbhorn was the first mandate-holder appointed for a relevant and difficult task. After a year of intense work, he left his position and was replaced by Victor Madrigal-Borloz. As the mandate allows the expert to have country missions, a relevant number of visits were undertaken, including one to Argentina.[639] Both mandate-holders exercised their mandate to transmit to States concerned letters of allegations and urgent appeals.[640]

I am going to focus on the thematic reports of the Independent Expert to explore how the issue was developed until present at the universal human rights level. Until now, there have been four reports. The first report was published in April 2017 and describes the elements of the mandate.[641] It also gives a panorama of the issue, referring to a statement of a dozen UN entities working to end violence against LGBTI persons and reminding that around seventy countries still criminalized same sex relationships. Moreover, it makes some reflections, emphasizing that the situation of LGBTI persons varies in each country.[642]

The report also affirms the need to implement existing instruments and to identify good practices and gaps and describes some of them.[643] It also indicates that the principle of non-discrimination contained in many human rights treaties is applied to LGBTI persons.[644] In addition, it refers to developments in different regions (e.g. the appointment of the special rapporteur on the rights of LGBTI persons in the Inter-American system, and Resolution 275 of the African Commission urging States to end violence committed against LGBTI persons by State or non-State actors).[645]

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[638] Human Rights Council Resolution A/HRC/RES/32/2, operative paragraphs 1-8.
[639] Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity on his mission to Argentina, UN Document A/HRC/38/43/Add.1, 9 April 2018.
[640] Office of the United Nations High Commissioner for Human Rights, "Your Human Rights", "Independent Expert on sexual orientation and gender identity", available at: https://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/Index.aspx
[641] Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Document A/HRC/35/36, 19 April 2017, pages 4-6.
[642] Ibid, pages 6-7.
[643] Ibid, pages 7-10.
[644] Ibid, page 7.
[645] Ibid, pages 8-10.

Moreover, the report addresses the root causes of violence and discrimination and indicates that it is necessary to work on the following underpinnings: decriminalization of consensual same sex relationships; effective anti-discrimination measures; legal recognition of gender identity; de-stigmatization linked with depathologization; socio-cultural inclusion; education; and empathy.[646]

It concludes, among other things, that everyone has some form of sexual orientation and regrets that some groups are affected by violence and discrimination because they have a sexual orientation different from the societal norm. As steps forward, the expert mentions that he would follow the issue on the basis of the six underpinnings mentioned above. He makes some recommendations, including the following: encourages States to ratify existing instruments; urges States to follow up on the recommendations made by special procedures, treaty bodies, and in the UPR; and to encourages more checks and balances between the Executive and Legislative branches.[647]

The second report was issued in July 2017 for the consideration of the GA.[648] In this opportunity, the mandate-holder describes the intersectionality between sexual orientation and gender identity, and other issues such as racism, poverty, migration, or disability, which fuel violence and discrimination. Moreover, the expert focuses on the process of decriminalization. According to his findings, 25 countries decriminalized same sex relationships in the last 20 years, including recent cases such as Lesotho, Belize, Mozambique, Nauru, Palau, Sao Tome and Principe, and Seychelles.[649]

The mandate-holder also describes positive developments on anti-discrimination measures in different countries and affirms that much remains to be done with regard to gender identity protection.[650] The conclusion of the second report emphasizes two of the underpinnings identified by the expert: decriminalization and anti-discrimination measures. Regarding the first underpinning, the experts indicates that checks and balances between the branches of the State and the role of civil society can contribute to change legislation.[651]

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[646] Ibid, pages 11-12.
[647] Ibid, pages 18-20.
[648] Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Document A/72/172, 19 July 2017.
[649] Ibid, pages 7, 11.
[650] Ibid, pages 17-21.
[651] Ibid, page 21.

Regarding the second underpinning, he highlights that it is important to adopt laws but also to focus on implementation.[652] The report recommends States to implement human rights treaties incorporating the respect for sexual orientation and gender identity; to cooperate with national human rights institutions; to protect human rights defenders; to reform laws, policies and practices against LGBTI individuals; among other actions.

The third report was issued in May 2018.[653] It focuses on hate crimes and hate speech as well as on violence and discrimination based on sexual orientation and gender identity.[654] It also addresses the root causes of discrimination: what constitutes masculine or feminine and what is labelled as normal. These root causes include three elements: the first is legislation in several countries which criminalize consensual same-sex conduct and the impact of these measures on other issues such as HIV prevention. The second is stigma: social discrimination in essential services such as health, education, employment. This stigma corrodes the social factory and affects LGBTI persons profoundly. The third is negation and the resulting gap: it is considered that these persons do not exist in a particular context and therefore violence and discrimination will not be collected as information needed to adopt measures to fight these abuses.[655] In this context, the report focuses on support for effective State measures at different levels, including law reform and access to justice.[656]

This third report recommends the adoption of laws and other measures by States tailored to their specific context; to repeal laws criminalizing consensual same-sex relationships; to avoid death penalty as sanction for consensual same-sex relationships; to take all measures to prevent and punish acts of violence, and to develop data collection procedures; to establish specialized prosecutorial units; to enact laws recognizing the rights of trans to change their documents; and to prohibit conversion therapies, among other measures.[657]

The last and fourth report to date is the one issued in July 2018.[658] It focuses on gender recognition as a component of identity. It begins by mentioning that the concept of gender

[652] Ibid, page 21.
[653] Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Document A/HRC/38/43.
[654] Ibid, pages 6-11.
[655] Ibid, pages 11-15.
[656] Ibid, pages 15-17.
[657] Ibid, pages 19-20.
[658] Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Document A/73/152, 12 July 2018.

identity varies among countries, but indicates that well established UN and regional documents use the term "trans" to refer to persons that identify themselves to a gender different as the one assigned at birth. This report focuses on one of the underpinnings mentioned in a previous one: depathologization.[659]

In this way, the report describes that until very recently, the tenth revision of the International Classification of Diseases maintained by the World Health Organization (WHO) included trans categories in the chapter of mental and behavioral disorders. In June 2018, the WHO released the eleventh revision of the Classification to be considered during this year, 2019. In the new document, trans categories have been removed from mental and behavioral disorders and a new category has been included in sexual health called "gender incongruence of adolescence and adulthood". This category is designed to facilitate access to gender-affirming treatment. The expert welcomes these changes that will help to depathologize trans persons, but indicates that the inclusion of a diagnosis of "gender identity disorder of childhood" has risen controversy, taking into consideration the rising autonomy that exists in relation to the rights of the child. This is why the mandate-holder decides to follow the matter in the future.[660]

The last report to date also indicates that the legal basis for State recognition is well established in international human rights treaties, taking into consideration the principle of non-discrimination. Self-determined gender is an essential choice of every human being that is related to his or her identity. Nevertheless, the expert acknowledges that UN human rights mechanisms continue to receive reports of transphobic violence and discrimination. It is still necessary to work on de jure or de facto discrimination on the basis of gender identity.[661]

It also addresses measures taken to respect gender identity at different levels: international (a 2016 joint call of UN human rights mechanisms, the OAS, the African Commission and the Council of Europe to reform medical classifications); regional (e.g. measures taken by the Council of Europe); and national (e.g. pioneer States such as Argentina, Malta and Denmark on the work of depathologization of gender identity).[662]

[659] Ibid, pages 3-4.
[660] Ibid, pages 5-6.
[661] Ibid, pages 7-8.
[662] Ibid, pages 13-21.

It also recalls that at least until 2018, only 10 States –including Argentina, which was the first of the world in 2010 to do it- have adopted laws adopting a model of recognition of gender identity based on self-identification. In many other cases of different regions of the world (e.g. Asia and Africa), the right has been recognized through the Justice system.[663]

The latest report highlights, among many other things, the need for States to address violence and discrimination based on gender identity and to move towards the implementation of the eleventh revision of the International Classification of Diseases as described above with careful attention to the analysis of gender incongruence of childhood; and to adopt legislative measures to ensure equality and punish transphobia and hate crimes.[664]

III.5.8.6 Balance of the work of Argentina and Latin America on the initiative on the rights of LGBTI persons.

In the last decade, the recognition of LGBTI persons at the international level has moved forward more than ever before. The Council contributed greatly to this cultural change since 2011 with a number of resolutions that ended in the appointment of an independent expert. This contribution has been significantly enhanced by the firm commitment of the former Secretary-General Ban Ki Moon and all High Commissioners from 2011 to date.

Argentina has also moved forward on the recognition of LGBTI individuals at the national level. A wide debate existed before the Equal Marriage Act was adopted in 2010, but today legal and cultural recognition has been acquired by LGBTI persons in the South American country. It comes as no surprise that this reflects its position internationally and that this decision has been maintained during different Government Administrations.

The country was part of the group of countries that pushed for the initiative from the very beginning. When South Africa disengaged from the initiative, a large group of Latin American countries, including Argentina, took the lead and pushed for the creation of a mandate. Argentina is also part of the core groups which promote LGBTI rights at the GA level and Inter-American System. As a result, Argentina has contributed to further develop

[663] Ibid, page 16.
[664] Ibid, pages 22-24.

the application of well-established principles of international human rights law, such as non-discrimination, to LGBTI individuals.

This has represented an enormous step forward. Nonetheless, much remains to be done as the issue remains divisive; many countries still criminalize adult consented same-sex relationships and they are not ready to change their position on cultural, religious and social grounds. Moreover, in all regions of the world, even in countries where positive legislative, administrative and other measures have been taken, there are still today several cases of discrimination and violence against LGBTI persons. It is highly probable that a group of States, including Argentina, will continue to support initiatives relating to the rights of LGBTI persons and to contribute to the development of international standards in this regard.

III.5.9 Other initiatives led or sponsored by Argentina in the Human Rights Council in the last few years.

During the lifespan of the Council, Argentina also joined initiatives promoted by the Common Market of the Southern Cone (MERCOSUR) as main sponsor in different issues, including democracy and racism.[665] Moreover, in the last few years, Argentina has joined different groups of States to promote new issues in the Human Rights Council. Indeed, the South American country joined a core group initiative in the Council to promote the prevention and elimination of child, early and forced marriages. This initiative has been led by the Netherlands and Sierra Leone and, as consequence, a series of resolutions have been adopted to strengthen efforts to prevent and eliminate this phenomenon, as well as to study its challenges, achievements, best practices and implementation gaps.[666]

The core group on the fight against child, early and forced marriages is composed by Argentina, Canada, Ethiopia, Finland, Honduras, Italy, Maldives, Montenegro, Netherlands,

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[665] UN Web TV, "Vote on Draft Resolution – "The incompatibility between democracy and racism" submitted by Argentina, Brazil, Paraguay, Uruguay, Venezuela", 2 July 2015, available at: http://webtv.un.org/search/ahrc29l.1-vote-item9-44th-meeting-29th-regularsessionhumanrightscouncil/4334384677001/?term=&lan=english&cat=Regular%2029th%20session&sort=date.

[666] UN Web TV, "Vote on Draft Resolution A/HRC/24/L.34/Rev.1 - Strengthening efforts to prevent and eliminate child, early and forced marriage: challenges, achievements, best practices and implementation gaps" 27 September 2013, available at: http://webtv.un.org/search/ahrc24l.34rev.1-vote-item3-37th-meeting-24th-regular-session-human-rights-council/2698995716001/?term=&lan=english&cat=Regular%2024th%20session&sort=date&page=2

Sierra Leone, Switzerland, Poland, Uruguay and Zambia. Until present, the Council organized a panel at the Council, requested reports to OHCHR, and organized an expert workshop in 2016. The last initiative focused on these types of marriages in humanitarian settings.[667] OHCHR elaborated a series of reports in conformity with Council resolutions and it also prepared a specific webpage.[668]

Furthermore, since 2017, Argentina also joined the core group that has moved forward the issue related to the negative impact of corruption in the enjoyment of human rights through various resolutions adopted by the Council from 2012 to present. This core group has been led from the beginning by Morocco and it has been growing throughout the years. Today it is composed of Morocco, Argentina, Austria, Brazil, Ethiopia, Indonesia and the United Kingdom.[669]

Until now, the Council has recognized by consensus the importance of the link between corruption and the enjoyment of human rights and it has encouraged States that have not yet done so to ratify the UN Convention against Corruption. The Council requested the Advisory Committee to prepare a report on corruption and human rights; invited OHCHR and the Office of the UN on Drugs and Crime (UNODC), as secretariat of the aforementioned convention, to exchange views on the link between corruption and the enjoyment of human rights. It also encouraged human rights mechanisms to consider the link between corruption and human rights within their mandates. Lately, it requested OHCHR to organize an event and prepare a summary with the results.[670]

Argentina also decided to join a group of countries led by Brazil, Cyprus, Ethiopia, Greece, Iraq, Ireland, Mali, Poland, Serbia and Switzerland, which have promoted the protection of cultural rights and of cultural heritage since 2016. This group condemns all acts of intentional

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[667] UN Web TV, "Vote on Draft Resolution - A/HRC/35/L.26 – "Child, early and forced marriage in humanitarian settings"", 22 June 2017, available at: http://webtv.un.org/search/ahrc35l.26-vote-item3-35th-meeting-35th-regular-session-human-rights-council/5479881908001/?term=&lan=english&cat=Regular%2035th%20session&sort=date&page=3

[668] Office of the United Nations High Commissioner for Human Rights, "Your Human Rights", "Women", "Child, early and forced marriage, including in humanitarian settings", available at: https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/ChildMarriage.aspx

[669] UN Web TV, "Vote on Draft Resolution - A/HRC/35/L.34 – "The negative impact of corruption on the enjoyment of human rights"", 23 June 2017, available at: http://webtv.un.org/search/ahrc35l.34-vote-item3-37th-meeting-35th-regular-session-human-rightscouncil/5480711103001/?term=&lan=english&cat=Regular%2035th%20session&sort=date&page=2

[670] Human Rights Council Resolutions A/HRC/RES/21/13, A/HRC/RES/23/9, A/HRC/RES/26/115, A/HRC/RES/29/11, A/HRC/RES/35/25, available at: https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/Documentation.aspx

destruction of cultural heritage occurred frequently in the context of armed conflicts and promotes the adoption of measures against smuggling and illicit trafficking of cultural objects, in cooperation with the UNODC and the UN Education, Science and Culture Organization (UNESCO). To date, the Council has adopted two resolutions and OHCHR has organized a seminar and published its conclusions.[671]

Moreover, Argentina has supported a series of initiatives relating to the abolishment of death penalty. It forms part of the task force that annually submits the resolution to the GA since 2008. The South American country is also part of the International Commission against death penalty. In the last few years, it joined the EU and Mongolia in a global alliance to end the trade of products used for death penalty, torture and other cruel, inhuman or degrading treatment. The EU has recently announced the intention to promote an international convention in this regard in the near future.[672]

Finally, in the last two years, during 2018 and 2019, for the first time since the establishment of the Council, Argentina has been a main sponsor of two initiatives regarding country situations. For instance, in September 2018, Argentina –at the time an Observer State of the Council- joined Canada, Chile, Colombia, Costa Rica, Guatemala, Guyana, Honduras, Mexico, Paraguay and Peru as main sponsor of an initiative on the promotion and protection of human rights in Venezuela, which was adopted by vote. The resolution welcomes a report made by OHCHR in the framework of its mandate; expresses concern about the human rights situation in that country; requests Venezuela to accept humanitarian assistance and to cooperate with the OHCHR; and requests the High Commissioner to prepare a comprehensive report.[673]

The second country situation co-led by Argentina was the one related to the human rights situation in Nicaragua during the March session of 2019. In this case, the main group of co-sponsors of the initiative were Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, Paraguay and Peru. A resolution was adopted by the Council by vote and, among other things, Nicaragua was urged to cooperate with OHCHR and to respect human rights

[671] Office of the United Nations High Commissioner for Human Rights, "Your Human Rights", "Cultural rights and the protection of cultural heritage", available at: https://www.ohchr.org/EN/Issues/ESCR/Pages/CulturalRightsProtectionCulturalHeritage.aspx.
[672] European Union External Action, "Banning the global trade in tools of torture", News Stories, 21 June 2019, available at: https://eeas.europa.eu/headquarters/headquarters-homepage/64632/banning-global-trade-tools-torture_mt
[673] Human Rights Council Resolution A/HRC/RES/39/1.

in its jurisdiction, in particular the rights to freedom of peaceful assembly, association or expression, as well as to guarantee the right to justice and reparation to the victims of human rights violations and abuses.[674]

[674] UN Web TV, "Vote on Draft Resolution - A/HRC/40/L.8 – "Promotion and protection of human rights in Nicaragua"", 21 March 2019, available at: http://webtv.un.org/search/ahrc40l.8-vote-item2-52nd-meeting-40th-regular-session-human-rights-council-/6016567235001/?term=&lan=english&cat=Regular%2040th%20session&sort=date&page=4.

IV. HUMAN RIGHTS IN ARGENTINA IN THE RECENT PAST AND THE IMPACT IN ITS ROLE AT THE INTERNATIONAL LEVEL, IN PARTICULAR IN THE HUMAN RIGHTS COUNCIL.

IV.1 Argentina and the heavy weight of the past: the dark years of the dictatorship.

It is not possible to assess the role of Argentina in the Human Rights Council without considering its recent past. Since the mid-1970's until present, Argentina, for bad and for good, has played a significant role in the universal human rights system. Following a period of turbulent violence and deep political and economic instability under the Presidency of Maria Estela Martinez de Peron (1974-1976), where serious crimes were committed by both violent groups and State officials, the Military Junta took power on 24 March 1976.

By the time, this was not an exceptional situation in the country where, since 1930, it had a succession of military regimes combined with periods of democratic Governments.[675] At the time, the existence of military regimes was not a rare characteristic in the political scene of Latin America either. During the 1960s, 1970s and 1980s, the vast majority of countries from the region was under the military rule or immersed in a civil war. In South America, Paraguayan military dictatorship began in 1954 and was followed by other military regimes in Ecuador (1963), Brazil (1964), Bolivia (1964), Peru (1968), Chile (1973), Uruguay (1973) and Argentina (1976). In Central America, long standing military regimes in Nicaragua (1937) and Guatemala (1954) were followed by new ones in El Salvador (1961) and Honduras (1963).[676]

A worldwide geopolitical division between the West and the East under the Cold War between the United States and the former Soviet Union as well as the impact of the Cuban Revolution of 1959 contributed to spread these regimes throughout several Latin American and Caribbean countries. Indeed, they were thought to contribute to security in the continent.

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[675] Potash, Robert A., "The Army and Politics in Argentina, 1928-1945: Yrigoyen to Perón", Stanford University Press, 1969. See also Potash, Robert A., "The Army and Politics in Argentina, 1945-1962: Perón to Frondizi", Stanford University Press, 1980; Potash, Robert A., "The Army and Politics in Argentina, 1962–1973: From Frondizi's Fall to the Peronist Restoration", Stanford University Press, 1996.

[676] Skaar, Elin, "Judicial independence and human rights in Latin America", Palgrave MacMillan, 2011, page 2.

Tragically, the last Argentine dictatorship, which extended until 1983, proved to be the most terrible dictatorship in the history of the country. In the name of the fight against terrorism, the Armed Forces committed gross human rights violations, including enforced disappearances; illegal deprivation of liberty in secret detention centers; torture; sexual offences; illegal executions; and appropriation of children who were born in captivity. Victims of these violations included, *inter alia*, members of often violent political groups, but also trade unionists, member of student unions, nuns and priests of shanty areas, some professionals of certain disciplines considered suspicious, friends of these people, friends of friends, and individuals who were mentioned during interrogations.[677]

In any case, the systematic practice of enforced disappearances was the most characteristic crime of the dictatorship. Soon, families, friends and lawyers started searching for the disappeared using the police, the judicial system and even petitioning to military authorities. They needed to know the truth about what happened. It was going to be a long search and, later, it would transform in a long fight towards truth and justice for the disappeared, who in too many cases, never re-appeared.

IV.1.1 The important role of the Argentine human rights movement. The Mothers and Grandmothers of Plaza de Mayo.

Since the mid-1970s, the Argentine human rights movement developed in the tragic context of a nation characterized by deep political violence. It was led by lawyers and relatives of victims of political detentions and enforced disappearances. Prior to the dictatorship, there were some human rights organizations such as the Argentine League for the rights of the man (Argentine League) established as early as 1937; the Service for Peace and Human Rights (SERPAJ), created in 1974; and the Permanent Assembly for Human Rights (APDH), set up in 1976. Soon, these non-governmental organizations started to denounce human rights violations which were being committed by the regime.

In the case of the victims and their relatives, the first organization was called "Families of detainees and disappeared persons for political reasons". It began forming in the context of the political turmoil and violence that preceded the months before the beginning of the

[677] "Nunca Más", Report of CONADEP (National Commission on the Disappearance of Persons), 1984, Part II, "The Victims", available at: http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_000.htm.

dictatorship, during the first months of 1976, but it was established as an NGO in 1977 with members in different provinces of the country.[678] APDH, the Argentine League, the Ecumenical Movement for Human Rights, and the Organization of Families of Detainees and Disappeared Persons for Political Reasons started to produce lists of persons who disappeared after 1975 and tried to disseminate the information abroad as much as possible.[679]

In 1977, a group of mothers started their difficult and terribly sad journey to know the fate of their children. At the beginning, they were only fourteen but the group soon grew in number and importance. After unsuccessful meetings with the police and other national authorities from the military regime, they started to gather once a week around Plaza de Mayo, the main square of Buenos Aires, located just across the Presidential Palace. Soon they were known as the Mothers of the Plaza de Mayo and became an icon of the fight against enforced disappearances not only in the country, but also in the rest of the world. Indeed, their headscarves soon started to constitute a worldwide symbol of resistance to oppression.

During 1978 and 1979, the Mothers were put under a lot of pressure and there were threats, arrests and even the disappearance of some of them, notably the President of the Mothers at the time, Azucena Villaflor. These obstacles did not stop them. In August 1979, the Mothers finally registered as an association. Gradually, they coordinated their efforts with other mothers who shared the same struggle in different provinces of the country.[680]

Encouraged by the enormous courage and persistence of the Mothers, by the end of 1977, another non-governmental human rights organization of women gradually developed searching for the truth about their relatives: the Grandmothers of Plaza de Mayo. Approximately 30 per cent of the disappeared were women and three percent of these women were pregnant at the moment they were abducted by the military. These women were looking for their grandchildren, who disappeared with their daughters during the dictatorship.[681]

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[678] Familiares de desaparecidos y detenidos por razones políticas, "Breve Historia de Familiares", available at: http://www.desaparecidos.org/familiares/historia.html.
[679] Amnesty International, "The Military Juntas and Human Rights", 1978, pages 2-5, in Bartolomei, Maria Luisa, "Gross and Massive Violations…", Ibid, pages 94-95.
[680] Fisher, Jo., "Mothers of the disappeared", Zed Books Ltd, London, 1989, pages 52-93.
[681] Nunca Más, Report of CONADEP, Ibid, Chapter II, "The Victims. The disappeared according to the victims".

During the tragic years of the dictatorship, new human rights NGOs were also created, notably the Center for Legal and Social Studies (CELS), which it started to work in 1979 and developed significant work against the crimes committed by the dictatorship, which continues even today.[682]

The situation of the disappeared was not only raised internally, but also abroad. The Argentines who were able to escape denounced the situation of gross human rights violations in different countries. There are numerous examples, such as the Argentine Commission for Human Rights and the Group of Argentine Lawyers Exiled in France. Some international NGOs also contributed to denounce the situation.[683]

In this sense, Amnesty International conducted a mission to the country in 1976 and issued a strong report in 1977.[684] The International Federation of Human Rights also sent a mission in January 1978 and the Lawyers Committee for Human Rights also visited the country in April 1979. On its part, the International Commission of Jurists (ICJ) issued reports on the situation and other human rights organizations, such as Pax Christi, made public what happened in the South American country during that period.[685]

The courageous work of these organizations –particularly the ones that were in Argentina, where the level of repression was terribly high and the threat to their own lives and integrity was a sound reality, undoubtedly helped in a significant way to make this situation known at the international level, including in the UN.

Once democracy was recovered in 1983, the NGOs continued fighting to ensure truth and justice for the victims of gross human rights violations committed during 1976-1983 and their relatives. In 1986, Mothers split in two groups: Mothers of Plaza de Mayo Founding Line and Mothers of Plaza de Mayo. Moreover, new NGOs were created at a later stage,

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[682] Centro de Estudios Legales y Sociales, "ESMA IV. Pedimos condenas para los nueve imputados", 11 June 2019, available at: https://www.cels.org.ar/web/2019/06/esma-iv-pedimos-condenas-para-los-nueve-imputados/

[683] Bartolomei, Maria Luisa, "Gross and Massive Violations…", Ibid, page 95.

[684] Amnesty International, "Report of an Amnesty International Mission to Argentina. 6-15 November 1976", Amnesty International Publications, Great Britain, March 1977, available at: https://www.amnesty.org/download/Documents/204000/amr130831977eng.pdf

[685] Bartolomei, Maria Luisa, "Gross and Massive Violations…", Ibid, page 95.

which continued to fight against impunity, such as Sons and Daughters for Identity and Justice against Forgetting and Silencing (HIJOS), founded in 1995.

Part of the uniqueness of the Argentine case is that NGOs early realized the importance of having legal means to challenge the amnesty laws –which were adopted during the democratic era- and to bring those responsible for human rights violations to justice. The cohesiveness of national NGOs and a high level of professionalization of human rights activists, lawyers and experts helped to remove significant obstacles, as we will see below.

IV.1.2 The Argentine case in the universal human rights system.

While these developments were taking place in Argentina and in the rest of Latin America in the late 1970s and early 1980s, the Commission on Human Rights, at the center of the universal human rights system, after having focused mostly on international law-making during its first two decades, decided to finally broaden its mandate so as to deal with human rights violations committed in specific countries.

As described above, the development of non-conventional mechanisms dealing with specific human rights violations started by the end of the 1960s. The first one was established under ECOSOC Resolution 1235 in 1967 to publicly gather and study information on grave human rights situations like the Apartheid. The second one was established in 1970 under ECOSOC Resolution 1503 in order to address, in a confidential process, consistent patterns of gross human rights violations, which in the end could be eventually considered in a public setting.[686]

Non-conventional mechanisms of the Commission were soon put to a test by the military regimes of Latin America, including those from Chile and Argentina. This should come as no surprise: Chile's Pinochet regime and the Argentine Military Junta are even today worldwide notorious and their methods were particularly brutal. These dictatorships justified

[686] See in this regard Chapter I.2.1.5 ("The development of non-conventional mechanisms: thematic and country mandates") of the present work.

their actions and their own existence[687] but the treatment of both countries in the universal human rights system was, however, significantly different.

Following the military coup against Chilean President Salvador Allende in 1973, the Commission reacted somehow quickly and established one of the first country mandates in history to deal with a human rights situation. The mandate lasted from 1975 to 1979 and had different formats: i.e. a working group, later replaced by a special rapporteur accompanied by two experts who studied the phenomenon of missing persons in the country.[688]

In the case of Argentina, the Junta had the chance to learn from its neighbor's experience and the dictatorship intended to counter-balance an international campaign for human rights in the country. It also had a complex and strategic political and economic relationship with the Great Powers that worked in its favor. All these factors have been thoroughly and widely analyzed and exceed the scope of this study.[689]

After the Argentine Coup in 1976, many communications were received at the UN and sent to the former Sub-commission under the 1503 procedure. The Sub-Commission expressed its concern quite early, in 1976, by adopting a resolution in August that year.[690] Nevertheless, except for a few statements in plenary from countries such as the United States or Sweden, there was a significant delay in the inter-governmental treatment of the Argentine situation in the Commission during the critical years of 1977-1980.

The Argentine Junta was also under the pressure of specific countries due to paradigmatic cases of disappeared persons from other nationalities, such as the French nuns, Leonie Duquet and Alice Domon, as well as the murder of the young Argentine-Swedish, Dagmar

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[687] See "Acta de Constitución de la Junta de Gobierno. Decreto Ley Numero 1", Santiago de Chile, 11 september 1973, available at: https://www.leychile.cl/Navegar?idNorma=237897. See also Junta Militar Argentina, "Documentos básicos y bases políticas de las Fuerzas Armadas para el Proceso de Reorganización Nacional", Buenos Aires, 1980, available at: http://www.bnm.me.gov.ar/giga1/documentos/EL000162.pdf

[688] Bartolomei, Maria Luisa, "Gross and Massive Violations…", Ibid, pages 97-98.

[689] Wright, Thomas C, "State terrorism in Latin America. Chile, Argentina and International Human Rights", Rowman & Littlefield Publishers Inc, Lanham, Boulder, New York, Toronto, Plymouth, UK, 2007. See also Schmidli, William Michael, "The fate of freedom elsewhere. Human Rights and US Cold War Policy toward Argentina", Cornell University Press, USA, 2013; Heinz, Wolfgang S. et al., "Determinants of gross human rights violations by State and State-sponsored actors in Brazil, Chile and Argentina, 1960-1990", Martinus Nijhoff Publishers, The Hague, Boston, London, 1999.

[690] Bartolomei, Maria Luisa, "Gross and Massive Violations…", Ibid, pages 97-98.

Hagelin.[691] In this context, a number of Argentines could save their lives thanks to the intervention of other countries. The Carter Administration, which governed the US between 1976 and 1980 and emphasized human rights as a relevant foreign policy, managed to help a few people and also adopted specific measures in relation to Latin American countries, including Argentina, to try to influence changes in human rights.

Nonetheless, at the UN level, the Commission neither established a mandate like the one on Chile nor followed the public procedure established under Resolution 1235. As a consequence, the only available option for NGOs and victims was the 1503 procedure and they decided to use it. Only in 1979, the working group on communications of this procedure finally agreed to send a number of communications of human rights violations in Argentina for the consideration of the plenary of the Sub-commission. In the session of that same year, the Sub-commission decided to transmit these communications to the consideration of the members of the working group on situations at the Commission, which decided to consider the Argentine case in 1980. These communications were processed by the Commission between 1980 and 1984 and during those years the Argentine Government responded to allegations made in this confidential procedure.[692]

The working group on situations transmitted the case to the plenary of the Commission the same year it received them, in 1980. The Commission discussed in a confidential manner the gravity of the situation, decided to keep the cases under review and asked further cooperation to Argentina. That same year, although there was opposition from Argentina, the Commission was able to create the first thematic mandate of the Commission, the Working Group on Enforced or Involuntary Disappearances, described in depth above. This was a mandate that could address any case in the world but it was clearly established to address the Argentine case. The fact that it could not name the Argentine situation reflected the intense work of Argentina in the Commission during the dictatorship and the political support of powerful countries to the regime.[693]

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[691] Piñero, Maria Teresa, "Las respuestas de la dictadura argentina a las denuncias en el ámbito internacional. Una mirada desde los archivos desclasificados de la Cancillería", available at: http://conti.derhuman.jus.gov.ar/2018/01/seminario/mesa_22/piñero_mesa_22.pdf.
[692] Bartolomei, Maria Luisa, "Gross and Massive Violations…", Ibid, pages 98-113.
[693] Guest, Iaian, "Behind the disappearances, Argentina's dirty war against human rights and the United Nations", University of Pennsylvania Press, 1990. See also, Bartolomei, Maria Luisa, "Gross and Massive Violations…", Ibid, pages 114-119.

Between 1981 and 1984, several new communications were processed, but after the restoration of democratic institutions in Argentina in late 1983, the Commission welcomed changes in Argentina and decided to discontinue the matter. Later, Raul Alfonsín, the first elected President in the country since the restoration of democracy, requested that the material on the national case under the 1503 procedure be published.[694]

The 1503 procedure proved to be a slow, complex and confidential tool to deal with gross human rights violations in the case of Argentina. By the time it began to consider the communications, the vast majority of enforced disappearances had already been committed. At the return of democracy, there was a political decision by the UN to dismiss the case. This decision has been criticized from a human rights perspective because there were no assurances of what the Alfonsín Administration would or could do regarding human rights violations committed during the military regime.[695]

If we compare the 1503 procedure with the work of the Inter-American Commission, the lack of effectiveness of the UN mechanism is much more evident. The famous 1980 report of the Inter-American Commission as a corollary to its visit to Argentina the previous year, benefited from onsite information. What is more, the visit and the report contributed to make a change in the human rights situation on the ground. After the visit and the issuance of the report, the number of disappearances seemed to have significantly decreased.[696]

In sum, for a long period of time, Argentina's role in the UN Commission on Human Rights was far from being exemplary. On the contrary, even if it was not an isolated case in the region, all gross human rights violations committed during the 1970s in this specific South American country left an undeletable mark in the universal human rights system. Indeed, the very concept of enforced disappearances, the rights to the truth and justice after gross human rights violations or serious violations of IHL, the work of the Argentine forensic team to identify victims, the efforts to search for children of the disappeared who were born in captivity and later illegally abducted and adopted or "appropriated" by families linked to the Armed Forces, and the tireless efforts and courage of families of the victims and NGOs are facts that are widely linked to Argentina at the international level.

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[694] Bartolomei, Maria Luisa, "Gross and Massive Violations…", Ibid, pages 137-185.
[695] Bartolomei, Maria Luisa, "Gross and Massive Violations…", Ibid, pages 186-198.
[696] Bartolomei, Maria Luisa, "Gross and Massive Violations…", Ibid, pages 276-280.

Measures taken to solve this tragic past are still being taken at the national level, notably through the judicial system. It has been a long path, in which during the first two decades of a young and at first vulnerable democracy that began in 1983, moments of progress and drawbacks were experienced.

IV.2 The return to democracy and the long path to combat impunity.

IV.2.1 The Alfonsín Administration. From CONADEP and the Trial to the Juntas to the amnesty laws.

President Alfonsín took office on 10 December 1983. The first measures adopted by the democratic President focused on the reestablishment of the rule of law and to hold the military accountable for gross human rights violations committed during the regime.[697] Only a few days after the beginning of the new democratic government, the Alfonsín Administration decided to create the National Commission on the Disappearance of Persons (CONADEP) through Decree 187/83. Said commission was integrated by representatives from different social sectors, e.g. scientific, religious, juridical, legislative, and literary.

The Commission was created to complement the work of national courts. Its mandate was specifically limited to receiving complaints and evidence, and referring them to competent tribunals; finding out the whereabouts and fate of the disappeared persons; determining the location of children taken away from their parents' and guardian's care; denouncing any concealment attempt before the courts; and issuing a final report 180 days after its creation.[698]

As a result of its work, it was possible to detect 180 illegal detention centers in different locations within the country, while another 80 were recognized as probable. Due to the size of the investigation, the Commission requested three months' extension to complete its report. By September 1984, it had registered 8,870 complaints, identified 1,300 accountable military and classified the disappeared persons into groups. As to these groups, for instance, the Commission estimated that 30% of the disappeared persons were workers, 17% clerks

[697] Alfonsín, Raúl, "Democracy and Human Rights", Síntesis Magazine Nº 29, Argentine Foundation for Freedom of Information (Fundación Argentina para la Libertad de Información (FUALI)), Buenos Aires, Argentina, December 2003.
[698] Decree No. 187/83.

and 80% youngsters. On 20 September 1984, the Commission submitted its final report, entitled "Nunca Más" (Never Again), which soon became a best seller in the country.

Soon after the publication of the CONADEP report, the Government decided to create a new position: the Under Secretary for Human and Social Rights. At first, this position was hierarchically under the Ministry of Interior and had the mandate of systematizing the information of the CONADEP, gathering new complaints of disappearances, identifying remains, and searching for the children born in captivity. In 1991, the structure of the Ministry was modified by Decree 245 and the Under Secretary became a National Directorship for Human Rights with additional functions, including the coordination of operations with the National Genetic Data Bank. By Decree 645, of 1996, the Directorship became the Office of the Undersecretary for Human and Social Rights. In 1999, it was transferred to the Ministry of Justice and Human Rights and, in 2002, it was upgraded to Secretary of Human Rights and remained with this status until present. This has been the highest public position in human rights within the country ever since.[699]

To strengthen the rule of law, the new Government promoted in Congress the adoption of the Law on the defense of democracy (Law No. 23.077), whereby Congress replaced the crime of rebellion in the Criminal Code for the crime of attacking the constitutional order and the democratic life. This law made the rules applicable to such attacks more stringent, especially as far as penalties were concerned.

In terms of reparations, the first democratic Administration took some steps. It passed a series of laws to vindicate the situation of the public officers who were dismissed during the dictatorship, including in sectors such as the diplomatic service, State companies, teachers, and to consider those years outside of work for their retirement.[700] Also, the first reparation law was adopted in 1986: Law to grant pension to the spouses and children of the disappeared persons (Law No. 23.466).[701] The Government also pushed for the adoption of Law No. 23.852 of 1990, whereby those who had suffered the disappearances of their parents and siblings before 10 December 1983 were exempted from military service. The military service was, however, repealed a few years later.

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[699] Guembe, María José, "Economic reparations for grave human rights violations: The Argentinean experience", in De Greiff Pablo, The Handbook of Reparations, Oxford University Press, Chapter 1, pages 21-54.
[700] Laws No 23.053, 23.238 and 23.278.
[701] Guembe, María José, "Economic reparations…", Ibid, pages 25-26.

The major issue, however, was to decide what to do with the terrible crimes committed by the dictatorship. One of the first limitations to overcome was the *de facto* Decree-law No. 22924 adopted by the military regime, known as the self-amnesty law, which provided for the extinguishment of the right to bring in court a legal action over crimes committed with a terrorist purpose, which took place from 25 May 1973 up to 17 June 1982. This law was declared null and unconstitutional by the adoption of Law No. 23.040 of 1983. The decision was controversial at the time: some scholars argued that the power to interpret laws solely pertained to the Judiciary,[702] while others supported the new law to fight against the impunity for those crimes.[703]

In this context, President Alfonsín signed Decree No. 158/83 ordering summary proceedings before a Military Tribunal against the members of the Military Junta that illegitimately took over the national government on 24 March 1976 as well as the members of the two subsequent Military Juntas.[704] Likewise, it decided to criminally prosecute the higher leaders of rebellious organizations, such as Montoneros and Ejército de Revolucionarios del Pueblo (ERP).

The Decree established that an appeal against the judgment pronounced by the Military Tribunal might be filed before a civil tribunal, the National Federal Court of Appeals in Criminal and Correctional Matters of Buenos Aires. As this special appeal was not available under applicable law, some amendments were proposed to the Military Justice Code, through Law No. 23.049. According to the new legislation, upon a given period of time without the trial coming to an end, and inasmuch as the Federal Criminal Court of Appeals of Buenos Aires considered undue delay and negligence on the part of the Military Tribunal, this civil tribunal would be in a position to take over the case, whatever the state of the proceedings.

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[702] Nino, Carlos, "A new strategy for the treatment of de facto rules", La Ley, volume 1983-D, page 935, in Sancinetti, Marcelo, "Human Rights in the Post-Dictatorship Argentina Pos-Dictatorial", Lerner Editores y Asociados, Argentina, 1988.

[703] Bacigalupo, Enrique, "Validity of the Rules Issued by the De Facto Government after the Election of the Constitutional Authorities", final decision issued in his capacity as Public Attorney, 1376/73, and "Something More about the Derogation of the Legislation issued by a De Facto Government", ED, Volume 49, page 989. See also Sancinetti, Marcelo et al., "The Criminal Law in the Protection of Human Rights. The Protection of Human Rights by Criminal Law in the Democratic Transitions in Argentina", Edit. Hammurabi SRL, Buenos Aires, Argentina, 1999, page 292.

[704] Decree No. 158/83, issued on 13 December 1983 and published on 15 December 1983.

As the trial in military venue showed to be impossible to accomplish, the procedure was referred to this civil federal tribunal. The trial started on 22 April 1985, and it was conducted in a remarkably short period, bearing in mind the political necessity to provide a quick conclusion to the issue. Out of the nearly 9,000 cases recorded, the Public Prosecutor for the case, Julio Strassera, only presented 709 cases and approximately 2,000 witnesses. The judgment provided as follows: the three commanders of the First Junta and two commanders of the Second Junta were convicted, while the Air Force commander of the Second Junta, as well as the members of the Third Junta, were acquitted.[705]

The commanders were convicted in their capacities of principals by virtue of the facts that could be proven under the proceedings. The ruling also urged the Military Tribunal to prosecute the higher officers who had held specific positions in the so-called anti-subversive operations. As there was again inaction of the Military Tribunal, a civil federal tribunal also judged other relevant high military officers and high officers of the security sector, including General Ramon Juan Alberto Camps and Miguel Osvaldo Etchecolatz.[706]

The historic Trial to the Juntas received special attention and generated a profound national debate among different sectors of society about its rather limited scope, considering the terrible crimes committed by the regime.[707] Nevertheless, the impact of such proceedings in the Latin American region and the international community was remarkable.

The trial against the commanders of the Juntas of the three military forces, as determined by the Executive Power, only focused on the chief officers, pursuant to the government's general strategy that was conducive to avoid prosecuting those who had abided to a higher officer without exceeding the task they had been entrusted with or without committing atrocities. Indeed, Alfonsín identified different levels of accountability and emphasized the need to sanction, in particular, higher authorities.

Notwithstanding the strategy implemented by the Executive Power in the Trial to the Juntas, further jurisprudential interpretation by the Judiciary enabled accountability for all the military agents who had complied with orders. This attribution of responsibility resulted

[705] Federal Criminal Chamber of Buenos Aires, Judgment of 9 December 1985.
[706] Lorenzetti, Ricardo Luis et al., "Derechos Humanos: Justicia y Reparación. La experiencia de los juicios en la Argentina. Crímenes de lesa humanidad", Editorial Sudamericana, 2011, pages 94-95.
[707] Moncalvillo, Mona et al., "Trial Against Impunity", Editoriales Tarso S.A., Buenos Aires, Argentina, 1980.

from the statement that no legitimate obedience to a higher officer might be accepted in case of the commission of atrocities.

In this context, and after a series of military revolts, the Alfonsín Administration was forced to push for the adoption of two amnesty laws, known as the Full Stop Law (Law No. 23.492) and the Due Obedience Law (Law No. 23.521). The first one was adopted to establish a final and short deadline of sixty days to bring crimes under the dictatorship to justice. This resulted in an overwhelming number of cases brought by families and their representatives as well as the decisions of judges to accelerate investigations on gross human rights violations committed during this period. The second law ended the possibility of incriminating and prosecuting those who committed crimes under instructions of their superiors. The Supreme Court of Justice confirmed in the Camps Case that it was impossible to go on prosecuting those responsible for severe human rights violations in Argentina and thus confirmed the validity of these laws. They remained in force until they were abrogated in 1998 by law 24.952, which deprived them of any effects for the future.[708]

These laws did not include the crime of appropriation of children of the disappeared. Thus, acts related to illegal appropriation, retention, concealment, and change of identity of the children of the disappeared persons were –and still are- investigated in court proceedings.[709] To contribute to the task of recovering the identity of children of the disappeared persons, Congress passed Law No. 23.511, which established the Genetic Data Bank with the main task to identify genetic information of children separated from their families in the dictatorship or who were born during their mothers' captivity, and who were taken away and given new identities by persons associated with the dictatorship. To date, it was possible to identify with scientific certainty 130 children who had been appropriated and who could see their identity restored. This has been done in close cooperation with the NGO Grandmothers of Plaza de Mayo and the National Commission on the Right to an Identity (CONADI), created in 1992 by Law No. 25.547.[710]

[708] Lorenzetti, Ricardo Luis, "Derechos humanos…", Ibid, pages 97-98.
[709] Thus, for example, Proceedings 10326/96 dated 22 September 1999 over the crime of misappropriation of children, related to case "Nicolaides C. and Others".
[710] Diario Infobae, "Las Abuelas de Plaza de Mayo anunciaron la restitución del nieto 130", 10 June 2019, available at: https://www.infobae.com/sociedad/2019/06/10/las-abuelas-de-plaza-de-mayo-anunciaron-la-restitucion-del-nieto-130/

IV.2.2 The Menem Administration. From the pardons to the truth trials and the reparation laws.

Since 1989, the newly elected President, Carlos Saul Menem (1989-1999), strengthened the impossibility of prosecuting and sanctioning those responsible for gross human rights violations. He issued a series of decrees granting presidential pardons to military officers and rebel groups and all ongoing criminal procedures were thus terminated.[711] As a result of these decrees, all cases pending against military officers were closed, whatever their procedural status.

These decisions triggered a doctrinal discussion on the scope of the power to pardon according to provisions of the National Constitution because it was not clear if a pardon could be granted to a person under investigation but without conviction. The Supreme Court of Justice settled the matter in the Aquino Mercedes Case by admitting the constitutionality of a decision of this nature (Court Decision 1992-2-899).

In this context, the members of the Military Juntas who were sentenced in the Trial of the Juntas or convicted under other cases were pardoned. Also, the higher officers of the Province of Buenos Aires Police convicted were pardoned. In turn, additional decrees benefited other governmental officials.[712]

However, the pardons did not affect the cases relating to the appropriation of children of disappeared persons born in captivity or illegal adopted. As a consequence, since the 1990s, there were some trials and, in 1998, one of the former Presidents during the dictatorship, General Videla, was sentenced in a case concerning children abducted and subjected to identity change in secret illegal detention centers.[713]

The amnesties and pardons did not discourage relatives of victims and human rights organizations to continue fighting against impunity in relation to other crimes committed during the dictatorship. In 1995, the public statements from former lieutenant commander Adolfo Scilingo that a number of bodies of illegal detainees had been thrown to the sea by

[711] Decrees No. 1002/89, 2741/90, 2745/90 and 2746/90. Decrees No. 1003/89, 1005/89, 2742/90, and 2743/90.
[712] Decrees No. 2745/90 and 2746/90.
[713] Lorenzetti, Ricardo Luis, "Derechos humanos…", Ibid, pages 104-105.

the Navy and the Coast Guard caused outrage in the Argentine society and intensified the need to exercise the right to the truth about the human rights violations perpetrated during the dictatorship, not only on the part of the victims' families but also for the society as a whole.

The request to investigate the facts alleged in cases that had been closed upon the pardons and full stop and due obedience laws was thus hastened.[714] The plaintiffs asserted their right to the truth about what had happened, which, among other things, included the right to find the remains of their relatives and the right to mourn their dead.[715]

As mentioned in the previous chapter, a landmark event took place within the context of the Lapacó Case (Nº 12059) before the Inter-American Commission. In August 1998, the Argentine Supreme Court of Justice declared that the extraordinary appeal filed by Ms. Carmen Aguiar de Lapacó, mainly intended to know the whereabouts of her disappeared daughter, was inadmissible. The Supreme Court argued that, in a criminal proceeding, the investigation is aimed at proving the existence of a punishable action. One month later, however, the Supreme Court decided otherwise in the Urteaga Case (Sentence 321:2767) and allowed a person to know the truth about his brother. The Supreme Court justified the change of position arguing that the request had been made under a specific resource, habeas data, and not under a criminal procedure.[716]

In any case, the Lapacó case was submitted before the Inter-American Commission and declared admissible by this regional body. The Argentine Government showed its willingness to reach a solution to Ms. Lapacó's claim. The result finally benefited not only the claimant, but also all the Argentine families who were searching for the truth. In the friendly settlement facilitated by the Inter-American Commission, Argentina recognized the right to the truth, which was defined as the exhaustion of every available resort to reach any clarification about what had happened to the disappeared persons.

The truth trials allowed the continuation of the investigation of the facts that surrounded the disappearance of thousands of persons during the last military government. Said

[714] See for instance Case Nº 76 "Facts that took place within the Navy Mechanic School", National Federal Criminal and Correctional Court of Appeals.
[715] See for instance Cases 450 and 761.
[716] Lorenzetti, Ricardo Luis, "Derechos humanos…", Ibid, pages 114-115.

investigations greatly contributed to the development of the right to the truth in the Argentine jurisprudence.

In 2003, in the Hagelin Case (Sentence 326:3268), the Supreme Court recognized the right to the truth of the families of the victims of human rights violations as an autonomous right, beyond the responsibility of the State to punish the perpetrators and to provide economic compensation to the victims and families. In 2004, the National Chamber of Criminal Cassation recognized that the obligation of the State to investigate the truth extended beyond the rights of the families and affirmed that it is of the utmost importance to promote collective memory and to prevent future human rights violations.[717]

The Argentine human rights movement not only focused on the right to the truth, but also on the right to reparation. This right was also recognized in the Inter-American Human Rights System. On 2 October 1992, the Inter-American Commission issued and published Report 28/92 whereby it stated that, by adopting the amnesty laws and the Presidential pardon 1002/89, Argentina had violated the right to justice as set out in the American Convention. As a consequence, it recommended Argentina to provide reparations to the petitioners and to take measures to establish the facts and identify those responsible for the perpetration of human rights violations.

This decision strengthened some complaints made before civil jurisdiction for compensation for the illegal detentions during the violent period of 1970s and 1980s. Judicial decisions, considered on an individual basis, arrived to different conclusions depending on the case. Those who were affected by the interpretation presented petitions to the Inter-American Commission and the issue was pending when Menem assumed power.

It is important to highlight that President Menem himself was a political prisoner between 1976 and 1981 and thus that he had been one of the approximately 10.000 prisoners during the dictatorship and its preceding years.[718] In 1991, President Menem issued Decree 70/91 in reply to the petitioners' claims. Decree 70/91 decided to give compensation to those persons who were arrested by the Executive Branch –upon an act issued by the latter, until

[717] Decision of the Cámara Nacional de Casación Penal, Sala I, "Defensor Público Oficial ante la Cámara Federal de Apelaciones de Mendoza s/recurso de casación", Case 3501, Sentence of 2 December 2004. See also, Lorenzetti, Ricardo Luis, "Derechos humanos…", Ibid, page 116.
[718] Guembe, María José, "Economic reparations…", Ibid, page 28.

10 December 1983. As a consequence, the cases brought before the Inter-American Commission were closed upon an amicable solution reached between the Argentine Government and more than ten petitioners (Report 1/93). That solution was beneficial not only to the petitioners denouncing the case -who received compensation- but also to those individuals who were in a similar situation.

Decree 70/91 was subsequently supplemented with laws adopted by Congress that extended the benefits provided thereby. In 1992, Congress adopted Law No. 24.043, which validated Presidential Decree 70/91 and extended its content to the military detained under a military tribunal and persons detained as a consequence of a state of siege.

Law No. 24.411 was enacted at the end of 1994 to give reparations in cases of enforced disappearance. It established a benefit to the relatives of those persons who were subjected to enforced disappearance. The same benefit extended to the relatives of any persons who had died as a consequence of State officials' activities.[719] Nonetheless, Law 24.411 proved controversial because a part of the relatives of victims considered that they would be accepting money in exchange for the fate of their children. Indeed, relatives had to recognize that the victim of enforced disappearance was dead to be able to have an economic compensation but they were not willing to do so because they were still looking for them.

The problem was addressed on 11 March 1994 through the adoption of Law No. 24.321, which entitled the State to declare the absence by enforced disappearance of any person who, up to 10 December 1983, had disappeared from the place of his/her domicile and/or residence with no notice of his/her whereabouts. A subsequent law, Law No. 24.823, provided that as long as the person remained disappeared, the benefits would be distributed amongst his/her descendants, spouse, ancestors and relatives, in that order of priority. The judge would declare the absence by enforced disappearance and the effects of the declaration would be similar to those of a declaration of death. However, the disappeared persons were not considered dead and therefore the investigations to determine their fate and whereabouts had to continue.[720]

[719] Law No 24.411, articles 3- 5.
[720] Guembe, María José, "Economic reparations…", Ibid, page 36-40.

In any case, not all families accepted reparations under Law No. 24.411. Mothers of Plaza de Mayo –led by Hebe de Bonafini- did not want to accept compensation while the rest of the NGOs, including Mothers of Plaza de Mayo Founding Line, considered that it was a personal decision. Moreover, although some politicians were against, the law included the disappearances that were committed by the Argentine Anti-Communist Alliance (AAA), a paramilitary force that was established during the violent years that preceded the dictatorship.[721] Additional reparations laws and measures were also adopted a few years later, during the Kirchners administrations. [722]

A final remark should be made about a landmark event that took place during Menem's Government that greatly contributed to the promotion and protection of human rights at the national level: the constitutional reform of 1994. Said reform inter alia incorporated new rights and guarantees into the Constitution (Sections 36 to 43) and stipulated that a number of international human rights treaties and declarations enjoyed constitutional hierarchy (cf. Section 75, subsection 22). The National Constitution as reformed, further stipulates that other human rights conventions may acquire constitutional status in the future in accordance with the procedure provided for therein.

IV.2.3 The De la Rua administration. In absentia trials abroad and a limit to extraditions.

Due to the impunity for gross human rights violations generated by the amnesty laws and pardons, a number of European national tribunals initiated processes to investigate and punish human rights violations committed during the last dictatorship (e.g. Italy and France).[723] On 5 December 2001, during the short Administration of President Fernando De la Rúa (1999-2001), Decree 1581/2001 was enacted providing that the requests for extradition for the facts occurred during the last military dictatorship in the national territory and other places subject to national jurisdiction would be dismissed. Those facts included, among others, those relating to the enforced disappearances.

This decision was justified in the Decree by making reference to, inter alia, the fact that some of the cases being tried by foreign courts had already been investigated and prosecuted by

[721] Guembe, María José, "Economic reparations…", Ibid, pages 38-39.
[722] Guembe, María José, "Economic reparations…", Ibid, page 41.
[723] Lorenzetti, Ricardo Luis, "Derechos humanos…", Ibid, pages 124-126.

the national judiciary, with the pertinent criminal cases being extinguished pursuant to applicable laws, or continued being investigated by national courts.

In the same year as the aforesaid Decree was passed, and despite the ruling issued by the Supreme Court of Justice regarding the constitutionality of the amnesty laws, on 6 March 2001, Federal Judge Gabriel Cavallo declared the unconstitutionality of the full stop and due obedience laws thus adopting a different position from the rest of the national courts since 1987. This approach was followed by other courts and reached the Supreme Court a few years later.

IV.2.4 The Kirchners administrations. Towards the end of impunity.

After an economic and political crisis at the end of 2001, which led to a succession of Presidents who held office for short periods of time, Nestor Kirchner was elected President in 2003 in democratic elections. His successor, in 2007, was his wife, Cristina Fernandez de Kirchner, who was elected for two successive terms and led the country until December 2015. The Kirchners adopted a series of measures that were key to end impunity for the gross human rights violations committed during the 1970s and 1980s.

First, the new Government of Nestor Kirchner promoted the adhesion to the Convention on the non-applicability of statutory of limitations to war crimes and crimes against humanity, which later acquired constitutional status. Second, the matter of the amnesty laws and pardons was put under consideration of Congress in a similar way as the nullity of the "self-amnesty law" was dealt with during the Alfonsín administration. As a result, Law No. 25.779 was adopted on 2 September 2003, whereby the aforesaid laws were declared "irretrievably null". This decision gave rise to different doctrine positions regarding its validity and legitimacy as it had happened 20 years before.[724]

The Kirchners' administrations also contributed to fight against impunity with the decision to create in the Office of the Prosecutor General a special unit to investigate crimes against humanity during the dictatorship (decision PGN 14-07); the decision to retire a number of

[724] Rivera, Julio Cesar, "Annulment of laws by the National Congress", La Ley, published on 22 August 2003. See also, Gordillo, Agustín, "May laws 23492 and 23521 be declared irretrievably null", in La Ley, published on 25 August 2003. Gil Domínguez, Andres, "The nullity of the laws and the epistemic value of democracy" in La Ley, 27 August 2003.

army generals; and the decision to consult civil society about the promotion of military officers.[725]

Upon the declaration of nullity of the amnesty laws, the Federal Court of Appeals in Criminal and Correctional Matters of Buenos Aires proceeded to re-open the "mega-cases" related to the serious crimes perpetrated during the dictatorship: Case 761 (related to the facts that took place within the framework of the Army Mechanic School "ESMA"), Case 450 (known as "Case of the Army's First Body or "Case Suárez Mason"), and Case 44 (usually called "Case Camps"). On the other hand, even though not covered by Law No. 25.779, a series of judges declared the unconstitutionality of presidential pardons adopted during Menem's Government.[726]

The Supreme Court of Justice also decisively contributed to end impunity, in particular through three judgments.[727] The first one was the Arancibia Clavel Case (Sentence 327:3312), where the Court decided on the non-applicability of the statute of limitations for crimes against humanity. According to the Supreme Court, the principle of legality –that is to say, the possibility to condemn someone for a fact that was not a crime when it was perpetrated- was not applicable because the Convention on the applicability of non-statutory limitations for war crimes and crimes against humanity only "declared" an existent *ius cogens* norm. The Supreme Court also took into consideration the jurisprudence of the Inter-American Court in cases such as Barrios Altos and Velazquez Rodriguez.

The second key sentence of the Supreme Court was delivered in the Simon Case (Sentence 328:2056), in which it decided on the unconstitutionality of the final stop and due obedience laws and strengthened the nullity declared by Congress. The progressive evolution of international human rights law, the customary nature of the crimes against humanity and the regional jurisprudence in relation to human rights –once again, for instance, it made reference to the Barrios Altos case of the Inter-American Court- were elements considered by the majority of Court to declare the unconstitutionality of the amnesty laws.[728]

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[725] González Ocampo, Ezequiel, "Shifting legal vision. Judicial change and human rights trials in Latin America", Cambridge University Press, 2016, pages 116-140.
[726] Centro de Estudios Legales y Sociales, "Derechos Humanos en la Argentina. Informe 2004", Siglo XXI, 2004, 1st Edition, in Lorenzetti, Ricardo Luis, "Derechos humanos…", Ibid, pages 126-128**.** See also Decision adopted by the National Federal Court in Criminal and Correctional Matters N° 3, 2004/3/19 related to case "Suárez Mason, Guillermo and others".
[727] Lorenzetti, Ricardo Luis, "Derechos humanos…", Ibid, pages 129-167.
[728] Lorenzetti, Ricardo Luis, "Derechos humanos…", Ibid, pages 145-158.

The last one was the Mazzeo Case (Sentence 330:3248), where the Supreme Court declared the unconstitutionality of the pardon decrees for cases of crimes against humanity. It is referred to crimes against humanity. The main defense of the military officers in the case was the previous declaration of constitutionality of the pardons and the principle of *ne bis in idem* (not to judge a person twice for the same crime). The majority of the Court considered the nature of the crimes against humanity –not subject to statute of limitations- and their existence as international customary norms. They also based their decision on the Almonacid Case of the Inter-American Court, which indicated that the principle of *ne bis in idem* is not absolute and is not applicable if, following the perpetration of gross human rights violations, there was no real intention to bring the person to justice.[729]

Concerning the Executive Branch, in July 2003, President Kirchner repealed Decree 1581/2001, and issued Decree 420/2003 establishing the obligation of courts to consider all extradition requests, as required under Law No. 24767 on International Cooperation in Criminal Matters, relating to the facts that took place in the Republic of Argentina between 24 March 1976 and 10 December 1983.

From that moment on, it has been possible that those responsible for human rights violations during the last military dictatorship may be extradited to another State, provided that they are not prosecuted in the country and other applicable legal conditions are met. Nevertheless, this did not happen because all cases were re-opened in Argentina.

The Kirchner administrations also promoted an additional series of reparations laws. Law No. 25.914, adopted on 30 August 2004, extended economic compensation to the persons who were born in captivity while their mothers were illegally detained; children who were detained or remained in military areas following the disappearance of their parents; and children whose identity was substituted. Moreover, in 2013, the Argentine Parliament adopted Law No. 26.564 to grant pensions to those persons who were victims of illegal detention until 10 December 1983.[730]

[729] Lorenzetti, Ricardo Luis, "Derechos humanos…", Ibid, pages 158-167.
[730] Argentine Ministry of Justice and Human Rights, "Reparation laws. Financial reparation for victims of State terrorism", available at: https://www.argentina.gob.ar/derechoshumanos/proteccion/leyesreparatorias

The right to economic compensation for persons in exile was discussed for a long time, but there were divided opinions in that regard. In October 2004, the Supreme Court of Justice ruled that the situation of those who have escaped to save their lives suffered a situation that was similar to that of those who were illegally detained and, therefore, enjoyed the right to reparation. This opened the possibility for persons in exile to ask for compensation.[731]

Furthermore, there were decisions aimed at enhancing the right of grandmothers to find their grandchildren. In 2009, Congress adopted Law No. 26.548 on the National Genetic Data Bank to ensure the collection, storage and analysis of the genetic information required as evidence for the investigations on enforced disappearances. Argentina also signed an agreement with the Argentine Forensic Anthropology Team (EAAF) with the aim of implementing the "Latin American initiative for the identification of disappeared persons."

The identification of children abducted from their biological families has not always been easy. There have been cases of children –today adults- who have refused to contribute to the cases so as to protect their adopted parents against legal prosecution. Not all of them have had the intention of initiating contact with their biological families.

In this context, the jurisprudence regarding the possibility to order a DNA test on a compulsory basis changed over time. The right to the truth of families and society and the right to privacy of every individual were in conflict. In 1996, the Supreme Court decided to admit a compulsory blood extraction (Guarino Case). Nevertheless, in 2003, the high tribunal changed its position and opposed to a compulsory blood extraction, which affected the privacy of the victim and would be used as evidence to prosecute her adoptive parents (Evelyn Vazquez Ferrá Case). Grandmothers of Plaza de Mayo brought this case before the Inter-American Human Rights System and, in the end, it reached a friendly settlement with the Argentine Government to ensure the participation of victims in judicial processes through specific legislation[732] The judicial case, meanwhile, was resolved because the genetic information was taken from Evelyn's belongings, without a compulsory blood test, and it was proved that she was the daughter of a disappeared woman.

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[731] Supreme Court of Justice, Case "Patricia Yofre de Vaca Narvaja". See also Ministry of Justice and Human Rights Resolution 670/2016, which limits the possibility to be compensated in case of exile, available at: http://www.jus.gob.ar/media/3176168/RS-2016-00812796-APN-MJ.pdf

[732] Decree No. 1800/2009, available at: https://www.argentina.gob.ar/normativa/nacional/decreto-1800-2009-160434/texto

In 2005, the Director of the National Data Bank affirmed that there was no need to extract blood from someone to identify his/her DNA because such information could be obtained from personal objects. In light of this development, in the framework of the case of two brothers (Prieto I and II Cases), and following a series of appeals, the Supreme Court decided that the DNA test made on the basis of biological material found in someone's belongings –not from a compulsory blood test- do not affect the right to privacy of victims and is an acceptable way to find the truth without affecting the integrity of any part of the body of the victim.[733]

Finally, Law No. 26.549 was adopted, according to which DNA tests could be undertaken on the basis of material extracted on a compulsory basis from personal objects upon a judicial decision and with the assistance of the National Data Genetic Bank. This law was in line with the friendly settlement signed between the Government of Argentina and Grandmothers of Plaza de Mayo in 2009 in the case of Evelyn Vazquez Ferrá and approved by the Inter-American Commission in 2010.[734] The issue is still controversial because it clashes with the right to privacy and there have been proposals to amend this law during 2019.[735]

In 2011, National Congress adopted Law No. 26.679, whereby it adopted the criminal offence of "enforced disappearance". From that moment on, there has been no need to resort to a multiplicity of related offences to criminalize the terrible practice which has made the Argentine military dictatorship worldwide known.

The creation of the National Memory Archive was another relevant measure adopted during the Kirchners administrations. It was decided that it would function as a decentralized body under the Secretary for Human Rights.[736] Likewise, the President and the Major of Buenos Aires City subscribed Agreement Nº 8/04, which ended in the construction of a space for the memory and for the promotion and defense of human rights at the Navy Mechanic School (ESMA). Today, the Secretary of Human Rights of the Ministry of Justice has its offices in ESMA.

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[733] Lorenzetti, Ricardo Luis, "Derechos humanos…", Ibid, pages 108-113.
[734] Inter-American Commission on Human Rights, Report 160/10, Petition 242-03, Friendly Settlement, Inocencia Luca de Pegoraro et al. Argentina, November 1, 2010.
[735] Honorable Congreso de la Nación Argentina, "Diputados Argentina", "Proyecto de Ley", 8 March 2019, available at: https://www.diputados.gob.ar/proyectos/proyecto.jsp?exp=0352-D-2019
[736] Decree No. 1259/2003, published on 17 December 2003.

IV.3 A positive change in the 21st century. The impact of Argentina in the fight against impunity at the international level.

Following the dramatic experience during part of the 1970s and 1980s, more than thirty-five years after the return to democracy in 1983, Argentina adopted an enormous quantity of legislative, judicial and administrative measures to tackle impunity for past human rights violations. It was a difficult process with progress and drawbacks. In a long and hard process, Argentina found its own way to successfully deal with its past and fight against impunity, making historic precedents with many of the decisions taken. It created one of the first truth commissions in the world to publish a report and it was the first country in the region and the third in the world –after the Trials of Nuremberg and the trials in Greece in the 1970s- to bring perpetrators of gross human rights violations to justice.

The final judicial decision of the Trial to the Juntas was limited to the responsibility of nine members of the Military Junta and to a series of events which could be clearly proved, thus excluding a significant number of perpetrators and crimes against humanity committed during that period. Nevertheless, the trial itself and its outcome –the judicial decision convicting some of the military leaders for terrible crimes- made history and had an important media impact all around the world.[737]

The amnesty laws adopted in 1986 and 1987 and later the pardon decrees represented a significant drawback, which allowed impunity for all the heinous crimes committed by the dictatorship. This sad precedent was carefully followed by its Latin American neighbors, which were still governed in many cases by military regimes. Indeed, following the Argentine path, 16 Latin American countries adopted amnesties to prevent the destabilization of their new democracies.[738]

Nonetheless, the Argentine human rights movement contributed both internally and abroad to fight against impunity. The truth trials and the reparation laws were the result of their tireless efforts, with the essential contribution of the Inter-American system.

[737] Skaar, Elin, "Judicial independence and human rights in Latin America", Palgrave MacMillan, 2011, page 3.
[738] González Ocampo, Ezequiel, "Shifting legal vision…", Ibid, page 3.

Moreover, the Grandmothers, together with the State through CONADI and the Genetic Data Bank, made a special contribution to the human rights field through the use of forensic genetics to search for children who had been appropriated and their identity suppressed. It was also a technique used in human rights trials to identify the remains of part of the victims who had disappeared. The technique was used and developed by the Argentine Forensic Anthropology Team, the first in the world to work in the context of gross human rights violations. This team has worked in 30 countries around the world.[739]

Since the turn of the century, in 2003, the Executive, Legislative and Judicial Branches all adopted measures that contributed to fight against impunity for crimes perpetrated during the dictatorship and thus, all cases that had been previously closed, were re-opened. Argentine courts are still investigating some of them. National jurisprudence made a progressive interpretation of international human rights law so as to finally hold accountable all responsible of gross human rights violations. This tendency was replicated in other countries of the region, such as Chile and Peru. Indeed, fortunately, judges abandoned long-standing criminal criteria applicable to ordinary cases –including the principles of legality, statute of limitations and non-retroactivity- and embraced creative interpretations of the National Constitution and international human rights law in order to adjudicate many complex cases of crimes against humanity.[740]

In conclusion, at the turn of the century, the South American country was able to make a very significant, successful change that decisively contributed to combat impunity for gross human rights violations. It was only then when Argentina had a strong international legitimacy and was ready to take a leading role, contributing to set norms and standards in issues closely related to its past but also to its present and future.

IV.4 Argentina and the new human rights agenda in the democratic era.

Since 1983, during its more than thirty-five years of continued democracy, the country has not only addressed extensively the question of impunity for gross human rights violations committed during the 1970s and 1980s. It has also focused on many other relevant issues such as the rights of women, children, older persons, migrants, indigenous peoples, LGBTI

[739] Argentine Forensic Anthropology Team-Equipo / Argentino de Antropología Forense (EAAF,) available at: https://eaaf.typepad.com/founding_of_eaaf/
[740] González Ocampo, Ezequiel, "Shifting legal vision…", Ibid, pages 6-70.

individuals, and persons with mental health problems. Argentina also adopted measures to guarantee economic, social and cultural rights. The promotion and protection of human rights became a State policy, both internally and abroad.

At the domestic level, as mentioned before, the Argentine National Constitution was amended in 1994. Since then, a series of international human rights instruments have acquired constitutional hierarchy and thus have complemented the rights guaranteed in the first part of the Constitution. These instruments are: the American Declaration on the rights and duties of man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on civil and political rights and its optional protocol; the International Covenant on economic, social and cultural rights; the Convention on the prevention and punishment of the crime of genocide; the Convention on the elimination of all forms of discrimination against women; the Convention on the elimination of racial discrimination; the Convention against torture and other cruel, inhuman and degrading treatment; and the Convention on the rights of the child.[741]

The amended Constitution provides for the possibility to give constitutional status to other international instruments with the approval of a two-thirds majority of Congress. On this basis, three instruments acquired constitutional status to date: the International Convention on the non-applicability of statute of limitation on war crimes and crimes against humanity,[742] the OAS Convention for the protection of all persons against enforced disappearances,[743] and the International Convention on the rights of persons with disabilities.[744]

Many progressive laws have also been adopted in the last few years to incorporate the highest standards of human rights protection. The following are some examples.

In 2004, the new law on Migration[745] was adopted to facilitate that citizens of MERCOSUR countries and migrants of rest of the world could obtain their residency. In addition, in 2007, Argentina ratified the Convention on the protection of the rights of all migrant workers and their families. As a consequence, the level of protection for migrants is one of the most

[741] See Argentine National Constitution, article 75 (22).
[742] See Law No. 25.778
[743] See Law No. 24.820
[744] See Law No. 27.044.
[745] See Law No. 25.871 and Decree No. 616/2009.

extensive both in the Latin American region and even internationally, in times where there is a general tendency in Western countries to limit the rights of migrants.

In 2010, Argentina adopted the historic Law on Equal Marriage (Law No. 26.618), allowing same-sex couples to get married and to have the exact same rights as heterosexual couples. As mentioned before, this law was the first law of its kind adopted in Latin America and the tenth in the world. In recent years, many countries of the region, namely Chile, Colombia, Brazil and Ecuador, have followed Argentina's lead and have protected -with different levels of recognition- LGBTI couples.

In 2012, the adoption of Law No. 26.743 on Gender Identity represented another significant step towards the full respect of the rights of trans persons. This law was the first in the world to require only the self-perception of gender as a condition to be identified with such gender in the legal documents. In other countries, surgery is required prior to legal recognition. The tendency, as we saw before, is fortunately changing in different countries. As a consequence, Argentina has also been avant-garde in terms of the protection of rights of LGBTI persons in the international community.

Argentina has also taken steps to guarantee economic, social and cultural rights. In a developing country, which has suffered cyclical and severe economic crises for several decades and the world biggest default to a foreign debt in 2001, the fight against poverty is key. In 2009, the Argentine Government created a Universal Allowance per Child, which benefits families with children since they are born and until they are 18 years old. Since 2011, by Decree 446/2011, there is also a Universal Allowance per Pregnant Women for those who are unemployed, work in an informal basis, or work as housemaids.

Since 2005, Argentina also has a national plan against discrimination, which has allowed the identification of all groups that suffer discrimination and the adoption of measures to protect them. Recently, Argentina developed a national action plan on human rights for the period 2017-2020. The key issues of the plan are: inclusion, non- discrimination and equality; public safety and non-violence, memory, truth, justice and reparation policies; universal access to rights and civic culture; and commitment to human rights.

Moreover, the first specific plan to prevent and eradicate violence against women (2017-2019) was adopted. It is worth mentioning that in the last few years, the rights of women – which had already been protected by the ratification of both universal and regional conventions and have a national State institution with competence in the field- have had an important influence in the national political agenda and public opinion.

During 2017 and 2018, the Argentine Government launched two additional action plans: one to reduce pregnancy in adolescents, and another to accompany children up to four years while their mothers work. Moreover, in 2017, the Parliament adopted the Law on gender equality representation in political spaces, which will have an impact in the composition of political parties and Congress.

Politicians from different parties have joined their voices with new social groups and organizations, which are taking a leading role in demanding the end of violence against women and in promoting the right of women to free, legal and safe abortion. The Administration of President Macri allowed the discussion on the legalization of abortion in Parliament during 2018 but, after a successful adoption in the Chamber of Deputies, the draft bill did not pass in the Senate. The debate is still open.

Argentina has also recognized the rights of indigenous peoples in the reform of the National Constitution (article 75, para 17). It has also enacted a series of specific laws and measures on the rights of indigenous peoples and created the National Institute for Indigenous Issues.[746] It has also been dealing with a series of cases on the rights of indigenous peoples to their ancestral lands in the Inter-American system. There are still challenges to effectively protect the rights of indigenous peoples and it would be desirable to reinforce existing policies both at the national and provincial levels to improve their life.

At the international level, the country supported the international decades dedicated to indigenous peoples at the UN level, as well as the Expert Mechanism on the rights of indigenous peoples created by the Human Rights Council. Nevertheless, Argentina had problems in negotiations during the Human Rights Council when a draft declaration on the rights of indigenous peoples was put to a vote in 2006. Unfortunately, issues regarding the

[746] Ministry of Justice and Human Rights of Argentina, "Normativa sobre Pueblos Indígenas y sus comunidades", available at: https://www.argentina.gob.ar/derechoshumanos/inai/normativa

scope of the terms self-determination and territories forced Argentina to abstain in the adoption of the instrument in the Council. Negotiations were re-opened at the GA level, when the declaration was finally endorsed, and Argentina changed its position and voted in favor, expressing its interpretation regarding some concepts contained therein.

IV.5 Argentina in the Human Rights Council.

When the Human Rights Council was established in 2006, Argentina had already embraced the promotion and protection of human rights as a State policy both internally and abroad for a long time. Its foreign policy in human rights adopted a principled position and its records in all international fora were strong, coherent and based on strengthening international standards and developing new ones.[747]

From the start, the South American country was committed to the creation of a strong UN human rights body, which could preserve all the valuable tools of the Commission – including, in particular the system of special procedures, but at the same time to improve the new body –for instance through the establishment of a non-selective and universal mechanism such as the UPR. The same position was sustained five years later when the Council was reviewed in 2011.[748]

Argentina has also supported the great majority of thematic resolutions relating to all human rights: civil, political, economic, social and cultural rights. Among these initiatives, it is important to highlight that since the creation of the Human Rights Council, Argentina has supported the vast majority of existing country mandates as well as the establishment of new ones. It has supported almost all country resolutions and special sessions to deal with urgent situations regarding gross human rights violations in countries from different regions of the world.

What is more, in the last few years, during the Macri Administration, Argentina, together with other Latin American countries, has taken the lead to denounce human rights violations

[747] See, for instance, Statement of the then Minister for Foreign Affairs, Jorge Taiana, to the 7th session of the Human Rights Council, 2008, available at: https://eoirs.cancilleria.gob.ar/node/4775.
[748] In this regard, see Chapter III.4 ("Argentina in the institutional building process of the Council in 2006 and in its review in 2011") of the present work.

in countries of its own region such as Nicaragua and Venezuela.[749] This decision has been a new and relevant development. Until a few years ago, except for resolutions regarding Israeli human rights violations –promoted by the OIC, no country outside of the Western world had ever submitted a country resolution since the establishment of the Council, except if it was the own concerned country and presented a resolution for technical cooperation or technical assistance.

Argentina has also closely cooperated with all Council's mechanisms, including in the UPR and with the special procedures of the Council. Many Special Procedures mandate-holders have visited the country and former United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, has recognized the commitment and openness of the country in this regard.[750] The positive role of Argentina was also recognized by a prestigious international NGOs such as Human Rights Watch.[751]

The Council was created to avoid politicization and selectiveness. As stated before, this has proved difficult because the Council is composed of State representatives. However, this does not necessarily mean that its work is not valuable, not only by dealing with specific country situations, when it is possible, but also by developing international norms and standards. Indeed, as we already saw in detail in previous chapters, the Council continued its essential work of elaborating international human rights law and standards and Argentina has made a significant contribution in this regard.

IV.5.1 Contribution of Argentina in the field of civil and political rights.

The influence of Argentina's past in its initiatives and its positions in the Council has been decisive in its contribution to the development of international human rights law and international human rights standards. Argentina made a significant contribution as a single State for three main reasons.

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[749] In this regard see Chapter III.5.9 ("Other initiatives led or sponsored by Argentina in the Human Rights Council in the last few years") of the present work.

[750] Human Rights Council, "Opening statement and global update of human rights concerns by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein at 38th session of the Human Rights Council", 18 June 2018, available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23206&LangID=E

[751] Human Rights Watch, "Keeping the momentum. One year in the Human Rights Council", 2011, page 33, available at: https://www.hrw.org/sites/default/files/reports/hrc0911ForWeb.pdf.

First, because it was able to successfully deal with its past and to fight against impunity for gross human rights violations committed in the 1970s and 1980s. This should be the rule in countries that transition from conflicts, unrest or authoritarian regimes. Unfortunately, many countries, including those from the wealthy and developed North, have not been able to do so.

Secondly, because, after the momentum created with the return to democracy was severely affected by the amnesty laws and pardons, the country was creative to address claims through several innovative tools such as the truth commission, the truth trials, the reparation laws, the continuation of prosecution for those involved in the appropriation of children, the use of forensic genetics, and the creation of a DNA data bank and a commission to identify children whose identity was stolen.

The approach to address a new phenomenon, enforced disappearances, was also innovative in order to be able to address the needs of the victims and their families. For instance, the recognition of the absence by enforced disappearance to solve hereditary and other issues without declaring the death of the victims until their fate and whereabouts were determined. This was only possible because the human rights movement was not only composed of a relevant number of powerful and committed non-governmental organizations, but also of an exceptional level of legal professionals.

Thirdly, because even if the Malvinas War, a serious economic crisis, and the international pressure both from specific countries and international and regional human rights mechanisms played a role in the fall of the military regime, the solutions found during the democratic era were nation-based and not imposed by other Powers as it happened, for instance, in the post-World War II with Germany.

As a consequence, the country counted with a high level of expertise and experience to "export" to the world. The way Argentina addressed its gross human rights violations has been carefully followed by scholars and the international community and it has influenced other countries of the region and even of other parts of the world. It is not surprising that Argentina had legitimacy to promote international norms and standards on the right to the truth, justice and the fight against impunity for gross human rights violations.

In the Council, Argentina firmly contributed to the adoption of the Convention for the protection of all persons against enforced disappearances in 2006. The country was strongly committed to the negotiations of this international instrument from the beginning. Indeed, it made a relevant number of contributions during discussions, not only submitting text proposals, but also describing at length its national experience as a tool to ensure the adoption of a text with firm, clear and useful provisions aimed at preventing the perpetration of this crime and investigating and prosecuting those responsible.

The Argentine delegation was not alone in its efforts during the negotiations of this convention. Argentine civil society –including some of the first NGOs of the national human rights movement developed in the 1970s such as APDH- also participated actively in this process. Thanks to their tireless work and efforts, the Argentine case was known forty years ago. It is worth reminding that the role of Argentine NGOs –and later of the State- were key to the development of the terms "enforced disappearances" and "detainees-disappeared", which did not exist until then in the UN vocabulary and became worldwide known and, unfortunately, used in many other cases all around the world. The International Convention against enforced disappearances also explicitly recognized the right to the truth in its preamble and in article 24 and Argentina firmly supported and actively promoted this inclusion.

It could be affirmed that Argentina has exported its own sad experience into international human rights law through the International Convention against disappearances. Even if it is probably one of its main contributions, it has not been the only one. As a way of example, long before the creation of the Council, upon request of its vibrant human rights movement, notably the Grandmothers of Plaza de Mayo, Argentina managed to promote the recognition in international human rights law of the right of children to preserve their identity without unlawful interference of the State. When a child is deprived of his or her identity, the State has the duty to protect him or her with the aim to re-establish it (article 8 of the Convention on the rights of the child).

Argentina has also significantly contributed to the development of international human rights standards related to the fight against impunity in the Council. The nature, content, scope, and implementation of the right to the truth has been developed until now in the Council through OHCHR reports and the work of special procedures, such as the Working

Group on Enforced or Involuntary Disappearances.[752] Argentina also worked towards the elaboration of standards in the use of forensic genetics and national data banks in cases of gross human rights violations through a series of resolutions and reports of OHCHR.

Moreover, Argentina led the establishment of a new rapporteur on the right to the truth, justice, reparation and guarantees of non-recurrence, together with Switzerland. The importance of a rights-based approach –rights to the truth, justice and reparations- was key in the Argentine experience to be able to guarantee all rights to the victims, their families and even to society.

IV.5.2 Contribution in the field of economic, social and cultural rights.

Since the return to democracy, Argentina was a close supporter of those States which led initiatives to develop international norms and standards on economic, social and cultural rights.[753] The Cold War had a profound impact in the legal development of civil and political rights, on one side, and economic, social and cultural rights on the other side. This difference was shortened in the 1990s with several instruments and conferences, which reaffirmed the universality, indivisibility and interdependence of all human rights.[754] Nonetheless, the differences between both categories of human rights have persisted to some extent until present.

The level of protection assigned to the 1966 covenants has been quite different: the obligation of States regarding satisfaction of economic, social and cultural rights extends to the maximum of available resources. However, the differences in terms of implementation of human rights fail to explain why the Covenant on economic, social and cultural rights did not create a treaty body to supervise the obligations in its text of 1966, even if with a different scope. A committee was only established almost 20 years later by ECOSOC Resolution 1985/17 and it was mandated to analyze reports. In other words, it was not created by an instrument of a binding nature and it did not include the second and relevant traditional

[752] United Nations Working Group on Enforced Disappearances, "General Comment on the Right to the Truth in Relation to Enforced Disappearances", available at: https://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf

[753] Argentina, for instance, ratified the Covenant on economic, social and cultural rights on 8 August 1986. See Office of the United Nations High Commissioner for Human Rights, "Ratification status for Argentina", available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=7&Lang=EN.

[754] See for instance, the Vienna Declaration and Programme of Action of 1993, 25 June 1993, paragraph 5.

function of any treaty body: to deal with communications, which allow individuals to make a claim at the international level.

On the contrary, the 1966 covenant on civil and political rights included a treaty body, the human rights committee, which has competence to assess reports from State Parties. It was also complemented by its first optional protocol on individual and inter-state communications adopted the same year as the main instrument and in force since 1976. It is clear that a lower political importance was paid to the implementation of economic, social and cultural rights for a long time.

It was only during the Human Rights Council -forty years after the adoption the covenants- that there was a decision to move forward and recognize in international human rights law the possibility to have a communications procedure in the Committee on economic, social and cultural rights. Argentina supported the efforts to negotiate and adopt such a protocol in a specific working group of the Council which was created to this effect. The protocol was adopted by the Council and later by the GA in 2008. The South American country ratified the instrument in 2011.[755]

The decision to adopt this instrument, which entered into force in 2013, was a relevant one because it contributed to enhance equal importance of all human rights. Argentina also provided political support to many resolutions in the Human Rights Council related to economic, social and cultural rights, namely: the right to health, the right to adequate housing, the right to education, cultural rights, among many others.

This decision to promote norms and standards does not dismiss the efforts that the country has to make to guarantee these rights at the internal level. As any other developing country, Argentina has faced challenges to effectively protect economic, social and cultural rights. Indeed, during its 200 years of existence, the country has suffered several economic crises including the profound 2001 crisis, which ended in a historic default.

In this context, as we already saw in the previous chapter, Argentina decided to submit in 2014 an initiative on the effects of foreign debt, in particular vulture funds, in the enjoyment

[755] United Nations Treaty Collection, "Depositary", status of the Optional protocol to the Covenant on Economic, Social and Cultural Rights as at 30 January 2020, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&clang=_en

of economic, social and cultural rights. The resolution was the only initiative on the issue presented by Argentina in the Council to date and was adopted by vote. Some developed countries, such as Germany and the United Kingdom, voted against arguing that it was not the right forum to discuss the issue. It is worth mentioning that the EU did not vote as a bloc and some European countries, including France, abstained.

The main contribution of the resolution was a key report of the Advisory Committee that describes the effects of the activities of vulture funds on the enjoyment of economic, social and cultural rights taking concrete examples of specific countries. The Advisory Committee in this way supported the position of the independent expert on foreign debt, who had previously referred to the impact of foreign debt and adjustment programs of international financial institutions and its impact in the enjoyment of economic, social and cultural rights. This position has also been sustained by scholars.[756] The issue will be discussed again when the final report is considered in the Council.

In this context, it is worth mentioning that, since 2016, Argentina has joined the cross regional initiative on corruption and human rights. This initiative, which was already described in the previous chapter, is also relevant in relation to the enjoyment of economic, social and cultural rights. In this case, all resolutions led by Morocco have been adopted by consensus. It is hard to understand why in this case the Council is the right forum for some Western States while in the previous case –on foreign debt and human rights- it is not. Both cases have an indirect –although very clear- impact in the enjoyment of economic, social and cultural rights such as the right to health, education and food.

IV.6 Contribution of Argentina to the development of a new human rights agenda.

The Human Rights Council was established at the turn of the twenty first century and, in line with the progressive development of international human rights law and standards, it was the space where emerging issues have been addressed. I would like to emphasize two main initiatives of the new human rights agenda where Argentina has contributed in line with its legislative and institutional framework at the national level.

[756] Donnelly, Jack, "International Human Rights…", Ibid, pages 160-161.

The first one is the rights of LGBTI individuals, where Argentina, together with other Latin American countries (e.g. Brazil, Uruguay, Chile, Colombia, Costa Rica and Mexico) promoted the initiative of establishing an independent expert on the protection against violence and discrimination based on sexual orientation and gender identity in 2016. This initiative followed a groundbreaking resolution adopted in 2011, the first inter-governmental document that expressly recognized the rights of LGBTI not to be subjected to violence or discrimination as well as other resolutions adopted ever since. In all these resolutions, Argentina participated actively and co-sponsored the initiative.

The progress in the field has been enormous in a relatively short period of time. The Argentine decision to form part of all core groups on the rights of LGBTI individuals (at the GA, the Council and the OAS) has shown the clear commitment of the country with the issue at the international level. This decision was fully in line with its national context. In the last decade, Argentina has transformed itself in one of the countries with the most progressive laws regarding equality of LGBTI individuals and gender identity. These laws have been accompanied by a positive cultural change towards respect and acceptance of sexual minorities in the country.

The second emerging issue where Argentina worked hand in hand with Brazil has been the protection of the rights of older persons. In a world where persons tend to live longer, the issue is unavoidable. The two biggest South American countries joined their efforts to the ones of the High Commissioner, who had referred to the need to establish a mandate in the Council to study the issue as well as the convenience to consider a specific legal framework for older persons.

These initiatives have been promoted in the last few years both at the UN and the OAS levels, with positive results so far. As it happened in many other cases, it was easier to move forward in the Inter-American System, where a regional instrument has already been adopted. At the UN level, Argentina and Brazil achieved by consensus the establishment of new special rapporteur in 2013. They have also contributed to the work on the issue at the GA level. A growing consensus has been demonstrating the need to develop a specific instrument of international human rights law in the field. It remains to be seen if this finally happens.

V. CONCLUSIONS.

In 2006, there was a significant change in the universal human rights machinery when the Human Rights Council replaced the former Commission and quickly became the main United Nations body dealing with human rights. The Council inherited two main functions: address and prevent human rights violations, and promote and develop international human rights law and standards.

From the beginning, a great deal of expectation from all stakeholders was put on the way the Council decided to work on specific country situations. This was so because the life of the Commission ended under strong accusations of politicization and selectivity. As expected, those who supported radical changes were disappointed.

It came without surprise that it was not possible to avoid politicization and selectivity in an intergovernmental setting, in particular in a highly-sensitive issue such as human rights. As long as a UN body is composed of States, it will have an eminent political nature.

Nonetheless, the GA established a series of changes to limit politicization and selectiveness as much as possible, including: membership criteria; voting majority in the election process; number of members of the new body; the creation of the UPR; and a new threshold for special sessions.

All in all, even if insufficient, these changes brought some improvements. Firstly, every single State of the UN is now under scrutiny in the UPR. This put relevant human rights challenges existing in developed countries on the spot, something that did not happen before.

Secondly, it was possible to preserve country mandates as a tool for addressing country situations. Indeed, the Council created new country mandates, such as the one on Iran and even re-established a former mandate on Belarus.

Thirdly, States with notorious human rights records find it more difficult to obtain the votes necessary to get elected in the Council by the majority of the GA. Even if the threshold is not as high as it should be, it is much higher than the one of the Commission.

Lastly, the possibility to hold special sessions is an additional tool aimed at addressing urgent situations. Indeed, until 2011, the number of regular and special sessions were almost the same. This was a major change because the Commission held special sittings on very rare occasions.

The main criticism of these special sessions by analysts, international NGOs and some States was that there were an important number of special sessions dedicated to the human rights violations of Israel in its occupied territories. There is no doubt that the situation in the Middle East deserved special attention and measures from the Council. The problem was that the single reference to Israel on so many occasions was a worrisome reminder of the main problems of the Commission: politicization and selectiveness.

Nonetheless, it should be noted that, in the last few years, the special sessions diminished but diversified. In 2018, there was one special session on the Occupied Palestinian Territories; in 2017 one on Myanmar; and in 2016 one on South Sudan and one on Syria. At present there have been 40 regular sessions and 27 special sessions.[757]

In any case, the same problem remained at a certain extent. The practical results of the Council on dealing with human rights situations have been, at least, mixed. In some cases, the Council reacted late and in an insufficient manner, like for example in relation to Darfur.[758] In other cases, the results were more effective, such as in some situations addressed during the so-called Arab Spring.[759] This is because, as any other inter-governmental body, the outcome will always have a political nature. The existing tools are adequate, but they are only used in country emergencies when the relevant political alliances allow so.

Beyond the mandate to address and prevent human rights violations, the Council has yet another important task at the international level that should not be disregarded: the development of international human rights norms and standards. Regarding international norms, it was already described in detail how the Council has had, as its predecessor body, a significant role in international law-making.

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[757] Human Rights Council, "HRC Sessions", "Special Sessions", available at: https://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Pages/SpecialSessions.aspx

[758] Freeman, Rose, "Improvement on the Commission? The UN Human Rights Council's inaction in Darfur", 16 U. C. Davis J. Int'l L. & Pol'y 81 2009, pages 81-129, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2338493

[759] Rathgeber, Theodor, "The Human Rights Council…", Ibid, pages 9-14.

During the Council's lifetime, a number of international human rights treaties were elaborated, negotiated and adopted, such as the Optional Protocol to the International Covenant on economic, social and cultural rights, and the Optional Protocol to the Convention on the rights of the child on a communications procedure. These instruments are now part of international human rights law and constitute relevant developments because, inter alia, they allow individuals to submit claims relating to violations of their economic, social and cultural rights at the international level.

In fact, the international law-making activities of the Council have not stopped. Today, the Council is negotiating possible international human rights treaties on transnational corporations and other business enterprises, and on the activities of private military and security companies.[760]

During more than a decade, the Council has also developed a series of principles, guidelines and other documents which are not binding in nature and could be referred as international standards. We can take as examples the declarations adopted by the Council on indigenous peoples, the rights of peasants, and the right to peace.

In some cases, the Council requested the Advisory Committee or special procedures mandate-holders to elaborate a first draft so as to be able to initiate negotiations. Later, these draft instruments were promoted by one or more Member States of the Council, adopted by this UN body and then endorsed by the GA. As an example, we can mention the Guiding Principles on Business and Human Rights.[761]

Although international standards are not formally a source of international law, on many occasions they are the first step in the direction of international law-making. Declarations on many human rights issues demonstrate it, such as the 1992 UN Declaration on Enforced Disappearances, which was followed by the adoption of the 2006 UN Convention on Enforced Disappearances.

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[760] Human Rights Council, "HRC Bodies", "Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights", available at: https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx. See also Human Rights Council Resolution A/HRC/RES/36/11.

[761] See for instance, Human Rights Council Resolution 17/4, UN Document A/HRC/17/4, operative paragraph 1.

The process of international law-making is complex and involves different national interests, cultures, religions and ideologies. Once there is consensus to adopt a resolution or declaration or an international human rights treaty, the instrument acquires a particular relevance at the international level because it represents the common minimum denominator among different civilizations on a specific human rights issue.

There is no doubt that the development of international human rights norms and standards has been one of the most valuables contributions of the Council so far. This achievement has been generally recognized by different stakeholders, including NGOs.[762] As international human rights norms and standards evolve with societies, it is clear that this progressive development will continue in the near future.

Even if different stakeholders could contribute to elaborate or push for the development of norms and standards –including experts, rapporteurs and NGOs, the international law-making is still a State-driven process. The most important forum at the UN to do so when it comes to international human rights law is the Council.

In this context, some regional or other groups of States and even single States push for the recognition at the universal level of specific human rights issues, which in many cases already exist at the domestic or regional level. This recognition at the UN level gives legitimacy, importance and universality to those norms and standards, which end up reflected in resolutions, declarations, principles, guidelines or international human rights treaties.

Certain individual States play a meaningful role in this regard because of many reasons: they have strong human rights foreign policies, expertise in a specific field, and a national interest in promoting a particular human rights issue. In some cases, they also have legitimacy and credibility, which is needed to convince other peers to move forward in a specific direction.

Argentina is one significant example of a single country that has made a relevant contribution to the development of international human rights norms in some specific areas taking into

[762] Amnesty International, "Meeting the challenge: Transforming the Commission on Human Rights into a Human Rights Council", AI Index: IOR 40/008/2005, 26 April 2005, available at: https://www.amnesty.org/en/documents/ior40/008/2005/en/

consideration its national experience in the fight against impunity in the aftermath of gross human rights violations (e.g. the right not be subjected to enforced disappearances, the right to the truth). The country has also been able to contribute to develop international standards in emerging human rights issues which have normative gaps. In this sense, the creation of special procedures could be the first step towards developing international norms in this regard (e.g. older persons, LGBTI individuals). Consequently, Argentina was able to "export" successfully to the Council many legal concepts developed at the national level in a creative way and has contributed in this way to the progressive development of international human rights law.

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